NO. 18-6315

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID IVY,
Petitioner,

v.

TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

ANDREW C. COULAM
Senior Assistant Attorney General
Counsel of Record

War Memorial Building
301 6th Avenue North
Ground Floor, G-5
Nashville, Tennessee 37243

Counsel for Respondent

CAPITAL CASE

RESTATEMENT OF THE QUESTION PRESENTED

The petitioner sought to adjudicate an *Atkins* intellectual-disability claim on state collateral review by means of a petition for state writ of error *coram nobis*, a petition for state writ of *audita querela*, and a motion to correct illegal sentence under Tenn. R. Crim. P. 36.1. The Tennessee Court of Criminal Appeals held that the *coram nobis* claim was time-barred by more than a decade with essentially no showing by the petitioner as to why the statute of limitations should be tolled, that the writ of *audita querela* no longer exists in Tennessee, and that an *Atkins* intellectual-disability claim is not cognizable under the narrow purview of Rule 36.1. Did the court's decision thwart the constitutional prohibition against the execution of the intellectually disabled by declining to shoehorn an *Atkins* claim into the petitioner's chosen, but inapt, procedural vehicles?

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JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied petitioner's application for permission to appeal on May 18, 2018. According to this Court's docket, the petition for writ of certiorari was filed with this Court within 90 days, on August 13, 2018. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257. Pet. at 2.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT OF THE CASE

On June 8, 2001, the petitioner, who had previously been convicted of second-degree murder, especially aggravated robbery, and multiple counts of aggravated assault, shot his estranged girlfriend, LaKisha Thomas, to death while she was sitting in her car in Memphis. *State v. Ivy*, 188 S.W.3d 132, 139, 140 (Tenn. 2006). In the preceding month, the petitioner had threatened to kill her, attacked her, and left her with various injuries. *Id*. at 139.

Seven months later, while the criminal case against the petitioner was still in the pre-trial stage, the Tennessee Supreme Court held that execution of the intellectually disabled violates the

Eighth Amendment to the U.S. Constitution and Article I, § 16, of the Tennessee Constitution. *Van Tran v. State*, 66 S.W.3d 790, 807-08 (Tenn. 2001).[1] The following year, this Court reached the same conclusion regarding the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

The year after that, on January 13, 2003, the defendant was found guilty at trial of first-degree premeditated murder, and the jury imposed the death sentence. *Ivy*, 188 S.W.3d at 138; *State v. Ivy*, No. W2003-00786-CCA-R3-DD, 2004 WL 30211467, at *1 (Tenn. Crim. App. Dec. 30, 2004). The petitioner did not claim at trial that he was intellectually disabled. *Ivy*, 188 S.W.3d at 132-63. The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed in 2004 and 2006, respectively. *Id*. at 141, 158-59. This Court denied certiorari on October 2, 2006. *Ivy v. Tennessee*, 127 S. Ct. 258 (2006).

The petitioner thereafter filed a petition for state post-conviction relief in which he contended, among other things, that his trial counsel was ineffective for failing to have him evaluated by a mental health professional. *Ivy v. State*, No. W2010-01844-CCA-R3-PD, 2012 WL 6681905, at *42-46 (Tenn. Crim. App. Dec. 21, 2012), *perm. app. denied* (Tenn. Apr. 9, 2013). To support this claim, he retained Dr. Fred Steinberg, a psychologist, who conducted extensive testing of the petitioner. *Id*. at *17-20. Among these tests was the Wechsler Adult Intelligence Scale, Third Revision. *Id*. at *17. Ultimately, Dr. Steinberg diagnosed the petitioner with borderline personality disorder; he did not diagnose petitioner with intellectual disability. *Id*. at *17-20, *43. Nor did the petitioner allege at that juncture that he was intellectually disabled. *Id*.

[1] Capital punishment for the intellectually disabled had been unavailable in Tennessee as a matter of statute since 1990. 1990 Tenn. Pub. Acts, ch. 730, 1038; Tenn. Code Ann. § 39-13-203; *Keen v. State*, 398 S.W.3d 594, 600 (Tenn. 2012).

Petitioner's trial defense team also testified at the post-conviction hearing that they had reviewed the petitioner's school records. One of the petitioner's mitigation specialists, Elizabeth Benson, noted that she had obtained the petitioner's school records from the Memphis City School System. *Ivy*, 2012 WL 6681905, at *13. Trial counsel testified that Ms. Benson would have provided him with the petitioner's school records and that he would have reviewed them as part of his trial preparations. *Id*. at *6.

The post-conviction court denied relief in 2010; the Tennessee Court of Criminal Appeals affirmed in 2012; and the Tennessee Supreme Court denied review in 2013. *Id*. at *1.

Meanwhile, in 2011, the Tennessee Supreme Court had clarified that a raw intellectual quotient ("IQ") score above 70 is not dispositive on the question of whether a defendant is intellectually disabled under Tenn. Code Ann. § 39-13-203; therefore, trial courts may consider proof, if presented, that a defendant's IQ may be lower than the raw test score indicates. *Coleman v. State*, 341 S.W.3d 221, 235-48 (Tenn. 2011). This proof could include the standard error of measurement, among other considerations. *Id*. at 241, 242 n.55; *Keen*, 398 S.W.3d at 605-06, 608.

In March 2014, this Court similarly held that under the Eighth Amendment, a capital defendant should be allowed to present evidence which may demonstrate that his IQ is lower than the raw test score indicates when the raw score otherwise falls within the margin of error of a score demonstrating intellectual disability. *Hall v. Florida*, 134 S. Ct. 1986, 1990, 2001 (2014).

Fourteen months after the decision in *Hall*, on May 28, 2015, the petitioner, through his federally appointed counsel, filed a "Petition for Writ of Error Coram Nobis and/or Other Relief" in state court. Resp't's App. A at 2-8.[2] In it, he claimed for the first time in state court that he is

[2] The petitioner incorrectly asserts in his petition that he filed the petition on May 20, 2015. Pet. at 2.

intellectually disabled. *Id*.[3] He also sought an immediate abeyance of the proceedings while the Tennessee Supreme Court decided *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), which concerned whether the writ of error *coram nobis* could be used to adjudicate intellectual-disability claims. Resp't's App. A at 2-8. No expert affidavits or reports accompanied the petition to support petitioner's claim. Nor did he attempt to explain why he had raised his intellectual-disability claim over a decade after his judgment was entered. Resp't's App. A at 2-8.

The petitioner did attach, however, copies of two elementary-school records as exhibits to the petition. Resp't's App. B at 10-15. In one, signed in late 1984 when the petitioner was 12 years old and entitled "Memphis City Schools Mental Health Center Professional Report," educators noted that the petitioner had scored 73 on the Wechsler Intelligence Scale for Children-Revised ("WISC-R"). Resp't's App. B at 12. The report further noted that the petitioner was a child of "low average intellectual functioning whose progress was affected by a learning disability." Resp't's App. B at 11. The report did not state that the petitioner was intellectually disabled but did comment that he had "a continuing handicap in intellectual functioning and achievement which significantly impairs the ability to think and/or act in a regular school program . . . ." Resp't's App. B at 11-13.

Another exhibit contained a one-page report dated December 12, 1988 and entitled, "John S. Wilder Youth Development Center Summary of Testing." Resp't's App. B at 14-15. The report stated that the petitioner's score on a Culture Fair Intelligence Test was 73. Resp't's App. B at 15. There were places on the form for data from a WISC-R test, but the WISC-R area was left blank. *Id*. Again, the form did not label or otherwise indicate that the petitioner was intellectually

[3] The petitioner raised the claim more than a year earlier in federal court via a 28 U.S.C. § 2254 amended petition. Amend. § 2254 Pet. at PageID# 67-68, *Ivy v. Carpenter*, No. 2:13-cv-02374, ECF No. 14 (W.D. Tenn. Apr. 8, 2014).

disabled. *Id*. The petitioner did not claim that these school records were newly discovered. Resp't's App. A at 2-8.[4]

In response to the petition, the State argued, *inter alia*, that the statute of limitations barred relief to the petitioner. R., Technical Record, at 92-94.[5] Petitioner filed no reply and did not otherwise attempt to show that he was entitled to equitable tolling of the statute of limitations. The *coram nobis* court, however, agreed to hold the proceedings in abeyance while *Payne* was pending. R., Technical Record, at 95.

The Tennessee Supreme Court decided *Payne* on April 7, 2016, holding that the writ of error *coram nobis* was not an appropriate vehicle to litigate a constitutional intellectual-disability claim in light of the petitioner's changed understanding of intellectual-disability law after *Coleman*.[6] *Payne*, 493 S.W.3d at 486-87. In other words, Payne had "failed to state a claim that is cognizable under the coram nobis statute." *Id*. The Tennessee Supreme Court declined to address whether other remedies, such as Tenn. R. Crim. P. 36.1 or the writ of *audita querela*, were viable vehicles for relief. *Id*. at 489 n.9.

The *coram nobis* court lifted the stay in the petitioner's case shortly after *Payne* was decided. R., Technical Record, at 97. On May 11, 2016, the petitioner submitted a document entitled, "Additional Argument in Support of Petition for Writ of Error Coram Nobis and/or Other Relief." Resp't's App. C at 17-24. In it, he urged the *coram nobis* court to disregard *Payne* and, alternatively, to consider whether Tenn. R. Crim. P. 36.1 or the writ of *audita querela* could provide him with relief. *Id*.

[4] Tennessee courts will issue the state writ of error *coram nobis* only upon a showing of "subsequently or newly discovered evidence." Tenn. Code Ann. § 40-26-105(b); *Nunley v. State*, 552 S.W.3d 800, 811 (Tenn. 2018).

[5] Citations to "R." are to the appellate record in the Tennessee Court of Criminal Appeals.

[6] This Court denied certiorari of this decision. *Payne v. Tennessee*, 137 S. Ct. 1327 (2017).

The *coram nobis* court, however, declined to ignore *Payne*, which it found to be dispositive on the *coram nobis* question. Resp't's App. D at 30. The court further determined that Rule 36.1 was unavailing to the petitioner because the capital sentence was not facially void under the sentencing statutes. Resp't's App. D at 31. Last, the court ruled that the writ of *audita querela* is obsolete and cannot provide the petitioner with relief. Resp't's App. D at 31-32. As a result, the court summarily dismissed the petitions/motion on September 29, 2016. Resp't's App. D at 31-32.

The petitioner appealed to the Tennessee Court of Criminal Appeals, which affirmed on January 30, 2018. Pet. App. B at 1.[7] On the one hand, the court distinguished *Payne* on the facts and held that a constitutional intellectual-disability claim generally could be pursued under the writ of error *coram nobis* if the prohibition against executing the intellectually disabled existed at the time the petitioner's sentence was rendered. Pet. App. B at 3. On the other hand, the court found that the claim was time-barred under the *coram nobis* statute's one-year statute of limitations. Pet. App. B at 3-4 ("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

[7] In his petition before this Court, the petitioner avers that "[a]t oral argument in the Court of Criminal Appeals on Mr. Ivy's *coram nobis* petition . . . the state attorney general argued that Mr. Ivy did not have an available remedy in state court." (Pet. at 4.) This is incorrect: the Tennessee Attorney General's Office specifically refused to take this position. *Ivy* Oral-Argument Recording at 14:20-35, 14:55-15:10, 19:35-20:00, http://www.tncourts.gov/courts/court-criminal-appeals/arguments/2017/07/11/david-ivy-v-state-tennessee (last visited Nov. 2, 2018). Similarly, the petitioner claims that the State took inconsistent positions regarding the availability of a remedy between the federal habeas corpus proceedings and the *coram nobis* state appeal. (Pet. at 3-4.) He misconstrues the State's position in both forums. By saying on federal habeas review that the *Atkins* claim "is not yet exhausted," the respondent warden meant to convey that the question of whether the *coram nobis* court could adjudicate the intellectual-disability claim on the merits was not yet settled and that the federal court should not rule on the claim until the Tennessee appellate courts reached a decision on the question in Mr. Ivy's appeal. Warden's Memo of Law at PageID# 5004, *Ivy v. Westbrooks*, No. 2:13-cv-02374, ECF No. 85-1 (W.D. Tenn. May 30, 2017). The warden did not mean to suggest that the claim was proper for a merits review under the writ of error *coram nobis*, *contra Payne* and the writ's statute of limitations. Nor was the State, before the Tennessee Court of Criminal Appeals, foreclosing that a state avenue for review might exist: the petitioner's chosen avenues were simply incorrect under the Tennessee law. *Ivy* Oral-Argument Recording at 14:20-35, 14:55-15:10, 19:35-20:00.

was untimely by well over a decade, and, therefore, was barred by the statute of limitations."). The court further found that the claim did not fall under the narrow confines of Tenn. R. Crim. P. 36.1 and that the writ of *audita querela*, having been declared obsolete as early as 1845, "is no longer available in Tennessee." Pet. App. at 4. The court declined to provide an advisory opinion as to how the petitioner might try to assert his claim in state court in the future. Pet. App. at 4.

REASONS FOR DENYING THE PETITION

I. Tennessee Is Not Constitutionally Compelled to Adjudicate an *Atkins* Claim in Time-Barred, Non-Existent, or Otherwise Inapt Procedural Vehicles of the Petitioner's Choosing.

The petitioner argues that under *Montgomery v. Louisiana* and *Moore v. Texas*, the States are constitutionally compelled to provide an avenue of collateral review to adjudicate an *Atkins* intellectual-disability claim. Pet. at 5-7.[8] He implicitly concludes from this premise that the Tennessee courts violated the U.S. Constitution by rejecting his proposed avenues for adjudication. Pet. at 6-7. Neither assertion is correct; therefore, the Court should deny his petition for certiorari.

As an initial matter, the petitioner misreads both *Montgomery* and *Moore*: these cases do not mandate that the States shoehorn a petitioner's purported Eighth Amendment claim into inapplicable avenues of collateral review. *Montgomery* held that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), created a new substantive constitutional right to be applied retroactively on collateral review. *Montgomery*, 136 S. Ct. at 727, 729, 732. The Court remanded the matter back to the Louisiana collateral-review court, which had only refused to provide a merits determination on the *Miller* claim because it had not deemed *Miller* retroactive. *Id*. at 727, 732, 736, 737.

But *Montgomery* is inapplicable here because its holding is limited to situations in which collateral review is otherwise properly available. "If a state collateral proceeding *is open to a*

[8] *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery*, 136 S. Ct. at 731 (emphasis added) (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)). "In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, *assuming the claim is properly presented in the case*." *Id*. at 732 (emphasis added). Nowhere did *Montgomery* mandate that state courts must adjudicate claims that are time-barred, or are presented under non-existent procedural vehicles, or are facially inapplicable.

Nor did *Moore*. Mr. Moore properly brought his intellectual-disability claim in Texas's habeas corpus court and, indeed, received an adjudication on the merits. *Moore*, 137 S. Ct. at 1045-46. This Court simply faulted the Texas appellate court's merits determination because the court employed an intellectual-disability standard at odds with current psychological practice. *Id*. at 1049-53. Nowhere did the decision hold that a State must ramrod an intellectual-disability claim into an improper procedural vehicle for substantive adjudication.

Such a holding would conflict with the Court's well-settled law that state courts are not obligated under the federal Constitution to provide collateral review. "[Post-conviction relief] is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief . . .." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *see also Murray v. Giarratano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) ("Nothing in the Constitution requires the States to provide [post-conviction] proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551 . . . (1987), nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings."). This conclusion is even more compelling here because this was not the petitioner's first state collateral proceeding: he already had a full and fulsome post-conviction review.

And Mr. Ivy's chosen procedural vehicles were indeed improper, thereby compelling the state courts to reject the claims. The *coram nobis* avenue was inappropriate and time-barred because the evidence was not new. Tenn. Code Ann. § 40-26-105 delineates the writ of error *coram nobis* in relevant part as follows:

> 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(b) (emphasis added). The writ seeks to correct substantial factual error that would have prevented criminal liability attaching at the time of trial had the error been known. *Payne*, 493 S.W.3d at 485. "Thus, the goal of relief afforded under a writ of error coram nobis is a reliable determination of the petitioner's criminal liability for the offense with which he was charged . . .." *Id*. "The goal is *not* a redetermination of the petitioner's criminal liability in the face of changes in the law occurring many years after his trial." *Id.*

Coram nobis claims are also subject to a one-year statute of limitations. Tenn. Code Ann. § 27-7-103; *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). The limitations period begins to run from the date the judgment of the trial court becomes final. *Harris*, 301 S.W.3d at 144. That finality, in turn, occurs thirty days after the entry of judgment in the trial court if the defendant does not file any post-trial motions or upon entry of an order disposing of a timely filed post-trial motion. *Id*. (citing *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999)). While Tennessee courts may toll the statute of limitations, to do so, the petitioner must establish that the factual ground for relief arose after the limitations period normally commenced and, if the ground was later arising, whether a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. *Id*. at 145. More specifically, the petitioner must establish that he has been pursuing his rights diligently and that some extraordinary circumstance

prevented timely filing of the petition. *Whitehead v. State*, 402 S.W.3d 615, 627-28 (Tenn. 2013) (citing *Holland v. Florida*, 560 U.S. 631 (2010)).

The writ of error *coram nobis* was patently inapplicable—and the state petition time-barred—because the petitioner never alleged, much less proved, that the facts were newly discovered or that he was prevented from making the claim earlier. He made no such contention in his *coram nobis* petition or his "Additional Argument" filing in state court. Resp't's App. A at 2-8; Resp't's App. C at 17-23. He also did not do so in his briefing but merely intimated that when it comes to intellectual-disability claims, the delay in bringing the claims should be immaterial. Resp't's App. E at 42-49; Resp't's App. F. at 61-65.

Nor could the petitioner plausibly claim that the evidence was newly discovered. His trial defense team testified that they both had possessed and would have reviewed his Memphis school records during their trial preparations in 2002, and the petitioner rests the entirety of his intellectual-disability claim on these records. *Ivy*, 2012 WL 6681905, at *6, *13; Pet. at 6-7. This preparation occurred after the Tennessee Supreme Court had found that, in addition to the pre-existing statutory prohibition, the intellectually disabled are constitutionally ineligible to receive capital punishment. *Van Tran*, 66 S.W.3d at 807-08 (decided Dec. 4, 2001). Further, during his state post-conviction proceedings between 2006 and 2010, the petitioner had retained a psychology expert to test him, including administering the Wechsler Adult Intelligence Scale Third Revision, and the expert notably did *not* opine that the petitioner was intellectually disabled. *Id*. at *17-20, *43. This is the only psychology expert that the petitioner has ever presented to explore his intellectual functioning. The petitioner's evidence is decades old, was known to his defense team before 2003, and was not found to warrant a diagnosis of intellectual-disability by 2010. Therefore, the state courts reasonably concluded that the evidence was not newly discovered for

coram nobis purposes and that the petitioner did not establish his entitlement to tolling of the statute of limitations in 2015, eleven years after it had expired.

The petitioner's alternative procedural vehicle, the writ of *audita querela*, was even more inappropriate because it no longer exists in Tennessee:

> 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 [.]" Accordingly, the Petitioner is not entitled to relief on this basis.

Dellinger v. State, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576, 2015 WL 4931576, at *13 (Tenn. Crim. App. Aug. 18, 2015). "[T]he audita querela has nearly fallen into disuse." *Edmondson v. King*, 1 Tenn. 425, 426, 1809 WL 192, at *2 (1809). By 1833, the Tennessee Court went further and declared the writ "an obsolete remedy." *Barnes v. Robinson*, 12 Tenn. 186, 1833 WL 1086, at *1 (1833); *see also Marsh*, 25 Tenn. 210, 211, 1845 WL 1897, at *1 ("The writ of *audita querela* is nearly obsolete in England. 3 Bla. Com.; 1 Salk. 93; Raym. 439, and is absolutely unknown and obsolete in the practice of this State."); *Baldwin & Campbell v. Merrill*, 27 Tenn. 132, 140, 1847 WL 1635, at *4 (1847) ("The principle applicable to the writ of certiorari, when sought to be used as a substitute for an appeal, has no application when it is substituted for the writ of audita querela, a remedy obsolete in this state."). The Tennessee courts cannot be constitutionally compelled to employ a procedural vehicle declared obsolete in Tennessee more than a century ago.

In addition, the petitioner's *Atkins* claim was not cognizable under the narrow purview of Tenn. R. Crim. P. 36.1 because his capital sentence was facially valid in 2003. Under Rule 36.1, "[e]ither the defendant or the state may, at any time, seek the correction of an illegal sentence by

filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered." Tenn. R. Crim. P. 36.1(a). However, "few sentencing errors render sentences illegal" under Rule 36.1. *State v. Wooden*, 478 S.W.3d 585, 595 (Tenn. 2015). "For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." *Id*. at 591. More particularly, an illegal sentence under Rule 36.1 or the state writ of habeas corpus is one infected by "fatal error." *Id*. at 595[9]

Fatal error determinations assess the facial invalidity of a sentence by comparing the judgment to the applicable statutes, such as a sentence imposed pursuant to an inapplicable statutory scheme. *Summers v. State*, 212 S.W.3d 251, 255-56 (Tenn. 2007). "Unlike a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity." *Id*. These voidable judgments constitute "appealable errors," which are not cognizable under Rule 36.1, and include errors for which a right to direct appeal exists or rest on issues of fact to be established through proof where the trial court is, in essence, making findings of fact. *Payne*, 493 S.W.3d at 595; *Cantrell v. Easterling*, 346 S.W.3d 445, 451 (Tenn. 2011).

No court had adjudicated the petitioner intellectually disabled by 2003 (or even by the present date); therefore, he was eligible to receive the death penalty for his conviction of first-degree murder under Tennessee law. Tenn. Code Ann. § 39-13-204. To find the petitioner intellectually disabled, the courts would have to weigh evidence beyond the face of the record, thereby rendering the *Atkins* claim merely an alleged appealable error for which Tenn. R. Crim. P.

[9] The term "illegal sentence" is construed identically in the context of a petition for state writ of habeas corpus and a Rule 36.1 motion. *Wooden*, 478 S.W.3d at 494-95.

36.1 does not lie. *Payne*, 493 S.W.3d at 595. The U.S. constitution cannot mandate that Rule 36.1 be twisted and reshaped beyond all recognition to provide an avenue for an *Atkins* claim. The petition for writ of certiorari should be denied.

II. The Petitioner Has Not Identified a Circuit or State Split to Support His Petition.

The Court should also deny the petition because the petitioner has not identified a split of authority on the question he has presented. Pet. at 1-8. In fact, he has not cited a single federal court of appeals decision or a single state-court decision holding that state courts are constitutionally required to shoehorn an *Atkins* intellectual-disability claim into an improper procedural vehicle.

III. The Tennessee Court of Criminal Appeals' Decision Rests on Independent and Adequate State-Law Grounds.

The Tennessee Court of Criminal Appeals did not reach the merits of the petitioner's Eighth Amendment claim because it determined that the claim was time barred under state law. It is well established that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Moreover, principles of comity require federal courts to defer to a state's judgment on issues of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("[A] state court's interpretation of state law . . . binds a federal court . . . ."). This Court, therefore, lacks jurisdiction to review the state court's determination of its state-court procedural vehicles. The Court should thus decline petitioner's invitation to second-guess the Tennessee courts' decisions regarding a state statute of limitations, the continued existence of state common-law writ in Tennessee, or the cognizability of the claim under a state rule of criminal procedure.

The Tennessee Court of Criminal Appeals' application of the state *coram nobis* statute of limitations is an independent and adequate state-law ground. *See Coleman*, 501 U.S. at 749-50 (holding that a claim barred by statute of limitations in state court is an independent and adequate state-law ground that results in the procedural default of a federal habeas claim unless the petitioner can show cause and prejudice to excuse the default). The Court lacks jurisdiction to review the state-law determination.

The same should be true for the state court's decision on the continuing vitality of the state writ of *audita querela* or on whether a claim is cognizable under Tenn. R. Crim. P. 36.1. Whether a state common-law writ continues to exist or has been rendered obsolete by other state writs or by state statute is surely a state-law question reserved for the state courts. As such, the determination that *audita querela* no longer exists in Tennessee is an independent and adequate state-law ground. The Court should reach the same conclusion regarding the question of whether an *Atkins* claim is cognizable under the very limited purview of Rule 36.1. *See Burket v. Angelone*, 208 F.3d 172, 191 (4th Cir. 2000) (a claim found not to be cognizable by a state court under state collateral review was an independent and adequate state-law ground), *cert denied* 120 S. Ct. 2761 (2000). The Tennessee courts' decisions rest on independent and adequate state-law grounds not reviewable by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

s/ Andrew C. Coulam
ANDREW C. COULAM
Senior Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-1868
Fax: (615) 532-7791
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document and following appendix has been sent by first-class mail, postage pre-paid, to Kelley J. Henry, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, Tennessee 37203, on this 15th day of November, 2018. I further certify that all parties required to be served have been served.

s/ Andrew C. Coulam
ANDREW C. COULAM
Senior Assistant Attorney General

RESPONDENT'S APPENDIX

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RESPONDENT'S APPENDIX A

Petitioner's Petition for Writ of Error Coram Nobis and/or Other Relief

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

DAVID IVY, Petitioner, vs. STATE OF TENNESSEE, Respondent.	)	No. 01-12388 Death Penalty Case

PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR OTHER RELIEF

Petitioner David Ivy invokes this Court's jurisdiction pursuant to Tennessee Code Annotated §§16-10-101 and 16-10-102 (general and criminal jurisdiction of Circuit Courts, Tennessee Code Annotated §§27-7-101 *et seq.* and 40-26-105 (writ of error *coram nobis*), as a place holder based on the uncertainty of legal matters directly affecting Mr. Ivy's sentence of death that are to be addressed *in some way* by the Tennessee Supreme Court in *Payne v. Tennessee*, No. W2013-01248-SC-R11-PD (*Payne*), as explained below. Because of the unusual circumstances giving rise to this action and the imperative of protecting Mr. Ivy's fundamental constitutional rights, and because notions of judicial economy and the wise and the thoughtful allocation of the limited resources of the Court and the parties dictate that issue not be joined until the Supreme Court clarifies what those issues are, Petitioner requests that this action be held in abeyance pending the decision in *Payne* and that this Court immediately enter an order:

1. Holding this matter in abeyance until 30 days after the decision in *Payne v. Tennessee*, No. W2013-01248-SC-R11-PD (*Payne*);

2. Directing Petitioner to notify the Court and Respondent promptly after the issuance of the decision in *Payne;*

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3. Permitting Petitioner to amend this Petition within 30 days of the decision in *Payne;* and

4. Providing for such other, further and appropriate relief as the Court deems appropriate under the circumstances.

Mr. Ivy alleges that he is intellectually disabled and has significant brain damage. The United States and Tennessee constitutions prohibit the execution of persons like Mr. Ivyr, but to date there have been senseless procedural barriers preventing setting aside his death sentence as further outlined below.

* * * *

Atkins v. Virginia, 536 U.S. 304 (2002), placed a categorical restriction on the death penalty, recognizing that the Eighth Amendment bars the intellectually disabled as constitutionally ineligible for execution. As clearly set forth by the Supreme Court in subsequent decisions, *Atkins* provides immunity from capital punishment for an entire class of people. *See Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)(explaining that *Atkins* "ruled that the death penalty constitutes an excessive sanction for the entire category of intellectually disabled offenders."); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (referring to Atkins in the context of the Supreme Court "confining the instances in which the [death penalty] can be imposed."). Most recently, the United States Supreme Court held, "No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her

inherent dignity as a human being." *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986, 1992 (2014)(internal citation omitted).[1]

Because David Ivy is intellectually disabled and exempt from execution under the Eighth and Fourteenth Amendments and Article I §16 of the Tennessee Constitution (and/or Tennessee law), he petitions this Court for a writ of error *coram nobis* relief under Tenn. Code Ann. §40-26-105 and/or on the grounds that *coram nobis* provides him a remedy as the "lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Wlodarz v. State*, 361 S.W.3d 490, 499 (Tenn. 2012). Alternatively, David Ivy requests relief under the procedural vehicle identified by the Tennessee Supreme Court in the pending appeal in *Payne v. Tennessee*, No. W2013-01248-SC-R11-PD.

I. PENDING APPEAL IN *PAYNE v. STATE*

The Tennessee Supreme Court has granted the application for permission to appeal in *Payne* and directed the parties to address the issues raised by Payne and the following:

> (1) the appropriate remedy for an intellectual disability claim under these circumstances if *coram nobis* relief is not available; and
>
> (2) the relevance, if any, of the holding in *Van Tran v. Colson*,764 F.3d 594 (6th Cir. 2014), regarding retroactive application of this Court's decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011).[2]

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[1] In *Hall*, the Supreme Court struck down Florida's "rigid rule" defining setting a bright line cut off IQ score of 70 because it "creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Id.* at, 1990.

[2] In *Van Tran*, the Sixth Circuit granted habeas relief to the Petitioner and remanded the case to the State Court to conduct a new *Atkins* hearing holding:

> [B]ecause the Tennessee state court's decision did not apply the proper legal standard for assessing whether Van Tran has intellectual disability, which was announced in a recent decision of the Tennessee Supreme Court, the district court's judgment must be vacated and remanded. In accordance with the Supreme Court's command that the procedural scheme for enforcing Atkins is within the state's purview and because the State is faced with a state law—imposed procedural burden it could not have anticipated at the time of the original state-

Exhibit 1, Tennessee Supreme Court Order Granting Permission to Appeal in Payne.[3] It thus appears that the Tennessee Supreme Court is poised to reconsider its holding in *Keen v. State*, *Keen v. State*, 2012 Tenn. LEXIS at 932, *48 (December 20, 2012).

II. PROOF OF INTELLECTUAL DISABILITY

David Ivy seeks *coram nobis* relief in these proceedings, and he does so based upon the attached juvenile records establishing that he is intellectually disabled in accordance with clinical standards and within the meaning of the Eighth Amendment, the Tennessee Constitution, *Atkins v. Virginia*, 536 U.S. 3024 (2002) and *Hall v. Florida*, 572 U.S. ___ (2014). The records clearly show that age 12, Mr. Ivy was in special education ("resource") classes, was identified as "a child having a continuing handicap in intellectual functioning", and his IQ measured at 73 on a WISC-R (Exhibit 3: Memphis City Schools Mental Health Report). At age 14, Mr. Ivy's IQ was

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court Atkins hearing, we remand for the entry of a conditional writ of habeas corpus to allow the state courts to consider Van Tran's Atkins claim under the proper, now-governing standard.

Van Tran, 764 F.3d at 597. *Van* Tran relied on the Sixth Circuit's earlier decision in *Black*. The Sixth Circuit did not specify what procedural vehicle should be open to *Van Tran* on remand to the State Court, only that he be given a hearing. Like Van Tran, Black is entitled to a due process hearing in state court.

[3] Payne raised the following additional issues in his Application for permission to appeal: 1) Is *Hall v. Florida*, 572 U.S. ___ (2014) retroactively applicable to Pervis Payne's request for a hearing on his claim of intellectual disability under the Eighth and Fourteenth Amendments and/or Tennessee law? *See Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), cert. granted 574 U.S. ___ (Dec. 5, 2014); Pet. For Cert. In *Brumfield v. Cain*, O.T. 2014, No. 13-1433, p. 37 n. 10 (querying whether *Hall v. Florida* is retroactive); 2) Is Pervis Payne entitled to an evidentiary hearing on his Eighth Amendment intellectual disability claim under *Hall v. Florida*, 572 U.S. ___ (2014) and/or the Supreme Court's impending decision in *Brumfield v. Cain*, U.S. No. 13-1433; 3) Can Pervis Payne be denied an evidentiary hearing on his intellectual disability claim under the Eighth Amendment and Tennessee law, where: (a) he has evidence of intellectual disability that has never been considered by any court; (b) his case is in a similar procedural posture to the defendant in Hall (and/or Brumfield); and (c) his claim of intellectual disability, if proven, makes him categorically ineligible to be executed under the Eighth and Fourteenth Amendments and the Tennessee Constitution? *See Payne v. State*, Appellant's Opening Brief, Exhibit 2.

measured at 63 on the Peabody Picture Vocabulary Test and 73 on the Culture Fair Test (Exhibit 4: Wilder Summary of Testing). David Ivy is entitled to a full hearing on his intellectual disability claim given the evidence presented here and the Tennessee Supreme Court's pronouncement that the state of Tennessee has no legitimate interest in the execution of a person who is intellectually disabled.[4]

III. DAVID IVY STATES A CLAIM FOR *CORAM NOBIS* OR OTHER RELIEF

Based on the plethora of evidence establishing that David Ivy is intellectually disabled, as set forth in Exhibits 3 and 4, David Ivy is entitled to an evidentiary hearing and to *coram nobis* or any other relief this Court deems appropriate for three reasons:

First, based on the Tennessee Supreme Court's grant of permission to appeal in *Payne*, addressing Mr. Payne's entitlement to a hearing and to relief based on intellectual disability, *Payne v. State*, 2015 Tenn. Lexis 127 (Feb. 13, 2015), it appears that the Tennessee Supreme Court is poised to identify whether *coram nobis* or another remedy is the appropriate vehicle to raise *Atkins/Hall* claims in state court.

Second, Mr. Ivy is entitled to an evidentiary hearing and speicifically to *coram nobis* relief where the Tennessee Supreme Court has recognized that *coram nobis* survives as a remedy of last resort when all other remedies may be unavailable. *Wlodarz v. State*, 361 S.W.3d 490 (Tenn. 2012). As the Tennessee Supreme Court describes it, a writ of error *coram nobis* is recognized as the "lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Id.* at 499. Thus, to the extent that David Ivy has been

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[4] *See Keen v. State*, 2012 Tenn. LEXIS at 932, *48 (December 20, 2012)(The Tennessee Supreme Court writes that it is "committed to the principle that Tennessee has no business executing persons who are intellectually disabled[.]" *Id.* at *52.

denied relief via a motion to reopen and might otherwise be denied statutory *coram nobis* relief sought by this petition, he must still be granted relief and a *coram nobis* hearing under *Wlodarz*.

Finally, David Ivy is entitled to a hearing on his intellectual disability claim given the evidence presented here and the Tennessee Supreme Court's pronouncement in Mr. Keen's case that the state of Tennessee has no legitimate interest in the execution of a person who is intellectually disabled. *See Brumfield v. Cain*, U.S. No. 13-1433 (argued March 30, 2015).[5]

This Court, therefore, should grant David Ivy's petition for writ of error *coram nobis*; or other relief order a hearing on Mr. Ivy's intellectual disability claim; apply all applicable Eighth Amendment and constitutional standards including those required by *Hall v. Florida*; thereafter grant *coram nobis* or other relief and declare that Mr. Ivy's execution would violate the Eighth and Fourteenth Amendments, the Tennessee Constitution, and Tennessee law; and vacate his death sentence and impose a life sentence instead.

III. CONCLUSION

This Court should grant David Ivy's petition for writ of error *coram nobis* or other relief, order a hearing, and grant him relief on his intellectual disability claim under the Eighth and Fourteenth Amendments, the Tennessee Constitution, and Tennessee law, vacate his death sentences, and impose life sentences instead. Alternatively, the Court should grant Mr. Ivy a hearing on his *Atkins/Hall* claim under the appropriate procedural vehicle identified by the Tennessee Supreme Court in *Payne*. In either event, this Court should stay proceedings the

[5] At oral argument in *Brumfield v. Cain*, No. 13-1433 (U.S.), Justice Sotomayor acknowledged that *Atkins* requires a State to grant a hearing if a capital petitioner has met the threshold of showing some reason to believe that his mental capacity is compromised. Transcript, Brumfield, No. 13-1433 (March 30, 2015), pp. 21-22. Likewise, Justice Breyer acknowledged that, under *Atkins*, if a petitioner asks to present evidence that he is intellectually disabled, and "the State says no, you can't. That would clearly violate *Atkins*." Id. at pp. 24-25. Justice Breyer further stated that Louisiana's threshold for entitlement to a capital ID hearing, that the petitioner present "some evidence" of intellectual disability, "seemed [] good enough to be a federal standard." Id. at p. 29.

manner suggested at the outset pending the decision in *Payne,* and for 30-days thereafter so that Petitioner can file and amended petition or such other claims for relief in the manner that the Supreme Court will describe.

Respectfully Submitted,

Kelley J. Henry
Supervisory Assistant Federal Public
Defender - Capital Habeas Unit

Amy D. Harwell
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: _____
Amy Harwell

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered via United States Mail, postage pre-paid, to the Office of the Shelby County District Attorney General, 201 Poplar Avenue, Memphis, TN 38103 on this the 20 day of May, 2015.

_____
Amy Harwell

RESPONDENT'S APPENDIX B

Exhibits 3-4 to Petitioner's Petition for Writ of Error Coram Nobis and/or Other Relief

Exhibit 3

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CONFIDENTIAL

MEMPHIS CITY SCHOOLS MENTAL HEALTH CENTER
PROFESSIONAL REPORT

RESTRICTIONS: Information in this confidential report is for professional use only. This information should not be given to any other organization or individual and in no case to the persons to whom it relates without prior release through the Director of the Memphis City Schools Mental Health Center.

NAME David Ivy DOB 1-15-72 AGE 12 SEX M RACE B

SCHOOL Hanley GRADE 6 STUDENT # 5765501 PHONE none

PARENTS M/M John Ivory ADDRESS 736 Hanley ZIP 38114

REFERRAL:

David was referred to the Memphis City Schools Mental Health Center for a routine psychological re-evaluation. He was evaluated in 1982. The results indicated that David was a child of low average intellectual functioning whose progress was affected by a learning disability. David is presently attending resource classes.

SOCIAL SUMMARY:

Mrs. Dorothy Ivy, David's mother was interviewed in her home on November 13, 1984. She was cooperative and realizes that David is having some academic difficulties.

David lives with his parents and two siblings, Joyce, 13 and Dorothy, 19. Dorothy has a nine month old daughter, Lakecia who lives in the home. Mrs. Ivy is unemployed and Mr. Ivy is self employed in construction. The family receives Food Stamps.

When asked to describe David's behavior, Mrs. Ivy replied that "he's mannish." David is said to be "hard-headed" and likes to have his way. He is able to interact with the family as well as peers. David seldoms brings any of his friends to the home. He usually meets them on the corner near the school. David will sometime leave the home and not tell them where he is going. Most of the time, he can be found in the immediate neighborhood.

David does not have any responsibilities in the home. Mrs. Ivy states that when asked to do something, he rushes to get through. Self-help skills are said to be adequate. David can run errands and bring back correct change. Mrs. Ivy considers his behavior in the home and community to be fairly typical.

Mrs. Ivy states that David continues to have problems with asthma. He uses over the counter medication as needed. David used to wear glasses but lost them. He has not complained of having any eye problems.

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NAME: David Ivy
DOB: 1-15-72

Mrs. Ivy states that David has always been "kind of slow" in his school work. He does not seem motivated to achieve. In the home, he never does any studying. He had to repeat the fourth grade and manages to pass even though his work is far below grade level. David was recommended for resource placement during the third grade. The mother feels that the placement has been beneficial.

An assessment of David's social adaptive behavior indicates that he is functioning on a level commensurate with his chronological age. David's academic skills are far below grade level and he seems poorly motivated.

PSYCHOLOGICAL SUMMARY:

On the Wechsler Intelligence Scale for Children-Revised (WISC-R), David obtained a Full Scale IQ of 73, placing him in the borderline range of intelligence. He obtained a Verbal IQ of 73 and a Performance IQ of 77. Subtest scaled scores ranged from a low of 1 on Block Design to a high of 10 on Picture Completion and Picture Arrangement.

David's performance on the Bender Gestalt test suggests impaired perceptual functioning. He scored 4 errors and obtained a developmental age equivalent of 8-1.

On the Woodcock-Johnson Psycho-Educational Battery, Part Two, David's scores place him at the 2.4 grade level in Reading, 5.6 grade level in Math, and 2.8 grade level Written Language. These grade equivalent scores correspond to standard scores of 69 in Reading (2nd percentile), 86 in Mathematics (18th percentile), and 72 in Written Language (3rd percentile). These scores indicate deficits in all three areas.

Classroom Observation indicated David was able to remain on task throughout the period of the observation. The Teacher Checklist indicates that David is currently reading on the third grade level.

TREATMENT PLAN: (11-16-84)

Conceptualization - David is most appropriately diagnosed as a child having a 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, academic achievement is at or below the fourth percentile in Reading Comprehension, Reading Mechanics and Written Language and adaptive behavior is not significantly impaired.

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NAME: David Ivy
DOB: 1-15-72

Primary Diagnosis - Unspecified Mental Disorder 300.90
Special Education Diagnosis - Other Handicapping Condition 20

Short Range Goals:

1. To aid the child in obtaining the most appropriate educational placement to meet his needs.
   a. Recommendation is made that David be referred to the M-Team for appropriate educational placement.

2. To help the parents form a more realistic perception of the child's functioning.
   a. An informing conference will be held to convey test findings and recommendations.

Long Range Goal:

1. To aid the child in achieving self-sufficiency, including reduced dependancy.

Provision for Follow-up - The above treatment plan will be carried out by mental health center staff and unless additional services are needed this case will be closed.

Mildred Mitchell 10-31-84
Mildred Mitchell (Date)
School Social Worker
DOI: 11-13-84

Lee Steward 11/21/84
Lee Steward (Date)
Psychometrist
DOE: 11-5-84

Beverly Folks 11-21-84
Beverly Folks (Date)
Psychological Services Worker

William B. Jennings 11/26/84
William B. Jennings, Ph.D. (Date)
Psychologist

11-21-84
gw

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Exhibit 4

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John S. Wilder Youth Development Center

Summary of Testing

Name: Ivy, David NMN Birthdate: 1-15-72 Age: 14-10 Grade: 7

Testing Date: November 25-December 3, 1986

CALIFORNIA ACHIEVEMENT TEST, Level 15-C

	G. Eq.	S.S.		G.Eq.	S.S.
Reading Vocabulary	3.7	72	Mathematics Computation	7.0	85
Reading Comprehension	5.3	71	Mathematics Concepts/Applic.	6.7	84
Total Reading	4.5	75	Total Mathematics	6.4	85
Spelling	4.1	80	Reference Skills	6.5	86
Language Mechanics	6.7	90			
Language Expression	6.2	86	Total Battery	5.7	80
Total Language	6.4	87			

WIDE RANGE ACHIEVEMENT TEST

Word Recognition (reading) G. Eq. 4.5 S.S. 73 Spelling G. Eq. 3.6 S.S. 71 Arithmetic G. Eq. 3.9 S.S. 70

PEABODY PICTURE VOCABULARY TEST--REVISED

S.S. 63 Age Equiv. 8-4

CULTURE FAIR INTELLIGENCE TEST

I.Q. 73

CAREER MATURITY INVENTORY

14	Decisiveness
1	Involvement
4	Independence
4	Orientation
7	Compromise

TEST OF EVERYDAY LIVING

51	Purchasing Habits
54	Banking
56	Budgeting
44	Health Care
31	Home Management
44	Job Search Skills
30	Job Related Behavior
44	Total Battery

WISC--R

Verbal IQ ____

Performance IQ ____

Full Scale IQ ____

RESPONDENT'S APPENDIX C

Petitioner's Additional Argument in Support of Petition for Writ of Error Coram Nobis and/or Other Relief

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

DAVID IVY, Petitioner,	)	Filed 5/11/16 Richard L. DeSaussure, Clerk BY D.C.
vs.	)	No. 01-12388 Death Penalty Case
STATE OF TENNESSEE, Respondent.	)	

ADDITIONAL ARGUMENT IN SUPPORT OF
PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR OTHER RELIEF

I. INTRODUCTION

1. In *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), the United States Supreme Court reaffirmed that persons with intellectual disability "so [lack] the capacity for self-determination that it would violate the Eighth Amendment to permit the State to impose the 'law's most severe sentence.'" *Id.* at 2283, *quoting*, *Hall v. Florida*, 134 S.Ct. at 1993. The Court further held that even though there was evidence in the record that would negate a finding of intellectual disability," Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much." *Id.* at 2281. In *Brumfield's* case, the Court held that he is entitled to an evidentiary hearing on his *Akins* claim where he "scored 75 on an IQ test and may have scored higher on another test." *Id.* at 2278. The court further found sufficient evidence in the record that Brumfield has adaptive behavior deficits where he had low birth weight, was diagnosed as learning disabled and placed in special education classes, and reads at the fourth

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grade level and had other mental difficulties. Importantly, the Supreme Court found that Brumfield was entitled to an evidentiary hearing even though he was not diagnosed as mentally retarded prior to age 18.

2. In *Montgomery v. Louisiana*, 138 S.Ct. 718 (2016), the United States Supreme Court held that where it holds that a particular class of individual is categorically exempt from a specific range of punishment a state court may not refuse to provide a procedural vehicle for the implementation of that ruling

3. *Atkins v. Virginia*, 536 U.S. 304 (2002), placed a categorical restriction on the death penalty, recognizing that the Eighth Amendment bars the intellectually disabled as constitutionally ineligible for execution. The Tennessee Supreme Court has twice held that the State of Tennessee has no legitimate interest in executing the intellectually disabled. *Payne v. State*, No. W2013-01248-SC-R11-PD, 2016 WL 1394199, *6 (Tenn. April 7, 2016); *Keen v. State*, 398 S.W.3d 594, 613 ("Tennessee has no business executing persons who are intellectually disabled.").

4. Yet, the Tennessee Supreme Court has refused to identify the proper procedural vehicle for petitioners such as David Ivy. In *Payne*, the Court rejected procedures such as a Writ of Error Coram Nobis, a Motion to Reopen, and a free standing claim under the intellectual disability act. The Court declined to find any of those remedies as available to Payne, but that their "decision ... does not foreclose the Petitioner from availing himself of any and all state and federal remedies still available to him." *Payne,* 2016 WL 1394199, at *10. The Tennessee Supreme Court's refusal to identify a remedy runs afoul of *Montgomery* and also

forces Petitioner to invoke two additional avenues of relief: 1) a request to correct illegal sentence under Tenn. R. Crim. P. 36.1, and 2) a writ of *audita querela.* Petitioner will address these additional remedies *seriatum.*

II. MOTION TO CORRECT ILLEGAL SENTENCE

5. Under Tenn.R.Crim.P. 36.1, Petitioner "may, at any time, seek correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered."

6. Rule 36.1 explains that "[f]or purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes any applicable statute." *See State v. Wooden*, 478 S.W.3d 585 (Tenn. 2015).

7. Under Tenn. Code Ann. §39-13-203, the death sentence cannot be imposed or executed upon any person who is intellectually disabled or intellectually disabled at the time of an offense.

8. The Constitution places a substantive, categorical prohibition against the death sentence upon anyone who is intellectually disabled. *Hall v. Florida*, 572 U.S. ___ (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002).

9. As such, the death sentence is substantively, and categorically, illegal if imposed upon someone who is intellectually disabled. *See Montgomery v. Louisiana*, 577 U.S. ___ (2016) (acknowledging that prohibition against executing the intellectually disabled is a substantive prohibition against execution that must be applied retroactively).

10. A person is intellectually disabled if s/he has significantly subaverage

intellectual functioning, deficits in adaptive behavior, and onset of the condition during the developmental period or before age 18.

11. When determining whether an individual is intellectually disabled under §39-13-203, this Court is also constitutionally required to apply the standards of intellectual disability contained in and explicated by *Hall v. Florida*, 572 U.S. ___ (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011).

12. Any determination of intellectual disability must also be made in conformity with the Eighth and Fourteenth Amendments, *Hall, Atkins*, and *Coleman*, and Article I §§ 8 & 16 of the Tennessee Constitution.

13. *Hall* requires a state court to consider the standard error of measurement (SEM) applicable to all IQ tests, requiring consideration of all evidence of intellectual disability so long as an individual has an IQ of 70-75 or below and a raw IQ test score of 75 or below.

14. Petitioner has met this threshold showing through the proof already presented in his original filing and would be able to establish his intellectual disability at an evidentiary hearing. Failure to grant an evidentiary hearing violates the holding of the United States Supreme Court in *Montgomery, Brumfield, Hall*, and *Atkins*, notwithstanding the decision in *Payne* and *Keen*. The decisions of the United States Supreme Court take precedence over the decisions of the Tennessee Supreme Court. *Marbury v. Madison*, 5 U.S. 137, 146 (1803) ("This is the *supreme court*, and by reason of its supremacy must have the superintendance of

the inferior tribunals and officers, whether judicial or ministerial.")(emphasis in original).

III. PETITION FOR WRIT OF *AUDITA QUERELA*

15. Petitioner likewise seeks relief via this petition for writ of *audita querela* so that he may receive a full and fair hearing on his claims that he is intellectually disabled and therefore exempt from execution under *Hall v. Florida*, 572 U.S. ___ (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth and Fourteenth Amendments, Article I §8 & 16 of the Tennessee Constitution, and Coleman v. State, 341 S.W.3d 211 (Tenn. 2011).

16. This Court should grant Davd Ivy's petition for writ of *audita querela*, grant him a hearing on his claims of intellectual disability, apply all relevant intellectual disability case law (including *Hall v. Florida*, 572 U.S. ___ (2014)), and afterwards conclude that he is intellectually disabled and therefore exempt from execution under *Hall*, *Atkins*, the Eighth and Fourteenth Amendments, Article I §8 & 16 of the Tennessee Constitution, and *Coleman v. State*, 341 S.W.3d 211 (Tenn. 2011).

17. The common-law writ of *audita querela*:

> is a remedy granted in favor of one against whom execution has issued or is about to issue on a judgment the enforcement of which would be contrary to justice . . . because of matters arising subsequent to its rendition . . . . In other words, *audita querela* is a common-law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense . . .arising since its rendition and which could not be taken advantage of otherwise . . .

Am.Jur.2d *Audita Querela* §1 & nn. 1 &2 (May 2014). *See Rawlins v. Kansas*, 714 F.3d 1189, 1192-93, 1196 (10th Cir. 2013)(reciting history of *audita querela*, noting its extension and continuing yet infrequent use with respect to " some unanticipated circumstances arising post-judgment," over which the party subject to the judgment "had no control," and which would render enforcement of the original judgment "contrary to justice"); *United States v. Ghebreziabher*, 701 F. Supp. 115, 117 (E.D. La. 1988)(issuing writ of *audita querela* based on change in law and relieving petitioner of one of three guilty pleas).

18. While the Tennessee General Assembly's enactment of the statutory writ of certiorari and supersedeas replaced the writ of *audita querela* in certain circumstances (See Tenn. Code Ann. §27-8-102) the statute did not eliminate the availability of the writ or undermine its utility in appropriate circumstances. *See, e.g.., Travelers Indemnity Co. v. Callis,* 481 S.W.2d 384, 385 (Tenn. 1972)(post-judgment change in facts rendering enforcement of judgment inequitable, quoting *Baker v. Penecost*, 171 Tenn. 529, 106 S.W.2d 220 (1937)).

19. Such circumstances exist when "something which has happened since the judgment," *Mann v. Roberts*, 79 Tenn. 57, 1883 WL 3663, at *4 (Tenn. 1883), would make execution of the judgment "an oppressive defect of justice" *Jones v. Pearce*, 59 Tenn. 281, 1873 WL 3777, at *2 (Tenn. 1873), and no other remedy exists to prevent the injustice. *See United States v. Kessler*, 335 Fed.Appx. 403, 404 (5th Cir. 2009); *United States v. Collins*, 373 Fed.Appx. 94, 2010 WL 1572761, at *1 (2d Cir. 2010).

20. Petitioner now has proof that he is intellectually disabled under *Atkins*, *Hall*, *Brumfield*, and *Coleman* and is therefore ineligible for execution.

21. This Court should, pursuant to the writ of *audita querela*, conduct a hearing on David Ivy's intellectual disability, apply all governing law including all standards required by *Hall v. Florida*, 572 U.S. ___ (2014) and the Eighth and Fourteenth Amendments and Tennessee law, including *Coleman v. State*, 341 S.W.3d 221 (Tenn, 2011), and after doing so, conclude that David is intellectually disabled and vacate his death sentence.

IV. CONCLUSION

WHEREFORE, because the State of Tennessee "has no business" executing persons who are intellectually disabled, because Petitioner is intellectually disabled, and because the State does not have the authority to ignore the holdings of the United States Supreme Court, this Court should grant David Ivy a hearing under whichever procedural vehicle it sees fit, be it *coram nobis*, motion to reopen, Tenn. R. Crim. P. 36, writ of *audita querela* or any other remedy that at common law exists. Procedural technicalities ought not lead to wrongful execution.

Respectfully Submitted,

Kelley J. Henry
Supervisory Assistant Federal Public Defender - Capital Habeas Unit

Amy D. Harwell
Asst. Federal Public Defender

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: Kelley J. Henry
Kelley J. Henry

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered via United States Mail, postage pre-paid, to the Office of the Shelby County District Attorney General, 201 Poplar Avenue, Memphis, TN 38103 on this the 9th day of May, 2016.

Kelley J. Henry

RESPONDENT'S APPENDIX D

Order Denying Petition for Writ of Error Coram Nobis and/or Other Relief

IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

DAVID IVY, Petitioner	)	WRIT OF ERROR CORAM NOBIS
VS.	)	NO. 01-12388
STATE OF TENNESSEE	)	DEATH PENALTY

Filed 9/29/16
Richard DeSaussure, Clerk
BY D.C.

ORDER DENYING PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR OTHER RELIEF[1]

This matter is before the Court on the David Ivy's Petition For Writ of Error Coram Nobis[2] filed on May 28, 2015, and his amended pleading filed on May 11, 2016, in which he also seeks relief pursuant to Tenn. R. Crim. Pro. 36.1 and a petition for a writ of audita querela. Petitioner claims he is entitled to relief based upon what he asserts is proof of his intellectual disability which he claims categorically exempts him from the death penalty under existing law. The State filed a response on August 24, 2015, and an additional response on July 1, 2016, seeking summary dismissal. After a careful review of the pleadings and applicable law and for the reasons stated below, Petitioner Ivy's petition for writ of error coram nobis and other relief is summarily DISMISSED.

[1] In the concluding remarks of his May 2016 pleading, Petitioner states "this Court should grant David Ivy a hearing under whichever procedural vehicle it sees fit, be it *coram nobis*, motion to reopen, Tenn. R. Crim. P. 36, writ of *audita querela* or any other remedy that at common law exists." Any procedural vehicles mentioned generally which were not addressed specifically by Petitioner Ivy are deemed not properly raised and, therefore, not addressed in this order.

[2] Petitioner also sought to file this pleading citing "Other Relief" which he described as relief "under the procedural vehicle to be identified by the Tennessee Supreme Court in ...*Payne v. Tennessee*." As no procedural vehicle was identified in *Payne* as the appropriate means by which to address the claims raised here, this Court need not address this portion of the petition.

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I. Procedural History

On January 10, 2003, a jury found Petitioner guilty of the June 2001 premeditated first degree murder of Lakisha Thomas. The jury further found the following aggravating circumstance in sentencing Petitioner to death for the murder:

> (1) The defendant was previously convicted of one (1) or more felonies other than the present charge, whose statutory elements involve the use of violence to the person; and
>
> (2) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

See Tenn. Code Ann. § 39-13-204(i)(2) and (6) (Supp. 1999). In his initial direct appeal, the Tennessee Supreme Court affirmed his convictions and sentence. State v. Ivy, 188 S.W.3d 132 (Tenn.), cert. denied, 549 U.S. 914 (2006).

Petitioner subsequently filed a timely petition for post-conviction relief which was denied and affirmed on appeal. David Ivy v. State, 2012 WL 6681905 (Tenn. Crim. App. Dec. 21, 2012), perm. app. denied, (Tenn. Apr. 9, 2013).

II. Applicable Law and Analysis

Petition for Writ of Error Coram Nobis

Recently, in Payne v. State, ___ S.W.3d ___, 2016 WL 1394199 (Tenn. April 7, 2016), our Tennessee Supreme Court addressed whether a writ of error coram nobis is the appropriate procedural vehicle by which to raise a claim of intellectual disability:

> The Petitioner is seeking a hearing on his claim of intellectual disability through the procedural mechanism of error coram nobis relief. Our statute setting forth the parameters for seeking a writ of error coram nobis provides as follows:
>
> > The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have

> been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. 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(b). The decision to grant or deny a petition for writ of error coram nobis on its merits rests within the trial court's sound discretion. *Harris v. State,* 301 S.W.3d 141, 144 (Tenn.2010).

Claims under the coram nobis statute are subject to a one-year statute of limitations. Tenn. Code Ann. 27–7–103. "The statute of limitations is computed from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." *Harris,* 301 S.W.3d at 144 (citing *State v. Mixon,* 983 S.W.2d 661, 670 (Tenn.1999)). The trial court in this proceeding denied the Petitioner relief under the coram nobis statute on the basis that his claim was barred by this statute of limitations.

We have opined that the writ of error coram nobis "is an *extraordinary* procedural remedy ... [that] fills only a slight gap into which few cases fall." *Mixon,* 983 S.W.2d at 672. That slight gap is met only under the following circumstances:

> The ... petition must be in writing and (1) must describe with particularity the nature and substance of the newly discovered evidence and (2) must demonstrate that this evidence qualifies as "newly discovered evidence." In order to be considered "newly discovered evidence," the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. In addition to describing the form and substance of the evidence and demonstrating that it qualifies as "newly discovered evidence," the [petitioner] must also demonstrate with particularity (3) why the newly discovered evidence could not have been discovered in a more timely manner with the exercise of reasonable diligence; and (4) how the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment.

Harris, 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result) (footnotes omitted). These prerequisites make clear that the focus of a proper petition for writ of error coram nobis is on the *facts* that should have been made available to the fact-finder *at the time of the trial. See State ex rel. Carlson v. State*, 219 Tenn. 80, 407 S.W.2d 165, 167 (1966) (stating that the purpose of a coram nobis proceeding "is to bring to the attention of the court some *fact* unknown to the court, which if known would have resulted in a different judgment") (emphasis added).

As this Court explained almost twenty years ago, "the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial *factual* error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced." *Mixon,* 983 S.W.2d at 667 (citing John S. Gillig, *Kentucky Post–Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure* 11.42, 83 Ky. L.J. 265, 320 (1994–95)) (emphasis added). This concern with factual error was incorporated into the coram nobis statute:

> 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.

Id. at 668 (quoting Tenn. Code Ann. § 40–26–105 (1997 Repl.)).

Significantly, the relief being sought via a writ of error coram nobis "is the setting aside of the judgment of conviction and the granting of a new trial." *Harris,* 301 S.W.3d at 150 n. 8 (Koch, J., concurring in part and concurring in result) (citing Tenn. Code Ann. § 40–26–105(c)). As this Court previously has recognized, the writ of error coram nobis may provide a remedy "for those rare instances in which a petitioner may otherwise be wrongfully convicted of a crime." *Wlodarz v. State,* 361 S.W.3d 490, 504 (Tenn.2012). Thus, the goal of the relief afforded under a writ of error coram nobis is a reliable determination of the petitioner's criminal liability for the offense with which he was charged based on all of the evidence that should have been made available to the fact-finder at the initial trial. The goal is *not* a redetermination of the petitioner's criminal liability in the face of changes in the law occurring many years after his trial.

In the realm of coram nobis jurisprudence, "newly discovered evidence" refers to evidence that existed at the time of trial but of which the defendant, through no fault of his own, was unaware. *See* Tenn. Code Ann. § 40–26–105(b); *Harris,* 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result). As the Court of Criminal Appeals has recognized, however, "a narrow exception exists where 'although not newly discovered evidence, in the usual sense of the term, the *availability* of the evidence is newly discovered.' " *Sims v. State,* No. W2014–00166–CCA–R3–PD, 2014 WL 7334202, at *9 (Tenn. Crim. App. Dec. 23, 2014) (quoting *Harris,* 301 S.W.3d at 160–61 (Koch, J., concurring in part and concurring in result) (internal quotation marks omitted)). This narrow exception may be triggered when previously unavailable evidence becomes available following a change in *factual* circumstances. *Id.* Thus, where testimony that was not available at the time of trial later becomes available, the testimony may qualify as "newly discovered" even if the defendant knew about the witnesses at the time of trial. *See, e.g., Taylor v. State,* 180 Tenn. 62, 171 S.W.2d 403, 404–05 (1943) (applying exception in motion for new trial where one witness was hospitalized and one witness was outside the jurisdiction at the time of trial but who later became available to testify); *Brunelle v. State,* No. E2010–00662–CCA–R3–PC, 2011 WL 2436545, at *10 (Tenn. Crim. App. June 16, 2011) (noting that petitioner could have sought coram nobis relief after a Department of Children's Services report, known to the petitioner but sealed at the time of trial, became available), *perm. appeal denied* (Tenn. Oct. 18, 2011). We agree with our Court of Criminal Appeals, however, that this narrow exception is not triggered by post-trial changes in the law. *Sims,* 2014 WL 7334202, at *10. Rather, "[i]ssues regarding whether a change in the law should apply post-trial relate to retroactivity and are more properly addressed in post-conviction proceedings or a motion to reopen post-conviction proceedings." *Id.*

The gravamen of the Petitioner's claim in this proceeding is that he is ineligible to be executed because he is intellectually disabled. We reiterate our commitment "to the principle that Tennessee has no business executing persons who are intellectually disabled." *Keen,* 398 S.W.3d at 613. However, we also are committed to not contorting Tennessee's statutes under the guise of construction.

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. Therefore, we need not address the trial court's ruling on the statute of limitations.

The Petitioner also argues that, even if he is not entitled to relief under the coram nobis *statute,* he is entitled to a hearing under a common law claim of error coram nobis. In this regard, the Petitioner relies on this Court's decision in *Wlodarz,* claiming that we stated there that coram nobis "survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Wlodarz,* 361 S.W.3d at 499.

The Petitioner takes our language in *Wlodarz* out of context. The full quote is as follows:

> In *Mixon,* this Court described the writ of error coram nobis, *as codified in Tennessee Code Annotated section 40–26–105(b),* as an extraordinary procedural remedy which rarely produces results favorable to a petitioner. *See Mixon,* 983 S.W.2d at 673. Nevertheless, *its statutory terms* provide an alternative procedural remedy when all other post-judgment remedies fail. " '[K]nown more for its denial than its approval,' " [*State v.*] *Vasques,* 221 S.W.3d [514] at 524 [(Tenn. 2007)] (quoting *Mixon,* 983 S.W.2d at 666), the procedure survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available. *Mixon,* 983 S.W.2d at 672; *see also United States v. Morgan,* 346 U.S. 502, 512, 74 S. Ct. 247, 98 L. Ed. 248 (1954).

Wlodarz, 361 S.W.3d at 499 (emphases added). Clearly, we were speaking about the *statutory* writ of error coram nobis, not an undefined common law procedure that guarantees the Petitioner a hearing under any circumstances. We hold that *Wlodarz* does not provide the Petitioner with a common law remedy in coram nobis.

The Petitioner's claim that he is ineligible to be executed because of his intellectual disability is analogous to a claim that he is not competent to be executed. In *Van Tran v. State,* we held that error coram nobis was not an appropriate procedural mechanism for determining a capital prisoner's competency to be executed because "[t]he writ of error coram nobis challenges the judgment itself." 6 S.W.3d 257, 264 (Tenn.1999), *abrogated in part on other grounds by State v. Irick,* 320 S.W.3d 284, 294–95 (Tenn.2010). Similarly, the Petitioner's claim of intellectual disability does not attack the validity of his sentencing proceeding as of the time it took place. Rather, and crucially, his claim of ineligibility is completely independent of the validity of his original sentencing proceeding because it arises from a change in the law that occurred many years after he was sentenced. Indeed, Justice Wade acknowledged in his dissenting opinion in *Keen* that he had "found no authority from this state recognizing a coram nobis petition as an appropriate procedural vehicle for asserting a claim of intellectual disability." *Keen,* 398 S.W.3d at 618 n. 5 (Wade, J., dissenting).

The Petitioner is not entitled to relief on the basis of his proceeding in error coram nobis.

Here, petitioner Ivy seeks relief similar to that sought in Payne. Accordingly, Petitioner Ivy's petition for writ of error coram nobis does not warrant relief pursuant to Payne.

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Rule 36.1, Motion For Correction of Illegal Sentence

Petitioner contends his sentence of death is illegal due to his alleged intellectual disability. Rule 36.1 provides, in part, as follows:

> (a)(1) Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. Except for a motion filed by the state pursuant to subdivision (d) of this rule, a motion to correct an illegal sentence must be filed before the sentence set forth in the judgment order expires. The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents. The motion shall state that it is the first motion for the correction of the illegal sentence or, if a previous motion has been made, the movant shall attach to the motion a copy of each previous motion and the court's disposition thereof or shall state satisfactory reasons for the failure to do so.
>
> (2) For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

Rule 36.1 specifically defines an illegal sentence as one not authorized by statute at the time of sentencing. Petitioner's sentence was authorized by statute for a conviction of first degree murder at the time of the offense, and, therefore, this claim is not a proper basis for relief under Rule 36.1. This court also notes that changes in constitutional law render a sentence voidable, not illegal and void. See Taylor v. State, 995 S.W.2d 78, 84 (Tenn.1999).

Accordingly, Petitioner's Rule 36.1 motion should be dismissed.

Petition for Writ of Audita Querela

In James Dellinger v. State , 2015 WL 4931576 (Tenn. Crim. App. Aug. 18, 2015), perm. app. denied, (Tenn. May 6, 2016), the Tennessee Court of Criminal Appeals addressed the writ of audita querela in a capital case collateral proceeding where Petitioner Dellinger was claiming intellectual disability:

> A writ of audita querela 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. Aug. 21, 2000) (quoting United States v. Fonseca-Martinez, 36 F.3d 62, 64 (9th Cir.1994) (citation omitted)). 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 [.]"

Accordingly, Mr. Ivy's petition for a writ of audita querela should be dismissed.

III. Conclusion

For the reasons stated above, Petitioner David Ivy's Petition for Writ of Error Coram Nobis, Rule 36.1 Motion to Correct Illegal Sentence, and Petition for Writ of Audita Querela are summarily DISMISSED.

IT IS SO ORDERED this the 29 day of Sept, 2016.

James Beasley
Criminal Court Judge

CERTIFICATE OF SERVICE

I, Richard L. DeSaussure, Clerk, hereby certify that I have mailed a true and exact copy of same to Counsel for Petitioner, Christopher Minton, Kelley Henry, and Amy Harwell, Assistant Federal Public Defenders, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, and counsel for the State, ADA Steve Jones, this the 30th day of September, 2016.

R. DeSaussure
Clerk

RESPONDENT'S APPENDIX E

Petitioner's Initial Brief Before the Tennessee Court of Criminal Appeals (No. W2016-02454-CCA-R3-ECN)

IN THE COURT OF CRIMINAL APPEALS FOR THE
WESTERN DISTRICT OF TENNESSEE AT JACKSON

DAVID IVY,	)	
	)	
Appellant,	)	Shelby County Case No. 01-12388
	)	
v.	)	No. W2016-02454-CCA-R3-ECN
	)	
STATE OF TENNESSEE	)	DEATH PENALTY CASE
	)	
Appellee,	)	

BRIEF OF APPELLANT

Kelley J. Henry, TN BPR No. 021113
Supervisory Assistant Federal Public Defender - Capital Habeas Unit

Amy D. Harwell, TN BPR No. 18691
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
Phone: (615) 736-5047
Facsimile: (615) 736-5265
Email: kelley_henry@fd.org

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IN THE COURT OF CRIMINAL APPEALS FOR THE
WESTERN DISTRICT OF TENNESSEE AT JACKSON

DAVID IVY,	)	
	)	
Appellant,	)	Shelby County Case No. 01-12388
	)	
v.	)	No. W2016-02454-CCA-R3-ECN
	)	
STATE OF TENNESSEE	)	DEATH PENALTY CASE
	)	
Appellee,	)	

BRIEF OF APPELLANT

Kelley J. Henry, TN BPR No. 021113
Supervisory Assistant Federal Public Defender - Capital Habeas Unit

Amy D. Harwell, TN BPR No. 18691
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
Phone: (615) 736-5047
Facsimile: (615) 736-5265
Email: kelley_henry@fd.org

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Cases

Statement of Issues Presented

Persons with intellectual disability are constitutionally ineligible for execution. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Brumfield v. Cain*, 135 S.Ct. 2269 (2015). The State of Tennessee has no legitimate interest in executing an individual with intellectual disability. *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, 486 (Tenn. 2016) (same). The United States Supreme Court has warned that when one of their decisions holds that the federal constitution categorically exempts a class of persons from a specific sentence, a State cannot refuse to enforce that decision by failing to provide a procedural vehicle. *Montgomery v. Louisiana*, 136 S.Ct. 718, 732 (2016) ("In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, assuming the claim is properly presented in the case.")

The issue presented for review is what procedural vehicle will Tennessee provide for individuals such as Mr. Ivy who are intellectually disabled, but nevertheless sentenced to death?

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. T.R. 27-89. The State of Tennessee responded on August 24, 2015. T.R. 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. T.R. 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 pleadings in light of *Payne*. T.R. 97. Mr. Ivy complied. T.R. 98-105. Mr. Ivy's additional arguments alerted the Court to the United State's Supreme Court's decisions in *Brumfield v. Cain* and *Montgomery v. Louisiana*. 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. T.R. 104-108. The Criminal Court denied relief on September 29, 2016. T.R. 111-117. Mr. Ivy timely appealed. T.R. 118-119.

Statement of Facts

Evidence presented in the criminal court below establishes that at twelve years of age, David Ivy's reported IQ score on the WISC-R was 73 and it was observed that David's "[i]intellectual functioning is more than two standard deviations below the mean." T.R. 86. David was described as "slow." *Id.* He was placed in resource classes in the third grade and he failed the fourth grade. *Id.* At age fourteen, David's reported IQ scores were 63 on the Peabody Picture Vocabulary Test-Revised and 73 on the Culture Fair Intelligence Test. T.R. 89. In addition, his scores on the Woodcock Johnson Psycho-Educational Battery at age 12 and the Wide Range Achievement Test administered at age 14 demonstrated significant deficits in academic performance. T.R. 86, 89. Further, David Ivy's score on the Bender Gestalt test at age 12 "suggests impaired perceptual functioning." T.R. 86. The unrefuted record thus establishes a *prima facie* case that David Ivy is intellectually disabled and ineligible for the death penalty.

Despite this clear proof, the criminal court held that there was no available procedural remedy for David Ivy to adjudicate his *Atkins* claim. T.R. 117.

Argument

Petitioner acknowledges that the Tennessee Supreme Court's decision in *Payne* holds that *coram nobis* does not provide a procedural vehicle for adjudication of an *Atkins* claim. Respectfully, *Payne* was wrongly decided. Importantly, *Payne* did not address the Supreme Court's decision in *Montgomery* – a case that was decided after briefing and argument in *Payne*. Moreover, a petitioner such as David Ivy whose trial – unlike Payne's – occurred post-*Atkins* is entitled to present his claim of ineligibility for the death penalty pursuant to *error coram nobis*. Further, *Payne* did not address the Motion to Correct Illegal Sentence or *audita querela* procedural vehicles.[1]

Here, the criminal court's decision is based on a fundamental misunderstanding of the law at the time of Mr. Ivy's capital conviction. The court wrote, "Petitioner's sentence was authorized by statute for a conviction of first degree murder at the time of the offense, and, therefore, this claim is not a proper basis for relief under Rule 36.1." T.R. 116.[2] The court is incorrect. At the time Petitioner was sentenced to death the federal constitution constitutionally excluded all persons with intellectual disability from a sentence of death. Mr. Ivy is intellectually disabled. As such, his sentence is illegal. *See Sattazahn v. Pennyslvania*, 537 U.S. 101 (2003)

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[1] *But see Dellinger v. State*, 2015 WL 4931576 (Tenn. Crim. App. Aug. 18, 2015), *perm. app. denied* (Tenn. May 6, 2016) (holding that *audita querela* obsolete in Tennessee).

[2] The same reasoning controls the Court's decision on the Petition for Writ of *Error Coram Nobis*. T.R. 115.

(capital murder is defined as murder plus an eligibility factor); *Ring v. Arizona*, 536 U.S. 584 (2003)(eligibility factors are elements of the greater offense of capital murder which must be proven to a jury beyond a reasonable doubt); *Sawyer v. Whitley*, 505 U.S. 333 (1992)(actual innocence of the death penalty is established by proof of ineligibility for the death sentence).

In *Sawyer*, the United States Supreme Court specifically held that:

> Our Eighth Amendment jurisprudence *has required those States imposing capital punishment* to adopt procedural safeguards protecting against arbitrary and capricious impositions of the death sentence.

Sawyer, 505 U.S. at 341 (emphasis added).

The Supreme Court has repeatedly addressed the *Atkins* issue as one of eligibility. *See Atkins*, 536 U.S. at 320 ("such offenders ineligible for the death penalty."); *Hall*, 134 S.Ct. at 2001 ("But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do[.]"); *Brumfield, supra* (treating *Atkins* claim as a question of eligibility); *Montgomery*, 136 S.Ct. at 735 (2016) (observing that *Atkins* held that the execution of persons with intellectual disability is constitutionally "impermissible").

Montgomery, not *Payne*, should control the outcome here. *Montgomery* held that the federal constitution required the state of Louisiana to enforce the holding of *Miller v. Alabama*, 132 S.Ct. 2455 (2012). *Miller* held that automatic sentences of life without parole for juvenile offenders violated the Eighth Amendment's proscription against cruel and unusual punishment. Thus, the court held that such juveniles were

categorically ineligible for an automatic sentence of life without parole. Louisiana refused to apply *Miller* – decided fifty years after Montgomery's sentence – to Mr. Montgomery, declaring that the state's collateral review mechanisms did not provide an avenue of relief for Mr. Montgomery.

The Supreme Court wrote "[t]he Court now holds that when a new 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." 136 S.Ct. at 728.

So it must also be for Mr. Ivy. Mr. Ivy is clearly within the category of individuals that *Atkins/Hall/Brumfield* make constitutionally ineligible for the death penalty. Tennessee, one of the first states to make the execution of those with intellectual disability illegal, is committed to the principle that it has "no business" executing persons such as Mr. Ivy. Tennessee must identify a remedy for this very small pool of defendants like Mr. Ivy who have never had an adjudication of their ineligibility for execution. To force defendants such as Mr. Ivy to play procedural Whack-A-Mole is grossly, constitutionally, and fundamentally unfair.

A. The General Assembly And The Courts Have Clearly And Unequivocally Determined That It Is Fundamentally Unfair And Unconstitutional To Execute A Person Who Is Intellectually Disabled And Fundamental Fairness Requires That A Capital Petitioner Have An Opportunity To Litigate The Question Of Intellectual Disability

As far back as 1990, the General Assembly was concerned with the fundamental unfairness of executing a person who is [intellectually disabled].[1] Based

[1] During legislative debates, Tennessee lawmakers made clear that *as a civilized society*, we should not "be in the business of executing children or those who are

on this concern, they enacted Tenn. Code Ann. §39-13-203, which prohibits the execution of a person who suffers from intellectual disability and in pertinent part, states:

> (b) *Notwithstanding any provision of law to the contrary*, no defendant with [intellectual disability] at the time of committing first degree murder shall be sentenced to death.

Tenn. Code Ann. § 39-13-203(b)(emphasis added). Indeed, the General Assembly believed so strongly in the fundamental unfairness of executing intellectually disabled persons that they made sure that no other statute, rule or provision of law would trump Section 203. Though the General Assembly could have simply "listed evidence of [intellectual disability] as among the mitigating factors in § 39-13-204(j), the first degree murder death penalty statute," they determined that "the limitations and impairments associated with [intellectual disability] warrant more consideration than simply allowing the evidence to be weighed in the mix of aggravating and mitigating circumstances," and instead render a person *ineligible* for a death sentence. *Van Tran v. State*, 66 S.W.3d 790, 810 (2001). Ultimately, Section 203 passed "by nearly unanimous votes in both the State House of Representatives and

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mentally retarded." Tenn. S., Debate on H.B. 2107 on the floor of the Senate, 96th General Assembly, 2nd Reg. Sess. (April 12, 1990)(Tape S-106B). As Senator Darnell put it, "I think this, in a civilized society, is a minimum to say that we're not going to put . . . [intellectually disabled individuals] to death." *Id.* Senator Haynes echoed that sentiment, "From a conservative standpoint, I think it's a protection to society . . . I happen to agree with the death penalty. I just don't believe that [intellectually disabled] people ought to be electrocuted." *Id.*

the State Senate": 109 elected representatives voted in favor of the statute and 6 voted against it. *Van Tran*, 66 S.W.3d at 805, n.20.

More than ten years after the passage of Section 203, the Tennessee Supreme Court held that the Eighth Amendment to the United States Constitution and article I, section 16 of the Tennessee Constitution prohibit the execution of intellectually disabled individuals, "because such executions violate evolving standards of decency that mark the progress of a maturing society, are grossly disproportionate, and serve no valid penological purpose in any case." *Van Tran*, 66 S.W.3d at 792. The *Van Tran* Court concluded that "we have commonly recognized, a sentence of death is final, irrevocable, and 'qualitatively different' than any other form or level of punishment," and thus "**fundamental fairness** dictates that the petitioner have a meaningful opportunity to raise this issues." *Id.*, at 809, 812 (emphasis added). In this very context (a capital petitioner's challenge to his eligibility to be executed because of an intellectual disability) in *Howell*, the Tennessee Supreme Court found that the question of the right to be free from unconstitutional punishment implicates a fundamental right that must be addressed:

> If an excessively lengthy sentence implicates a **fundamental right**, as in *Burford*, then certainly a death sentence would as well. Therefore, contrary to the State's analysis, we find the case before us today does involve a **fundamental right**. We reject the State's attempt to frame the question as one of a right to attack a conviction rather than a right to be free from unconstitutional punishment.

Howell, 151 S.W.3d at 462-63 (emphasis added).

Repeatedly, Tennessee Courts have emphasized that it violates principles of fundamental fairness to execute a person with intellectually disability. *See Van Tran*, 66 S.W.3d at 792; *Howell v. State*, 151 S.W.3d 430, 462-63 (Tenn. 2004); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). Repeatedly, these courts have emphasized that "fundamental fairness require[s] giving [a capital petitioner] an opportunity to litigate his claim that he [is] a person with intellectual disability." *Coleman*, 341 S.W.3d at 237. The Tennessee Supreme Court stated in Mr. Keen's post-conviction case that it is "committed to the principle that Tennessee has no business executing persons who are intellectually disabled" and has not foreclosed any remedies that are available to intellectually disabled capital petitioners. *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012); *see also, Van Tran*, 66 S.W.3d at 792 (same); *Howell*, 151 S.W.3d at 462-63. Indeed, the Tennessee Supreme Court has also encouraged the General Assembly "to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed." *Payne v. State*, 493 S.W.3d 478, 492 (Tenn. 2016); *see also, Van Tran*, 66 S.W.3d at 792 (same); *Howell*, 151 S.W.3d at 462-63.

However, it is against this backdrop that this Court, the Tennessee Supreme Court, and State have repeatedly denied an available remedy to Mr. Ivy and other intellectually disabled petitioners, while continuing to intone that "fundamental fairness require[s] giving [a capital petitioner] an opportunity to litigate his claim

that he [is] a person with intellectual disability." *Coleman*, 341 S.W.3d at 237; *Keen v. State*, 398 S.W.3d 594 (holding that a motion to reopen post-conviction petition based on new scientific evidence of innocence due to intellectual disability is not an available remedy, and that *Coleman* is not a new rule of law triggering a motion to reopen proceedings); *Payne v. State*, 493 S.W.3d 478 (2015) (error *coram nobis* is not an available remedy for intellectually disabled petitioners); *Chalmers v. Carpenter*, 2016 WL 4186896 (Tenn. Ct. App. 2016) (declaratory judgment action is not an available remedy for intellectually disabled petitioners).

B. This Court Should Identify a Procedural Vehicle for the Adjudication of Mr. Ivy's Meritorious Claim That He is Constitutionally Ineligible for the Death Penalty

Tennessee is constitutionally obligated to enforce the decisions of the United States Supreme Court. *Marbury v. Madison,* 5 U.S. 137 (1803).

1. *Coram Nobis*

Relief under *coram nobis* is appropriate where extraordinary circumstances are present. *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1992). In a criminal case, *coram nobis* relief can be granted when the error complained of existed outside the record and involved matters that were not or could not have been litigated at the trial, on a motion for new trial, on appeal, or in a state habeas corpus proceeding. Tenn. Code Ann. 40-26-105(b). If the defendant can show he was "without fault in failing to present certain evidence at the proper time, a writ of *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." *Id.* At a hearing, Ivy can meet this standard.

The one year statute of limitations governing *coram nobis* in Tennessee is not jurisdictional. *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001) ("Clearly, in a variety of contexts, due process may require tolling of an applicable statute of limitations.") The Tennessee Supreme Court noted that in capital cases, due process concerns are amplified.

Here, due process and equity demand that Mr. Ivy being given an opportunity to present his claim. Mr. Ivy's case is analogous to *Brumfield.*

2. MOTION TO CORRECT ILLEGAL SENTENCE

Under Tenn.R.Crim.P. 36.1, Petitioner "may, at any time, seek correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered." Rule 36.1 explains that "[f]or purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes any applicable statute." *See State v. Wooden*, 478 S.W.3d 585 (Tenn. 2015).

Under Tenn. Code Ann. §39-13-203, the death sentence cannot be imposed or executed upon any person who is intellectually disabled or intellectually disabled at the time of an offense. The Constitution places a substantive, categorical prohibition

against the death sentence upon anyone who is intellectually disabled. *Hall v. Florida*, 572 U.S. ___ (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002). As such, the death sentence is substantively, and categorically, illegal if imposed upon someone who is intellectually disabled. *See Montgomery v. Louisiana*, 577 U.S. ___ (2016) (acknowledging that prohibition against executing the intellectually disabled is a substantive prohibition against execution that must be applied retroactively).

A person is intellectually disabled if s/he has significantly subaverage intellectual functioning, deficits in adaptive behavior, and onset of the condition during the developmental period or before age 18. When determining whether an individual is intellectually disabled under §39-13-203, this Court is also constitutionally required to apply the standards of intellectual disability contained in and explicated by *Hall v. Florida*, 572 U.S. ___ (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). Any determination of intellectual disability must also be made in conformity with the Eighth and Fourteenth Amendments, *Hall, Atkins*, and *Coleman*, and Article I §§ 8 & 16 of the Tennessee Constitution. *Hall* requires a state court to consider the standard error of measurement (SEM) applicable to all IQ tests, requiring consideration of all evidence of intellectual disability so long as an individual has an IQ of 70-75 or below and a raw IQ test score of 75 or below.

Petitioner has met this threshold showing through the proof already presented in the lower court and would be able to establish his intellectual disability at an evidentiary hearing. Failure to grant an evidentiary hearing violates the holding of

the United States Supreme Court in *Montgomery*, *Brumfield*, *Hall*, and *Atkins*, notwithstanding the decision in *Payne* and *Keen*. The decisions of the United States Supreme Court take precedence over the decisions of the Tennessee Supreme Court. *Marbury v. Madison*, 5 U.S. 137, 146 (1803) ("This is the *supreme court*, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial.")(emphasis in original).

3. PETITION FOR WRIT OF *AUDITA QUERELA*

Though arcane, should the Court find that there is no other avenue of relief, then, Petitioner likewise seeks relief via this petition for writ of *audita querela* so that he may receive a full and fair hearing on his claims that he is intellectually disabled and therefore exempt from execution under *Hall v. Florida*, 572 U.S. ___ (2014), *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth and Fourteenth Amendments, Article I §8 & 16 of the Tennessee Constitution, and Coleman v. State, 341 S.W.3d 211 (Tenn. 2011).

This Court should grant Davd Ivy's petition for writ of *audita querela*, grant him a hearing on his claims of intellectual disability, apply all relevant intellectual disability case law (including *Hall v. Florida*, 572 U.S. ___ (2014)), and afterwards conclude that he is intellectually disabled and therefore exempt from execution under *Hall*, *Atkins*, the Eighth and Fourteenth Amendments, Article I §8 & 16 of the Tennessee Constitution, and *Coleman v. State*, 341 S.W.3d 211 (Tenn. 2011).

The common-law writ of *audita querela*:

> is a remedy granted in favor of one against whom execution has issued or is about to issue on a judgment the enforcement of which would be

> contrary to justice . . . because of matters arising subsequent to its rendition . . . . In other words, *audita querela* is a common-law writ constituting the initial process in an action brought by a judgment defendant to obtain relief against the consequences of the judgment on account of some matter of defense . . .arising since its rendition and which could not be taken advantage of otherwise . . .

Am.Jur.2d *Audita Querela* §1 & nn. 1 &2 (May 2014). *See Rawlins v. Kansas*, 714 F.3d 1189, 1192-93, 1196 (10th Cir. 2013)(reciting history of *audita querela*, noting its extension and continuing yet infrequent use with respect to "some unanticipated circumstances arising post-judgment," over which the party subject to the judgment "had no control," and which would render enforcement of the original judgment "contrary to justice"); *United States v. Ghebreziabher*, 701 F. Supp. 115, 117 (E.D. La. 1988)(issuing writ of *audita querela* based on change in law and relieving petitioner of one of three guilty pleas).

While the Tennessee General Assembly's enactment of the statutory writ of certiorari and supersedeas replaced the writ of *audita querela* in certain circumstances (See Tenn. Code Ann. §27-8-102) the statute did not eliminate the availability of the writ or undermine its utility in appropriate circumstances. *See, e.g., Travelers Indemnity Co. v. Callis,* 481 S.W.2d 384, 385 (Tenn. 1972)(post-judgment change in facts rendering enforcement of judgment inequitable, quoting *Baker v. Penecost*, 171 Tenn. 529, 106 S.W.2d 220 (1937)).

Such circumstances exist when "something which has happened since the judgment," *Mann v. Roberts*, 79 Tenn. 57, 1883 WL 3663, at *4 (Tenn. 1883), would make execution of the judgment "an oppressive defect of justice" *Jones v. Pearce*, 59 Tenn. 281, 1873 WL 3777, at *2 (Tenn. 1873), and no other remedy exists to prevent

the injustice. *See United States v. Kessler*, 335 Fed.Appx. 403, 404 (5th Cir. 2009); *United States v. Collins*, 373 Fed.Appx. 94, 2010 WL 1572761, at *1 (2d Cir. 2010).

Petitioner has unrefuted proof that he is intellectually disabled under *Atkins*, *Hall*, *Brumfield*, and *Coleman* and is therefore ineligible for execution. This Court should, pursuant to the writ of *audita querela*, remand for a hearing in the trial court on David Ivy's intellectual disability, apply all governing law including all standards required by *Hall v. Florida*, 572 U.S. ___ (2014) and the Eighth and Fourteenth Amendments and Tennessee law, including *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), and after doing so, conclude that David is intellectually disabled and vacate his death sentence.

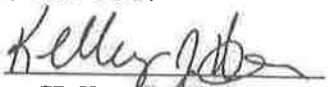
Conclusion

This Court should reverse the decision of the criminal court, identify an appropriate procedural vehicle for Mr. Ivy to present his claim, and remand for further proceedings, including a jury trial on the issue of his ineligibility for the death penalty given his intellectual disability.

Respectfully Submitted,

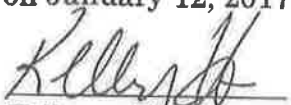
Kelley J. Henry
Supervisory Assistant Federal Public
Defender - Capital Habeas Unit

Amy D. Harwell
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: 
Kelley J. Henry

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered via United States Mail, postage pre-paid, to Richard D. Douglas, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 on January 12, 2017.


Kelley J. Henry

RESPONDENT'S APPENDIX F

Petitioner's Reply Brief Before the Tennessee Court of Criminal Appeals (No. W2016-02454-CCA-R3-ECN)

IN THE COURT OF CRIMINAL APPEALS FOR THE
WESTERN DISTRICT OF TENNESSEE AT JACKSON

DAVID IVY,	)	
	)	
Appellant,	)	Shelby County Case No. 01-12388
	)	
v.	)	No. W2016-02454-CCA-R3-ECN
	)	
STATE OF TENNESSEE	)	DEATH PENALTY CASE
	)	
Appellee,	)	

REPLY BRIEF OF APPELLANT

Kelley J. Henry, TN BPR No. 021113
Supervisory Assistant Federal Public Defender · Capital Habeas Unit

Amy D. Harwell, TN BPR No. 18691
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
Phone: (615) 736-5047
Facsimile: (615) 736-5265
Email: kelley_henry@fd.org

IN THE COURT OF CRIMINAL APPEALS FOR THE
WESTERN DISTRICT OF TENNESSEE AT JACKSON

DAVID IVY,	)	
	)	
Appellant,	)	Shelby County Case No. 01-12388
	)	
v.	)	No. W2016-02454-CCA-R3-ECN
	)	
STATE OF TENNESSEE	)	DEATH PENALTY CASE
	)	
Appellee,	)	

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Kelley J. Henry, TN BPR No. 021113
Supervisory Assistant Federal Public Defender - Capital Habeas Unit

Amy D. Harwell, TN BPR No. 18691
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
Phone: (615) 736-5047
Facsimile: (615) 736-5265
Email: kelley_henry@fd.org

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I. STATEMENT REGARDING ORAL ARGUMENT

On initial submission, Mr. Ivy did not request oral argument. However, in light of the U. S. Supreme Court's decision in *Moore v. Texas*, 581 U.S. ____, No. 15-797 (March 28, 2017), counsel believes that oral argument is necessary to assist the Court in deciding this case. Accordingly, Mr. Ivy requests oral argument in this case.

II. FACTS

The Eighth Amendment to the United States Constitution forbids the death penalty for individuals with intellectual disability, among other reasons, because they are at "special risk" for wrong execution. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 572 U.S. ___, (2014). The State spends a portion of its brief recounting the State's version of the facts of the crime without explaining how those facts relate to the Eighth Amendment claim before the Court. It should be noted that substantial evidence has been uncovered in the corollary federal habeas proceeding which tends to show that material exculpatory evidence was withheld from trial counsel and that Mr. Ivy may be completely innocent of the crime for which he has been sentenced to death. For purposes of this appeal, and to avoid any argument in future proceedings, Mr. Ivy denies the facts of the crime as laid out by the State in its Answering Brief at pp. 2-7.

III. UNDISPUTED RECORD EVIDENCE OF INTELLECTUAL DISABILITY

A Memphis City School Mental Health Center Report concludes that at 12 years of age David Ivy, who was the in the 6th grade, "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." The educator at the time diagnosed David has having an "unspecified mental disorder" and "Other handicapping condition."

The evaluation notes that David scored a 73 on the WISC-R.[1] The report observes that David had been retained in the third grade, had been placed in resource classes in third grade, has academic deficits in all three areas tested, and has impaired perceptual functioning, His mother describes David as "kind of slow" in school and that he does not perform any household tasks. At the time of the testing, David was reading at a third grade level.

David was tested two years later and his performance had not improved. He scored a 63 IQ on the Peabody Picture Vocabulary Test with an age equivalency of 8 years, 4 months. David was 14 years, 10 months at the time, thus he tested nearly 6 years below his chronological age. David scored 73 on the Culture Fair IQ Test.

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[1] The examiner did not, as the State suggests, conclude that David had low average intelligence. Ans. Brf. at p. 4.

Such score was two standard deviations below the mean. David continued to show academic deficits in all three areas. At fourteen, David was in the seventh grade.

David never advanced beyond the seventh grade and dropped out of school as soon as he was legally eligible to do so at age 16.

Given these facts, David Ivy clearly meets criteria for intellectual disability under the Supreme Court's decisions in *Atkins v. Virginia, supra, Hall v. Florida,* 572 U.S. ___, (2014), *Brumfield v. Cain*, 576 U.S. ___and *Moore v. Texas, supra.* Accordingly under *Moore* and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), the State of Tennessee is not free to abdicate its responsibility to provide a procedural vehicle for the adjudication for Mr. Ivy's clearly meritorious claim.

IV. THE HOLDING IN *MOORE V. TEXAS*

The Court in *Moore* reiterated that the Eighth Amendment " 'restrict[s] the State's power to take the life of *any* intellectually disabled individual." Slip Op. at 9, *quoting Atkins* (emphasis in original). In determining whether an individual meets the criteria for intellectual disability the Court held that states must follow the most recent "medical communities diagnostic framework" for diagnosing intellectual disability. Slip Op. at 9. Failure to do so, the Court ruled, serves no legitimate penological purpose, violates evolving standards of decency and creates an unacceptable risk that persons will be sentenced to death "in spite of factors which may call for a less severe penalty." *Id., quoting, Atkins*, 536 U.S. at 320.

The *Moore* Court observed that Supreme Court jurisprudence requires states to consider the standard error of measurement when assessing IQ. Moore's IQ scores were 74 and 78. Slip Op. at 7. Both scores qualified Moore for 8th Amendment protection. Here, Mr. Ivy's scores are 73, 73, and 68.

For assessment of adaptive deficits the Court specifically held that states must evaluate deficits, not strengths. Slip Op. at 12. The Court held that it is inappropriate to consider crime facts or prison behavior when evaluating evidence of adaptive behavior deficits. Slip Op. at 13. The Court explained that an individual need only show deficits in one of three domains (conceptual, social, and practical). Slip Op. at 4. The record evidence here shows that Mr. Ivy has deficits in the conceptual and practical domains.[2]

The third criteria, age of onset, was not at issue in *Moore*. Nor is it here. The proof of Mr. Ivy's intellectual disability comes from testing conducted prior to age 18.

The Supreme Court in *Moore* restated its command to the states: the constitution forbids the states from executing an individual with intellectual disability. Period. There is no wiggle room. States are not free to ignore the High Court's Order.

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[2] If given a hearing, Mr. Ivy may well be able to show that he has deficit in all three areas of adaptive functioning. He need not make such a showing however, as he plainly meets the criteria based on the undisputed record.

V. *CORAM NOBIS* IS APPROPRIATE IN THIS CASE

Unlike other capital post-conviction appellants such as Pervis Payne, Mr. Ivy had a constitutional protection against the imposition of the death penalty at the time of trial because he was tried after the decision in *Atkins*. That fact sets his case apart and makes those decisions inapplicable.

Moreover, respectfully, *Moore* makes clear that the holding in *State v. Payne*, 493 S.W.3d 478 (Tenn. 2016) is in error. Indeed the entire analytical framework in *Payne* obscures the core holding of *Atkins* and its progeny.

Moore is rooted in *Atkins*. The same is true for *Hall* and *Brumfield*. Plainly the holdings of all of these cases apply to all individuals with intellectual disability, regardless of procedural posture. The *Moore* Court was explicit, the states are "restricted" from executing "*any*" person with intellectual disability

This Court is bound by *Moore*.

VI. THE STATE MISUNDERSTANDS THE RELEVANCE OF *MONTGOMERY V. LOUISIANA*

The State utterly fails to address the core issue regarding the interrelationship of *Montgomery* to the Eighth Amendment claim here. The Supreme Court held in *Montgomery* that where the constitution places certain categories of individuals outside a certain range of punishment the States must provide a procedural vehicle to enforce the constitutional right. In *Montgomery* te constitutionally protected right involved juvenile life without parole. But that is a distinction without a difference here, particularly in light of the language in *Moore*.

Under *Moore*, Tennessee is required to provide a procedural vehicle for the vindication of Mr. Ivy's meritorious claim that he is constitutionally protected from execution.

VII. GIVEN *MONTGOMERY* AND *MOORE*, THE STATUTE OF LIMITATIONS SHOULD BE TOLLED

The *coram nobis* statute of limitations is not jurisdictional. Tennessee courts can, and do, toll the statute when due process requires. Given that Mr. Ivy's death sentence violates the constitution and is thus forbidden by *Atkins, Hall, Brumfield,* and *Moore*, this Court should grant tolling.

VIII. ALTERNATIVELY, TENN. RULE CRIM. P. 36.1 SHOULD PROVIDE A PROCEDURAL VEHICLE

Given that the law restricted the power of the State to sentence Mr. Ivy to death in 2002, his capital sentence is void. The Court should so hold and grant him relief under Rule 36.1.

IX. CONCLUSION

For the above stated reason and those in the principle brief, Mr. Ivy prays this Court will reverse the decision of the Shelby County Criminal Court and remand his case for an adjudication of his Eighth Amendment claim that he is ineligible for execution because he is intellectually disabled.

Respectfully Submitted,

Kelley J. Henry
Supervisory Assistant Federal Public Defender - Capital Habeas Unit

Amy D. Harwell
Asst. Federal Public Defender
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By: Kelley J. Henry
Kelley J. Henry

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered via United States Mail, postage pre-paid, to Andrew Coulam, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 on April 3, 2017.

Kelley J. Henry
Kelley J. Henry