NO. 19-5988

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE CHALMERS,
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

BENJAMIN A. BALL
Senior Assistant Attorney General
Counsel of Record

301 6th Avenue North
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-7859

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

I

Does *Moore v. Texas*, 137 S. Ct. 1039 (2017), require Tennessee courts to shoehorn an *Atkins* claim into a petitioner's chosen, but inapt, procedural vehicles?

II

Does this Court have jurisdiction to decide whether its opinion in *Moore* requires Tennessee courts to grant successive collateral review of a criminal judgment?

III

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

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The order of the Tennessee Supreme Court denying the petitioner's application for permission to appeal is unreported but available at *Chalmers v. State*, No. W2018-01650-SC-R11-PD, 2019 Tenn. LEXIS --- (June. 17, 2019). (Pet's App'x, 5.) The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal from the denial of his motion to reopen state post-conviction proceedings is also unreported. (Pet's App'x, 1-4.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied the petitioner's application for permission to appeal on June 17, 2019. (Pet's App'x, 5.) Justice Sotomayor extended the time for filing a petition for writ of certiorari until September 16, 2019. *Chalmers v. Tennessee*, No. 19A182 (U.S. Aug. 18, 2019). The petitioner filed his petition on September 16, 2019. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet. 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. III, § 2 provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority
>
> . . .
>
> In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the

> Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Tenn. Code Ann. § 40-30-102(c) establishes filing limitations for petitions under the Tennessee Post-Conviction Procedure Act:

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

Tenn. Code Ann. § 40-30-117(a) authorizes the reopening of state post-conviction proceedings under the following pertinent circumstance:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial . . . .

Tenn. Code Ann. § 40-30-122 defines the appellate rulings that qualify as a basis for reopening: "[A] new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

STATEMENT OF THE CASE

A jury convicted the petitioner of first-degree felony murder and especially aggravated robbery for the 1994 shooting death of Randy Allen during a robbery. *State v. Chalmers*, 28 S.W.3d 913, 915-16 (Tenn. 2000). The jury sentenced the petitioner to death for the murder, and the trial judge imposed a concurrent 20-year sentence for the especially aggravated robbery. *Id.* at 917. The Tennessee Court of Criminal Appeals affirmed the petitioner's convictions and sentences. *State v. Chalmers*, No. 02C01-9711-CR-00449, 1999 WL 135093, at *10 (Tenn. Crim.

App. Mar. 15, 1999). The petitioner's convictions and sentences were affirmed by the Tennessee Supreme Court. *Chalmers*, 28 S.W.3d at 920. This Court denied certiorari. *Chalmers v. Tennessee*, 532 U.S. 925 (2001).

A year after the Tennessee Supreme Court affirmed the petitioner's convictions and sentences, the court held that execution of an intellectually disabled person violates the Eighth Amendment to the U.S. Constitution and article I, section 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).

In 2001, the petitioner filed a petition for post-conviction relief in which he contended, among other things, that his counsel was ineffective for failing to have him evaluated by a mental health professional. *See Chalmers v. State*, No. W2006-00424-CCA-R3-PD, 2008 WL 2521224, at *31 (Tenn. Crim. App. Sep. 11, 2007), *perm. app. denied* (Tenn. Dec. 22, 2008). To support his claim, the petitioner retained Dr. Keith Caruso, an expert in forensic psychiatry and general psychiatry, who diagnosed him with post-traumatic stress disorder, mixed receptive expressive language disorder, attention deficit hyperactivity disorder, and borderline personality disorder. *Id*. at *17. Dr. Caruso did not diagnose the petitioner with intellectual disability, and the petitioner did not allege during those proceedings that he was intellectually disabled. *Id.* at *17-18, *31.

The post-conviction court denied relief in 2005. The Tennessee Court of Criminal Appeals affirmed in 2007. And the Tennessee Supreme Court denied review in 2008. *Id*. at *1.

In 2011, the Tennessee Supreme Court clarified that a raw intellectual quotient ("IQ") score above 70 is not dispositive on the question of whether a defendant is intellectually disabled under

[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).

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 v. State*, 398 S.W.3d 594, 605-06, 608 (Tenn. 2012).

The following year, the petitioner filed a motion to reopen post-conviction proceedings in which he alleged for the first time that he is intellectually disabled and thus ineligible for the death penalty. *Chalmers v. State*, No. W2013-02317-CCA-R3-PD, 2014 WL 2993863, at *3 (Tenn. Crim. App. June 30, 2014), *perm. app. denied* (Tenn. Nov. 19, 2014). In the motion, the petitioner argued that *Coleman* established a new constitutional right that was not recognized at the time of his trial. *Chalmers*, 2014 WL 2993863, at *3. On December 20, 2012, the Tennessee Supreme Court released its opinion in *Keen*, in which the court rejected the bases on which the petitioner sought to reopen post-conviction, namely the claims that *Coleman* established a new constitutional right with retroactive applicability and that a newly-obtained IQ test score constituted newly-discovered scientific evidence of actual innocence necessary to reopen post-conviction proceedings. *Id*. The petitioner then amended his motion to include a petition for writ of error coram nobis. *Id*. The trial court denied relief in September 2013, finding that the petitioner's coram nobis claim was barred by the one-year statute of limitations. *Chalmers*, 2014 WL 2993863, at *3. After the petitioner unsuccessfully sought permission to appeal the denial of his motion to reopen, he appealed the denial of his coram nobis petition. *Id.*

On May 27, 2014, while the petitioner's coram nobis appeal was pending, this Court decided *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), holding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive

deficits." In its opinion affirming the trial court's denial of the coram nobis petition, the Tennessee Court of Criminal Appeals held that, unlike Hall, the petitioner had not been precluded during trial or post-conviction proceedings from presenting evidence, other than raw I.Q. scores, to prove that his functional intelligence quotient was 70 or below when he committed the crime. *Chalmers*, 2014 WL 2993863, at *10. The court concluded that the trial court properly found that the petition was time-barred, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal on November 19, 2014. *Id*. at *12. This Court denied certiorari. *Chalmers v. Tennessee*, 136 S.Ct. 39 (2015). This Court also denied a petition for rehearing. *Chalmers v. Tennessee*, 136 S.Ct. 573 (2015).

The petitioner filed a second motion to reopen post-conviction proceedings on May 26, 2015, again asserting that he is intellectually disabled but relying upon *Hall* as the newly announced rule of constitutional law. (Resp's App'x, 1-3.) The post-conviction court denied the motion. (Resp's App'x, 1.) The Court of Criminal Appeals then denied the ensuing application for permission to appeal, holding that under *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), *Hall*'s holding was not retroactive in application and thus could not serve as the basis for reopening post-conviction proceedings. (Resp's App'x, 3.) The Tennessee Supreme Court denied the petitioner's application for permission to appeal. (Resp's App'x, 4.)

The petitioner also moved the Davidson County Chancery Court for a declaratory judgment stating that he is intellectually disabled. *Chalmers v. Carpenter*, No. M2014-01126-COA-CV, 2016 WL 4186896, at *1 (Tenn. Ct. App. Aug. 4, 2016), *perm. app. denied* (Tenn. Nov. 16, 2016). The chancery court dismissed the action, and the Tennessee Court of Appeals affirmed. *Id*. The Tennessee Supreme Court again denied review. *Id*.

On March 28, 2017, this Court decided *Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017), rejecting a multifactor test crafted by the Texas Court of Criminal Appeals for determining whether a capital defendant was intellectually disabled. In the context of Moore's initial state collateral-review bid following retrial, this Court held that Texas's multifactor standard improperly "deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id*. The Court required, "in line with *Hall*, . . . that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id*. at 1050.

On March 29, 2018, the petitioner filed yet another motion to reopen state post-conviction proceedings, asserting that *Moore* created a new constitutional right that must apply retroactively. (Pet's App'x, 2.) The post-conviction court denied the motion, and the Tennessee Court of Criminal Appeals denied permission to appeal. (Pet's App'x, 2-4.) In denying an appeal, the Court of Criminal Appeals held that *Moore* "is clearly derivative of *Atkins* and *Hall*" and that the decision "did not announce a new constitutional rule requiring retrospective application." (Pet's App'x, 4.) The Tennessee Supreme Court denied further review. (Pet's App'x, 5.)

Petitioner now seeks a writ of certiorari.

REASONS FOR DENYING THE WRIT

The petition should be denied because the petitioner failed to raise the question currently presented in his certiorari petition in any Tennessee court below; regardless, Tennessee is not constitutionally compelled to adjudicate a claim of intellectual disability in time-barred, non-existent, or otherwise inapt procedural vehicles of the petitioner's choosing. As to the issue presented below, the Court does not have jurisdiction to decide the question presented, i.e., whether *Moore* requires Tennessee courts to grant successive collateral review of a criminal judgment. The

state court's decision that the petitioner's claim does not satisfy Tennessee's statutory criteria for successive collateral review did not resolve any federal question that would give this Court jurisdiction. In any event, the state court properly determined that *Moore*, which merely applied *Atkins* and *Hall*, did not announce a new rule of constitutional law.

I. The Petitioner Failed to Adequately Raise the Claim Presented in His Petition in Any Court Below.

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

The petitioner did not assert, in his motion to reopen post-conviction proceedings or in his applications to the Tennessee Court of Criminal Appeals or to the Tennessee Supreme Court, that *Moore* requires the State of Tennessee to provide a forum for his intellectual disability claim . (Resp's App'x, 5-56.) This Court therefore should decline review because the petitioner did not adequately raise this issue before any court below.

II. Tennessee Is Not Constitutionally Compelled to Adjudicate an *Atkins* Claim in Time-Barred, Non-Existent, or Otherwise Inapt Procedural Vehicles.

Even if the issue had been raised below, *Moore* does not require Tennessee to shoehorn an *Atkins* claim into an inapt procedural vehicle. The petitioner argues that, pursuant to *Montgomery* and *Moore*, States are constitutionally compelled to provide an avenue of collateral review to adjudicate an *Atkins* intellectual-disability claim. (Pet. at 7-9.) He implicitly concludes from this

premise that the Tennessee courts violated the U.S. Constitution by rejecting his proposed avenues for adjudication. (Pet. at 8-9.) 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 States drag a petitioner's purported Eighth Amendment claim through 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 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.

Montgomery's holding is limited to situations in which collateral review is otherwise properly available. "If a state collateral proceeding *is open to a 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 adjudicate claims that are time-barred, that are presented in non-existent procedural vehicles, or that 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 force 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 principle is particularly salient here because this was not the petitioner's first state collateral proceeding: he already had a full and fulsome post-conviction review.

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

The Court does not have jurisdiction to consider the the issue actually raised below--whether the petitioner was entitled to reopen his post-conviction petition based on *Moore*--because the state court decision does not rest on the resolution of any federal question. With 28 U.S.C. § 1257(a), Congress has limited the Court's jurisdiction over "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" to issues governed by binding federal law. *See Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991) (holding that the Court's appellate jurisdiction under § 1257(a) is limited "to enforcing the commands of the United States Constitution"). This Court may intervene on a state court decision "only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

Here, the state court's decision that successive collateral review is not available for petitioner's intellectual-disability claim does not involve an issue of constitutional dimension. The States have no constitutional obligation to provide any procedures for the collateral review of criminal judgments. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Though not compelled by the Constitution, Tennessee provides several ways to collaterally attack criminal judgments. One is through its Post-Conviction Procedure Act, which has built-in restrictions on the availability of collateral review, including that petitioners may file only one petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-102(c).

As pertinent here, however, "[a] petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in [Tenn. Code Ann.] § 40-30-117." Tenn. Code Ann. § 40-30-102(c). Reopening is available if (1) the claim in the motion to reopen is based on a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, (2) retrospective application of that right is required, and (3) the motion is filed within one year of the qualifying appellate ruling. Tenn. Code Ann. § 40-30-117(a)(1). By statute, "a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." Tenn. Code Ann. § 40-30-122.

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

independent of [any] federal question and adequate to support the judgment." *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Nor does *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) establish that this Court has jurisdiction. In *Montgomery*, this Court held that the holding in *Teague v. Lane*, 489 U.S. 288 (1989), "establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises." 136 S. Ct. at 729. *Teague* provided that new rules do not apply retroactively unless they are "substantive rules," which forbid "criminal punishment of certain primary conduct" or "a certain category of punishment for a class of defendants," or if they are new "watershed rules of criminal procedure." *Id.* (internal quotation marks omitted). Under *Montgomery*, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.*

This holding does not control here. The question in *Montgomery* was whether an admittedly new rule must be applied retroactively. In this case, on the other hand, the state court held that *Moore* did not announce a new rule at all. That question turned not on whether *Moore* was "substantive" but on the relevant state statutes that define what constitutes a "new rule of constitutional criminal law." *See* Tenn. Code Ann. §§ 40-30-117(a)(1), -122. Although this statutory definition was informed by *Teague*, the state court ultimately applied a state statute that controls whether a state prisoner is entitled to a second state collateral review proceeding.[2] *See Bush v. State*, 428 S.W.3d 1, 13, 19-20 (Tenn. 2014) (discussing the adoption of § 40-30-122).

[2] The Court of Criminal Appeals' citation to *Teague* along with § 40-30-122 is therefore not sufficient to establish jurisdiction in this case. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956). The court's ultimate holding in this case was that the petitioner had not satisfied the statutory basis for reopening. (Pet's App'x, 3-4.)

The state court's decision that *Moore* was not a basis for reopening the petitioner's post-conviction proceedings rests on a state law ground that is independent of any federal retroactivity question and adequate to support the judgment. Thus, this Court does not have jurisdiction to review that decision.

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

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

"In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id*. "And a holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S. 342, 348 (2013) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

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

In *Hall*, this Court considered Florida's attempt to enforce this restriction with a "rigid rule" that foreclosed exploration of intellectual disability unless the capital defendant had an IQ test score below 70. *Hall*, 572 U.S. at 704. The Court concluded that "Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of

'approximately 70.'" *Id.* at 724. Indeed, *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id*. at 719 (citing *Atkins*, 536 U.S. at 308, n.3, 309 n.5). The *Hall* Court made clear how thoroughly its holding was dictated by *Atkins*: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, *were a fundamental premise of Atkins*." *Id.* at 720 (emphasis added).

In *Moore*, as relevant here, the Court merely applied *Atkins* and *Hall* to a multifactor test created by the Texas Court of Criminal Appeals. "As we instructed in *Hall*," the Court noted, "adjudications of intellectual disability should be 'informed by the views of medical experts.'" 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 721). The multifactor test in Texas, however, created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* (quoting *Hall*, 572 U.S. at 704).

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

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

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/ Benjamin A. Ball
BENJAMIN A. BALL
Senior Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202-0207
Phone: (615) 741-7859
Fax: (615) 532-7791
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for petitioner: Amy D. Harwell, at 810 Broadway, Suite 200, Nashville, Tennessee 37203, on the 18th day of October 2019. I further certify that all parties required to be served have been served.

s/ Benjamin A. Ball
BENJAMIN A. BALL
Senior Assistant Attorney General

RESPONDENT'S APPENDIX

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RESPONDENT'S APPENDIX A

Order denying application for permission to reopen post-conviction petition pursuant to Rule 28, W2016-02413-CCA-R28-PD, filed February 26, 2017

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

TYRONE CHALMERS v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. C01-50

No. W2016-02413-CCA-R28-PD

ORDER

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his renewed motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

The Petitioner was convicted of first degree felony murder and especially aggravated robbery of Randy Allen. In light of this conviction, the Petitioner was sentenced to death based upon the aggravating circumstance that the Petitioner was previously convicted of one or more felonies, other than the present charge, whose statutory elements involved the use of violence of the person. The conviction and sentence were upheld by the Tennessee Supreme Court upon appeal. See *State v. Chalmers*, 28 S.W. 3d 913 (Tenn. 2000). The United States Supreme Court denied certiorari on March 19, 2001. *Cert. denied*, 532 U.S. 925 (2001).

Since his conviction, the Petitioner has filed multiple petitions for post-conviction relief from his earlier conviction. On April 19, 2001, the Petitioner filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel. This petition was later amended through a September 2003 filing raising the additional grounds of intellectual disability. The trial court denied the petition for post-conviction relief and the denial was upheld by the appellate courts. *Tyrone Chalmers v. State*, 2008 WL 2521224 (Tenn. Crim. App. 2008), *perm. app. denied* (Tenn. Dec. 22, 2008). Petitioner filed a motion to reopen post-conviction proceedings on April 10, 2012, alleging that he was ineligible for the death penalty due to his intellectual disability under the ruling in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), arguing that it established a new constitutional right that was not available at the time of trial. In addition, the Petitioner argued that his petition should be reopened because of a new evaluation that should

qualify as new scientific evidence that he was intellectually disabled. This petition was later amended to include a petition for writ of error coram nobis and the Petitioner invoked the intellectual disability provisions of Tennessee Code Annotated §39-13-203. This petition and its amendments were denied by the trial court with the denial being founded on the premises that the grounds alleged by the Petitioner were precluded by *Keen v. State*, 398 S.W.3d. 594 (Tenn. 2012) and were filed untimely. The trial court denial of the relief sought was upheld by the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court. See *Tyrone Chalmers v. State*, W2013-02329-CCA-R28-PD (Tenn. Crim. App. 2014), *perm. app. denied* (Tenn. Nov. 19, 2014). Finally, on May 26, 2015, Petitioner filed a motion to reopen his post-conviction proceedings in the criminal court of Shelby County, Tennessee. The trial court denied the Petitioners motion to reopen and he has sought permission to appeal his denial from this Court.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
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> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. *Id.* at (c).

The Petitioner argues that his post-conviction petition should be reopened due to

the ruling of the United States Supreme court in *Hall v. Florida,* 134 S.Ct. 1986 (2014). However, the Tennessee Supreme Court has previously addressed the retroactive application of *Hall* and has rejected the claim that *Hall* would allow for a retroactive review of Tennessee cases. *Payne v. State of Tennessee*, 493 S.W.3d 478 (Tenn. 2016). The Petitioner admits the existence of the *Payne* decision in his application but asks this Court to declare that the *Payne* decision was wrongly decided in light of the ruling of the United States Supreme Court in the case of *Montgomery v. State of Louisiana*, 136 S.Ct. 718 (2016). The Petitioner argues in his application for permission to appeal that the "state [S]upreme [C]ourt's decision did not take account of the decision in *Montgomery v. Louisiana* ... decided just weeks before the decision in *Payne*." This Court will note that *Montgomery v. Louisiana* was decided on January 27, 2016 and *Payne v. State of Tennessee* was decided on April 7, 2016. The argument that our Supreme Court failed to "take account" of the reasoning and guidance of *Montgomery* is without merit in that at the time of the ruling in *Payne* the decision in *Montgomery* had been decided and published.

Notwithstanding the timing of the decisions in the *Montgomery* case by the United States Supreme Court and the *Payne* case by the Tennessee Supreme Court, the ruling espoused by the United States Supreme Court in *Montgomery* made no mention of the findings of *Hall* nor did it mention any effect of the retroactive application of *Hall* as the Petitioner asks this court to determine. The *Montgomery* decision applied to application of a sentence of life without parole to juvenile offenders and did not affect the application of the death penalty to adults. Therefore even with the presented argument in relation to the timing of the two opinions, the reliance upon *Montgomery* to overrule the *Payne* decision is without merit. The holdings of the *Montgomery* opinion would not, and did not, affect the retroactive application of *Hall* by Tennessee courts.

For these reasons, the post-conviction court did not abuse its discretion in denying the motion to reopen post-conviction proceedings. The application for permission to appeal is denied. Because it appears the Petitioner is indigent, costs are taxed to the State.

PER CURIAM

ALAN E. GLENN, JUDGE
CAMILLE R. MCMULLEN, JUDGE
J. ROSS DYER, JUDGE

RESPONDENT'S APPENDIX B

Tennessee Supreme Court Order denying Rule 11 application, W2018-01650-SC-R11-PD, filed May 17, 2019

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

TYRONE CHALMERS v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P24965

No. W2018-01650-SC-R11-PD

ORDER

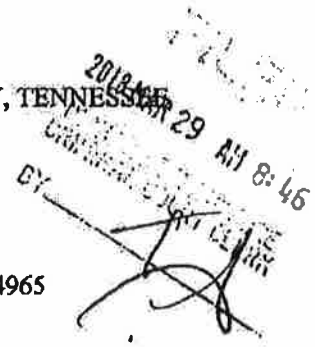
Upon consideration of the application for permission to appeal of Tyrone Chalmers and the record before us, the application is denied.

PER CURIAM

RESPONDENT'S APPENDIX C

Petitioner's motion to reopen petition for post-conviction relief filed in Shelby County Criminal Court on March 29, 2018

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE
AT MEMPHIS



TYRONE CHALMERS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. P-24965
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent.	)	

MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF

Petitioner, Tyrone Chalmers, files this motion to reopen and for post-conviction relief pursuant to Tenn. Code Ann. §40-30-117(a)(1). Mr. Chalmers is intellectually disabled and as a result, his death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I §§ 6, 8, 9, 10 & 16 of the Tennessee Constitution, as well as Tennessee law. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). Under the new rule of constitutional law announced in *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017), state courts must evaluate an intellectual disability claim using the "medical community's current standards" to identify those who are intellectually disabled. *Moore*, 137 S.Ct. at 1053. All aspects of an intellectual disability determination must comport with those current standards, which include criteria and standards established by the American Psychiatric Association (APA) in its Diagnostic & Statistical Manual of Mental Disorders, Fifth Edition (DSM-5, published in 2013), and the American Association of Intellectual and Developmental Disabilities (AAIDD) in its User's Guide to Intellectual Disability, Eleventh Edition (AAIDD-11, published in 2010).

With *Moore* having held that the Eighth Amendment requires application of the current standards of DSM-5 and AAIDD-11 to both the intellectual functioning and adaptive functioning

prongs of the Eighth Amendment test for intellectual disability, *Moore* sets forth a new rule of law that must be applied retroactively, thus allowing a motion to reopen under Tenn. Code Ann. §40-30-117(a)(1).

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

This Court should therefore reopen post-conviction proceedings in light of *Moore*. As in *Moore*, this Court should review Tyrone Chalmers' intellectual disability claim by assessing his evidence of intellectual disability by applying all current, medical standards – including those contained in DSM-5 and AAIDD-11. When doing so, this Court should conclude that Tyrone Chalmers is intellectually disabled under these standards, his execution would violate the Eighth Amendment and the Tennessee Constitution, and his death sentence must be vacated.

I. *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017)

In *Moore v. Texas*, 581, U.S. ___, 137 S.Ct. 1039 (2017), the Supreme Court held that a determination of intellectual disability under the Eighth Amendment "must be informed by the medical community's diagnostic framework." *Moore*, 137 S.Ct. at 1048. *Moore* recognizes that

the medical community's current standards include those of the APA set forth in DSM-5 and those set forth by the AAIDD in AAIDD-11.

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

Under *Moore*, a court must assess a petitioner's intellectual functioning in accordance with current medical standards and examine a petitioner's IQ test scores by taking into account the standard error of measurement, as required by DSM-5 and AAIDD-11. *Moore*, 137 S.Ct. at 1049, *citing* DSM-5 at 37, and AAIDD-11, User's Guide at 22-23. Applying DSM-5 and AAIDD-11 in *Moore*, the Supreme Court concluded that because Moore had at least one IQ score which, applying SEM, placed his IQ within a range of 70 or below, Moore could qualify as intellectually disabled and additional proof of his intellectual disability had to be weighed.

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

Moore then held that when assessing a petitioner's adaptive functioning, a reviewing court may not "deviate[] from prevailing clinical standards." *Id.* In accordance with DSM-5 and

AAIDD-11, *Moore* requires that a reviewing court focus on the individual's adaptive deficits not adaptive strengths, because "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Moore*, 137 S.Ct. at 1050 (emphasis in original), *citing* DSM-5 at 33, 38 and AAIDD-11 at 47. *Moore* further provides that it is improper to rely on adaptive strengths developed in prison. *Moore*, 137 S.Ct. at 1050, *citing* DSM-5 at 38 and AAIDD-11 at 20. *Moore* also holds that a reviewing court may not use an individual's academic failure, history of abuse, or other mental health disorders as undermining a finding of intellectual disability, for DSM-5 and AAIDD-11 recognize such risk factors and co-existing conditions as being fully consistent with intellectual disability. *Moore*, 137 S.Ct. at 1050, *citing* AAIDD-11 at 58-63, and DSM-5 at 40. Nor may a state apply lay stereotypes concerning intellectual disability. *Moore*, 137 S.Ct. at 1051-1052, *citing* AAIDD-11 at 25-27.

Ultimately, the Supreme Court concluded that the state habeas court in *Moore* had properly evaluated Moore's intellectual disability because it "applied current medical standards," but that the Texas Court of Criminal Appeals improperly "failed adequately to inform itself of the medical community's diagnostic framework," used "nonclinical" factors, and errantly "reject[ed] the habeas court's application of medical guidance." *Moore*, 137 S.Ct. at 1053.

Consequently, the Supreme Court concluded that the lower court's ruling that Moore was not intellectually disabled "cannot stand," because it failed to apply DSM-5 and AAIDD-11 to Moore's evidence of intellectual disability. *Id.*

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

As Tyrone Chalmers has noted, DSM-5 and AAIDD-11 set forth current medical standards that apply to any assessment of intellectual disability. DSM-5 was issued in 2013; AAIDD-11 in 2010. Tyrone Chalmers has had no opportunity to have his intellectual disability assessed in light of DSM-5 and AAIDD-11 for one reason: Tennessee courts have not provided a post-conviction remedy for application of DSM-5 or AAIDD-11 to any claim of intellectual disability.[1]

In fact, in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), the Tennessee Supreme Court first permitted (but did not require) consideration of AAIDD-11's clinical standards when

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[1] On July 18, 1997, a jury in the criminal court of Shelby County convicted Mr. Chalmers of one count of first-degree felony-murder and one count of aggravated robbery. Based on the aggravating factor of one prior violent felony, the jury sentenced him to death.

On direct appeal, the Tennessee Court of Criminal Appeals affirmed Mr. Chalmers's murder and robbery convictions and sentences, *State v. Chalmers*, 1999 WL 135093 (Tenn. Crim. App. March 15, 1999), as did the Tennessee Supreme Court. *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000). The United States Supreme Court denied a petition for writ of certiorari. *Chalmers v. Tennessee*, 532 U.S. 925 (2001).

Mr. Chalmers filed a petition for post-conviction relief challenging his convictions and sentence in this Court. This petition was denied. The Court of Criminal Appeals affirmed the trial court's denial of relief, *Chalmers v. State*, 2008 WL 2521224 (Tenn. Crim. App. June 25, 2008), and the Tennessee Supreme Court denied Mr. Chalmers's application for permission to appeal. *Chalmers v. State* (Tenn. Dec. 29, 2008). Mr. Chalmers did not file a petition for a writ of certiorari in the United States Supreme Court.

Mr. Chalmers filed a petition for a federal writ of habeas corpus in the United States district Court for the Western District of Tennessee, and that petition is pending. *Chalmers v. Colson*, No. 09-02051 (W.D. Tenn.). On April 10, 2012, Mr. Chalmers filed in this Court a motion to reopen his post-conviction proceeding. In that motion Mr. Chalmers asserted that (1) *Coleman v. State*, 341 S.W.2d 221 (Tenn. 2011), created a new constitutional right entitling him to relief from his death sentence; and (2) an expert witness report that Mr. Chalmers was intellectually disabled at the time of the crime constituted new scientific evidence establishing innocence. On February 1, 2013, Mr. Chalmers filed an Amended Motion To Reopen Petition For Post-Conviction Relief in which he asserted that he was entitled to error *coram nobis* relief in addition to relief under the motion to reopen statute.

assessing intellectual disability. *See Coleman*, 341 S.W.3d at 242 n.55. Even so, *Coleman* only considered the APA's Fourth Edition of its Diagnostic and Statistical Manual (DSM-IV-TR), which was promulgated in 2000 – 13 years before publication of DSM-5. *See e.g., Coleman*, 341 S.W.3d at 231 n.11. Moreover, the Tennessee Supreme Court has held that *Coleman* is not retroactive, and thus Mr. Chalmers has never had the opportunity for application of either AAIDD-11 or even the outdated DSM-IV-TR to his intellectual disability claim.

Moore holds, however, that a petitioner with an Eighth Amendment intellectual disability claim is entitled to the application of the current medical standards set forth in DSM-5 and AAIDD-11 – just like the review the Supreme Court granted to *Moore*. Because Tyrone Chalmers has not received application of DSM-5 and AAIDD-11 to his Eighth Amendment Intellectual Disability claim – the very review that the Supreme Court provided in *Moore* – he is entitled to that review now. Because he is a state post-conviction petitioner just like Moore, Tyrone Chalmers is entitled to the very same application of law that the Supreme Court provided Moore. Equal protection and equal justice demand nothing less.

On September 19, 2013, this Court dismissed Mr. Chalmers's Amended Petition without holding an evidentiary hearing.

Mr. Chalmers filed in the CCA and the Tennessee Supreme Court applications for permission to appeal that portion of this Court's order that denied him relief under the motion to reopen statute. Both courts denied Mr. Chalmers permission to appeal. *Chalmers v. State*, No. W2013-02329-SC-R11-PD (Tenn. May 15, 2014, Order); *Chalmers v. State*, No. W2013-02329-CCA-R28-PD (Tenn. Crim. App. January 14, 2014, Order).

On June 30, 2014, the Tennessee Court of Criminal Appeals filed its opinion affirming this Court's denial of Mr. Chalmers's petition for writ of error *coram nobis*. *Chalmers v. Tennessee*, 2014 WL 7334202 (Tenn. Crim. App. June 30, 2014). The Tennessee Supreme Court denied Mr. Chalmers's application for permission to appeal. *Chalmers v. State*, No. W2013-02317-SC-PD (Tenn. Nov. 19, 2014, Order).

III. For Purposes Of Tenn. Code Ann. §40-30-117(a)(1),*Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017) Is A New Retroactive Rule Of Law Permitting This Motion To Reopen

Under Tenn. Code Ann. §40-30-117(a)(1), a petitioner may reopen post-conviction proceedings based upon "a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." As already noted, *Moore* sets forth an Eighth Amendment requirement that a reviewing court apply the 2013 standards of DSM-5 and the 2010 standards of AAIDD-11 to any claim of intellectual disability. Where Tyrone Chalmers was tried in 1997, obviously this Eighth Amendment requirement set forth in *Moore* did not exist at the time of the trial, where DSM-5 and AAIDD-11 were promulgated years later. And indeed, *Moore* has now "changed the course of the Supreme Court's intellectual disability jurisprudence," which requires an application of current medical standards. *Ybarra v. Filson*, 869 F.3d 1016, n. 9 (9th Cir. 2017). *See Moore*, 137 S.Ct. at 1057-1058 (Roberts, C.J., dissenting) (under the Eighth Amendment, *Moore* now requires medical assessment of intellectual disability).

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

Moreover, since *Moore* was decided, the Supreme Court has remanded four federal habeas corpus proceedings for application of *Moore*: *Martinez v. Davis*, No. 16-6445 (U.S.), Order (Apr. 3, 2017); *Henderson v. Davis*, No. 15-7974 (U.S.), Order (Apr. 3, 2017); *Long v.*

Davis, No. 16-8909 (U.S.), Order (Oct. 2, 2017); *Weathers v. Davis*, No. 16-9446 (U.S.), Order (Oct. 10, 2017); *Wright v. Florida*, No. 17-5575 (U.S.) Order (Oct. 16, 2017). Martinez's death sentence became final in 1994 (*see Martinez v. Davis*, 653 Fed. Appx. 308, 311 (5th Cir. 2016)); Henderson's death sentence became final in 2004 (*see Henderson v. Stephens*, 791 F.3d 567, 571 (5th Cir. 2015); Long's death sentence became final in 2009 (*see Long v. Davis*, 664 Fed. Appx. 361 (5th Cir. 2016)); and Weather's death sentence became final in 2003. *See Weathers v. Davis*, 659 Fed. Appx. 778 (5th Cir. 2016). Because retroactive rules of law must be applied in federal habeas corpus proceedings (*Teague v. Lane*, 489 U.S. 288 (1989)), the Supreme Court's remand orders in *Martinez, Henderson, Long,* and *Weathers* likewise prove that *Moore v. Texas* is retroactive. So, too, does the Fifth Circuit's decision in *Cathey v. Davis*, 822 F.3d 221 (5th Cir. 2017), which has applied *Moore* retroactively in federal habeas proceedings – proving yet again that *Moore* is indeed retroactive here.

The Supreme Court's remand orders after *Moore* and the decision in *Cathey* prove that DSM-5 and AAIDD-11 must be applied to death sentences like Tyrone Chalmers to which DSM-5 and AAIDD-11 have yet to be applied – even if the death sentence was imposed years prior. *Moore* is indeed retroactive.

In addition, *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016) requires the retroactive application of substantive rules of law that allow a person to show that s/he "belongs to a protected class" which is exempt from a particular punishment. *Montgomery*, 136 S.Ct. at 735. Because application of *Moore* means that Tyrone Chalmers falls within the "entire category of intellectually disabled offenders" whom "States may not execute," (*Moore*, 137 S.Ct. at 1051), *Moore* places Tyrone Chalmers in the "protected class" of intellectually disabled persons and is

thus a substantive, retroactive rule of law. *See Montgomery*, 136 S.Ct. at 620-621 (noting that where legal rule places a person within the class of intellectually disabled persons who may not be executed, the rule is substantive even if certain procedures attach to enable petitioner to show he is member of that protected class). *See also Welch v. United States*, 578 U.S. ___ (2016) (substantive rules apply retroactively).

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

Consequently, *Moore v. Texas* is retroactive for purposes of Tenn. Code Ann. §40-30-117(a)(1), and Tyrone Chalmers is entitled to proceed via this motion to reopen. This Court should so conclude.

IV. For Purposes Of Tenn. Code Ann. §40-30-117(a)(1), *Hall v. Florida*, 572 U.S. __ (2017), Announced A New Rule Of Law That Was Given Retrospective Application In *Moore v. Texas*, Which Permits This Motion To Reopen

A. *Hall* held that the Eighth Amendment requires capital intellectual disability determinations to comport with prevailing professional clinical norms

In *Atkins*, the United States Supreme Court left to the states the process of developing procedures and standards to give effect to the Eighth Amendment prohibition on sentencing the intellectually disabled to death. *Atkins*, 536 U.S. at 317. *See also Bobby v. Bies*, 556 U.S. 825, 831 (2009) (*Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation will be so impaired as to fall within *Atkins*'

compass.")(internal quotations omitted); *Coleman v. State*, 341 S.W.3d 221, 234 (Tenn. 2011) ("the *Atkins* Court stopped short of formulating a national constitutional standard for determining whether a [petitioner] is intellectually disabled and, therefore, not subject to the death penalty."); *Howell v. State*, 151 S.W.3d 450, 457 (Tenn. 2004) (referencing *Atkins*' delegation to States the task of defining intellectual disability).

In *Hall v. Florida*, 572 U.S. __, 134 S.Ct. 1986 (2017), the United States Supreme Court considered "how intellectual disability must be defined in order to implement [] the holding of *Atkins*." Hall, 134 S.Ct. at1993. *Hall* recognized that the Eighth Amendment requires that capital intellectual disability determinations comport with prevailing professional clinical norms, which contemplate finding intellectual disability based on a broad array of evidence that may include IQ test scores above 70. *Id.*, at 1994-95 (Florida Supreme Court's strict interpretation of capital intellectual disability statute "disregards established medical practice"). "Intellectual disability," the Court observed, "is a condition, not a number," *id.* at 2001, and for that reason states must take into account that "an IQ test score represents a range rather than a fixed number." *Id.* Ignoring the imprecision of such scores "risks executing a person who suffers from intellectual disability." *Id.*

Hall thus presented a new rule of constitutional law for purposes of Tennessee's Post-Conviction Procedure Act. *Accord Bush v. State*, 428 S.W.3d 1, 17 (Tenn. 2014) (ruling that the definition of a new rule of state law for purposes of Tenn. Code Ann. § 40-30-117(a)(1) motions set forth in Tenn. Code Ann. § 40-30-122 "encompasses" and is "equivalent to the "procedures without which the likelihood of an accurate conviction is seriously diminished" definition of a new rule set out in *Teague v. Lane*, 489 U.S. 288 (1989)).

B. The *Payne* Court held that *Hall* had not been found to be retroactive

In *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), the Tennessee Supreme Court considered the implications of the decision in *Hall* for intellectually disabled death row petitioners like Chalmers. The Court held that *Hall* would benefit such petitioners "only if it applied retroactively," and observed that "the United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review." *Payne*, 493 S.W.3d at 490-91 (citing Tenn. Code Ann. § 40-30-117(a)(1)). On this basis, in 2016, the Tennessee Supreme Court ruled that *Hall* could not support a motion to reopen post-conviction proceedings.

C. *Moore* applied *Hall* retrospectively to cases on collateral review

In *Moore*, the Supreme Court applied *Hall* retrospectively to a case on collateral review. In a state court post-conviction proceeding, a Texas court found Moore was intellectually disabled based on current clinical standards, but the Texas Court of Criminal Appeals reversed on the ground that it was error for the post-conviction court not to have used 1992 court-created criteria and non-clinical factors (the "*Briseno* factors"). The Supreme Court reversed the Texas Court by applying *Hall* to Moore's post-conviction caseand criticized Texas for "departing from clinical practice" in Moore's post-conviction proceeding by preferring "the consensus of Texas citizens on who should be executed" over medical and clinical standards. *Moore*, 137 S.Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'").

The Court held that the Texas Court of Criminal Appeals' conclusion that Moore was not intellectually disabled because he had scored 74 on an IQ test was "irreconcilable with *Hall*," and that, under *Hall*, "the lower end of Moore's score range falls at or below 70." *Id.* at 10-11.

The Supreme Court then continued its inquiry "in line with *Hall*'s requirement] that courts consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual functioning deficits." *Id.* at 12.[2]

Five days after applying *Hall* retrospectively in Moore's post-conviction proceeding, the Supreme Court also did so in two federal habeas proceedings, granting certiorari and remanding the cases for consideration in light of *Moore*. *Martinez v. Davis*, No. 16-6445 (U.S.), Order (April 3, 2017); *Henderson v. Davis*, No. 15-7974 (U.S.), Order (April 3, 2017). *See also Hallburton v. Florida*, No. 13-10790 (U.S.), Order (Oct. 6, 2014) (vacating the denial of post-conviction capital intellectual disability relief based on a 74 IQ test score *Haliburton v. State*, 123 So.3d 1146 (Fla. 2013) and remanding for reconsideration in light of *Hall*). Thus, the United States Supreme Court has now applied the Eighth Amendment rule announced in *Hall* retrospectively.

D. Where the Supreme Court has applied the rule of *Hall* retroactively, it is proper grounds for Mr. Chalmers's motion to reopen

In light of the Tennessee Supreme Court's rationale in *Payne* that the rule of *Hall* did apply retrospectively, that ruling plainly no longer has force. The new rule announced in *Hall* did not exist at the time of Mr. Chalmers's trial or post-conviction proceeding. That rule has now been applied retrospectively by the Supreme Court in *Moore*. That retrospective application means that *Moore* supports Mr. Chalmers's motion to reopen, and this court should grant it to uphold "the principle that Tennessee has no business executing persons who are intellectually

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[2] The Court also found error in the Texas court's analysis of Moore's adaptive behavior evidence because it examined his strengths, which contravenes "the medical community['s] focus[of] the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 12 (italics in original).

disabled." *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). Where Mr. Chalmers filed his motion to reopen his post-conviction proceeding within one year of *Moore*, his motion is proper under the Post-conviction Procedure Act and should be granted. Tenn. Code Ann. § 40-30-117(a)(1). *See e.g.*, *Strouth v. State*, 999 S.W.2d 759 (Tenn. 1999) (petitioner filed motion to reopen post-conviction proceeding within one year of *Barber v. State*, 889 S.W.2d 186 (Tenn. 1994), which ruled that constitutional rule of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) applied retrospectively).

V. This Court Should Grant The Motion To Reopen, Conduct An Evidentiary Hearing Or Jury Trial, And Vacate Tyrone Chalmers' Death Sentence

Mr. Chalmers has been diagnosed with intellectual disability per the criteria of the leading professional association, the American Association on Intellectual and Developmental Disabilities (AAIDD), the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), and the standards enumerated by this Court in *Moore*. As Daniel Reschly, Ph.D. sets forth in his sworn affidavit, Mr. Chalmers meets all of the three-pronged criteria: 1) Mr. Chalmers displays significantly subaverage intellectual functioning as evidenced by an obtained IQ score of 66.4 on the Stanford-Binet Fifth Edition[3]; 2) Mr. Chalmers manifests significant deficits in all three domains of adaptive functioning—Conceptual, Social, and Practical—delineated by the AAIDD, 2002 and 2010 editions. He repeated the first grade, and was enrolled in special education in the second grade. His reading has never advanced beyond a fourth grade level. He cannot tell time, and cannot understand or work with money. He has

[3] Mr. Chalmers raw score on this test was a 69. This score has to be adjusted for the obsolescence of the original test norms. Mr. Chalmers also had a raw score of 76 on the WAIS-IV, which, when corrected for norm obsolescence, is actually 75. His raw score on the WISC-R was 77, which is a 72.7 when corrected for norm obsolescence.

never been able to navigate beyond a one-mile radius from his childhood home; 3) Mr. Chalmers exhibited these limitations during the developmental period (i.e., before the age of eighteen). *See* Exhibit 1, Affidavit of Dr. Daniel Reschly. The proof of Mr. Chalmers' intellectual disability is unrefuted. Exactly as in *Moore*, Tyrone Chalmers has an IQ test score of 75 or below accompanied by deficits in adaptive behavior. Thus, the Eighth Amendment demands that a reviewing court consider all of his evidence of intellectual disability to determine whether, under governing medical standards, he is intellectually disabled. *See Moore*, 581 U.S. at ___ (slip op. at 11, 12) (inquiry into intellectual disability had to continue given Moore's IQ test score of 74).

CONCLUSION

Tyrone Chalmers is entitled to application of *Moore* and because he establishes his entitlement to relief under *Moore* and the Eighth Amendment, this Court should grant this motion to reopen. After reopening the proceedings, this Court should conduct an evidentiary hearing at which Tyrone Chalmers can prove his intellectual disability and entitlement to relief under the Eighth Amendment. Alternatively, this Court should grant Mr. Chalmers a jury trial on the issue, because the absence of intellectual disability makes him ineligible for death. The Sixth Amendment therefore requires a jury trial on this matter and requires the state to prove lack of intellectual disability beyond a reasonable doubt. *Hurst v. Florida*, 577 U.S. ___ (2016).

After conducting a hearing and/or jury trial, this Court should declare Tyrone Chalmers intellectually disabled under the Eighth Amendment and Tennessee Constitution, conclude that his death sentence thus violates the Eighth Amendment and the Tennessee Constitution, vacate his death sentence, and impose a sentence of life imprisonment.

Respectfully Submitted,

By: Paul Bruno

Paul Bruno
B.P.R. # 017275
The Bruno Firm
5115 Maryland Way, 1st Floor
Brentwood, TN 37027

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via United States Postal Service upon the Office of the District Attorney General, 201 Poplar Street, Suite 301, Memphis, Tennessee 38103-1945, on this 23rd day of March, 2018.

Paul Bruno

VERIFICATION

I swear or affirm under the penalty of perjury that the foregoing motion is true and correct to the best of my knowledge.[4]

Signature: _____ Date: 3-23-18

Sworn to and subscribed before me this the 23rd day of ~~November, 2017~~. March, 2018

_____
Notary Public

Winona C Muir
Signature

My Commission Expires: 03-08-2021

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

AFFIDAVIT OF COUNSEL REGARDING INDIGENCY

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

Paul Bruno Date: 3/23/18

Counsel for Petitioner

Sworn to and subscribed before me this the 23rd day of March, 2018.

Winona C. Muir

Notary Public

Winona C. Muir

Signature

My Commission Expires: 3-06-21

AFFIDAVIT OF INDIGENCY

I, Tyrone Chalmers, am too poor to pay any money to the court.

Signature: _____ Date: 3-23-18

Sworn to and subscribed before me this the 23rd day of ~~November, 2017.~~ March, 2018

_____
Notary Public

Winona C. Muir
Signature

My Commission Expires: 03-08-2021

RESPONDENT'S APPENDIX D

Petitioner's application for permission to appeal, pursuant to Rule 28, W2018-01650-CCA-R28-PD, filed in the Court of Criminal Appeals on September 10, 2018

IN THE TENNESSEE COURT OF CRIMINAL APPEALS,
WESTERN SECTION, AT JACKSON

TYRONE CHALMERS,	)	
	)	
Petitioner-Applicant	)	CCA No. W2018-01650-CCA-R3-PD
	)	Shelby County No. [redacted]
vs.	)	
	)	**ORAL ARGUMENT REQUESTED**
STATE OF TENNESSEE,	)	**Under Tenn.S.Ct.R. 28(10)**
	)	
Respondent	)	

APPLICATION FOR PERMISSION TO APPEAL

Paul Bruno
BPR#17275
Bulloch, Fly, Hornsby & Evans, PLLC,
P.O. Box 398
Murfreesboro, TN 37133

IN THE TENNESSEE COURT OF CRIMINAL APPEALS,
WESTERN SECTION, AT JACKSON

TYRONE CHALMERS,	)	
	)	
Petitioner-Applicant	)	CCA No. _____
	)	Shelby County No. C01-50
vs.	)	
	)	**ORAL ARGUMENT REQUESTED**
STATE OF TENNESSEE,	)	**Under Tenn.S.Ct.R. 28(10)**
	)	
Respondent	)	

APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Tenn. Code Ann. 40-30-117(c) and Tenn.S.Ct.R. 28(10), Tyrone Chalmers, by and through counsel, seeks permission to appeal the Shelby County Criminal Court's August 10, 2018, denial of his motion to reopen his post-conviction proceeding. Att. A. That court failed to recognize the developments in Supreme Court decisions that alter the decisions of the Tennessee Supreme Court. For that reason, this Court must again take the lead in assuring the protection of the Constitution for intellectually disabled people facing the death penalty.

The Tennessee Supreme Court ruled in *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), that the United States Supreme Court's decision in *Hall v. Florida*, 572 U.S. __, 134 S.Ct. 1986 (2014), would benefit intellectually disabled individuals who have been sentenced to death "only if it applied retroactively" and observed that the Supreme Court "has not ruled that *Hall* is to be applied retroactively to cases on collateral review." *Payne*, 493 S.W.3d at 490-91 (citing Tenn. Code Ann. §

40-30-117(a)(1)). That has now changed, and therefore *Hall* supports Mr. Chalmers's motion to reopen.

This Court should grant Mr. Chalmers's application and schedule his case for oral argument.

I. This Court is familiar with Mr. Chalmers's case – he has been forced to run the gauntlet of capital intellectual disability litigation several times before by the back-and-forth of Tennessee case law

Mr. Chalmers satisfies the Tennessee statutory criteria for intellectual disability that make a person ineligible for the death penalty. Tenn. Code Ann. § 39-13-203. The State has never disputed that as he has tried repeatedly to present his claim to the courts. The State has only said there is no procedural vehicle for Tennessee courts to hear his evidence.

Mr. Chalmers has significantly subaverage intellectual functioning that was manifest during his childhood. This is evidenced, in part, by his clinically accurate I.Q. test scores: 73 on a Wechsler Intelligence Scale for Children-Revised ("WISC-R") that was administered in 1985 as part of his special education in Memphis City Schools; a 75 on a WAIS-IV; and a 66 on a Stanford-Binet V.[1] As a child in school, Mr. Chalmers repeated the first grade and was enrolled in special education from

[1] The raw scores on these tests were corrected according to the professional clinical practice of adjusting scores to account for documented increases in average IQ's over time and consequent obsolescence of the original scoring norms. This component of IQ test score analysis is commonly referred to as "the Flynn Effect." *See* Motion to Reopen Ex. A (Affidavit of Dan Reschly, Ph.D.) at ¶¶ 36-38, 67-74. *See also* Coleman v. State, 341 S.W.3d 221, 242 n. 55 (Tenn. 2011) ("The [American Association on Intellectual and Developmental Disabilities] currently recognizes ten potential 'challenges' to the reliability and validity of I.Q. test scores. Among these challenges [is] the Flynn Effect []. . . . . Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward."); Geraldine W. Young, "A More Intelligent and Just *Atkins*: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability," 65 Van. L. Rev. 61 (2012).

second grade through high school, where he earned a "resource diploma." His reading ability never advanced beyond a fourth grade level, and he took the verbal competency test required for high school graduation seven times before he earned a passing score. Mr. Chalmers also exhibits substantial adaptive deficits: gullibility in social relationships; he could not tell time on an analog watch; he could not use money; he could not navigate his way beyond a one-mile radius from his mother's home. He exhibited all of these indications of intellectual disability before he was 18 years old. *See* Att. B, Ex. A (Aff. Of Dan Reschly, Ph.D.).

A. In 2003, at the time of Mr. Chalmers's post-conviction proceeding, Tennessee courts enforced the bright-line rule set forth in *Howell v. State* that prohibited capital petitioners could not prove intellectual disability if they had IQ scores above 70, even if within the 71-75 point standard error of measure like Mr. Chalmers's 73 and 75 scores

In his post-conviction proceeding in 2003 Mr. Chalmers moved to amend his post-conviction petition to include a claim that he is intellectually disabled based on the Tennessee Supreme Court's decision in *Van Tran v. State,* 66 S.W.3d 790 (Tenn. 2001), and the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). That claim was predicated, in part, on his special education 73 I.Q. test score, which proves significantly subaverage intellectual functioning and onset of his condition before the age of 18 as required by the first and third prongs of the Tennessee capital ID statute. Tenn. Code Ann. § 39-13-203(a)(1), (3).

Before Mr. Chalmers's post-conviction hearing was held, the Tennessee Supreme Court imposed a strict interpretation of the "functional IQ of 70 or below" language in the capital ID statute. In *Howell v. State*, 151 S.W.3d 450 (Tenn.

2004), the Court ruled that the statute intended a bright-line I.Q. cutoff determined by a petitioner's raw I.Q. test score, with no consideration of I.Q. tests' SEM or score correction for inaccurate norms:

> to be considered mentally retarded, a defendant *must* have an I.Q. of seventy or below. The statute makes no reference to a standard error of measurement in the test scores *nor consideration of* any range of scores above the score of seventy. Therefore, we decline to 'read in' such provisions [] in order to extend the coverage of the statute.

Howell, 151 S.W.3d at 458 (emphasis added).[2] *See also Porterfield v. State*, No. W2012–00753–CCA–R3–PD, 2013 WL 3193420, at *22-23 (Tenn. Crim. App. June 20, 2013) (*Howell* held "that the demarcation of an I.Q. score of 70 was a 'brightline' rule *that must be met*") (emphasis added); *State v. Pruitt*, No. W2009–01255–CCA–R3–DD, 2011 WL 2417856, at *24 (Tenn. Crim. App. June 13, 2011)(*Howell* "held that the Tennessee legislature's decision to include a 'bright-line' cutoff score of seventy provided 'a clear and objective guideline to be followed by courts'").

This Court enforced the bright line rule set forth in *Howell*, and the effect was that every petitioner with mild intellectual disability whose claim relied on I.Q. test scores within the 71-75 SEM was denied relief. *See Howell v. State*, No.

[2] *Howell's* bright-line rule was presaged by two decisions from this Court. In *Warren v. State*, No. M1999-1319-CCA-R3-PC, 2000 WL 1133558 (Tenn. Crim. App. Aug. 10, 2000), the petitioner raised a claim of ineffective assistance for his trial counsel's advising him to plead guilty to avoid capital prosecution instead of challenging his eligibility to be executed on grounds of intellectual disability. This court found that trial counsel had not performed deficiently because petitioner had a 71 IQ test score and the capital ID statute required a 70 or lower. *See also Blair v. State*, No. W1999-01847-CCA-R3PC, 2000 WL 72031 (Tenn. Crim. App. Jan. 24, 2000) (same, where defendant had scores of 73 and 68).

W2009–02426–CCA–R3–PD, 2011 WL 2420378 (Tenn. Crim. App. June 14, 2011)[3]; *Sims v. State*, No. W2008–02823–CCA–R3–PD, 2011 WL 334285 (Tenn. Crim. App. Jan. 28, 2011) (though petitioner was ID under AAIDD standard that considers SEM scores, he was not under *Howell* bright-line cutoff); *Smith v. State*, No. E2007-00719-CCA-R3PD, 2010 WL 3638033 (Tenn. Crim. App. Sept. 21, 2010) (rejecting SEM and score-correction and denying claim for failure to provide an I.Q. test score ≤70 prior to age 18); *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 23, 2010) (refusing to consider scores within SEM and denying claim for failure to prove IQ<71); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009) (same); *Black v. State*, No. M2004–01345–CCA–R3–PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005) (same). Some of these petitioners had their claims denied despite having <71 I.Q. test scores because there were SEM scores in the record.

Thus, though Mr. Chalmers presented evidence at his post-conviction hearing of substantially diminished intelligence and adaptive behavior deficits that satisfied the clinical standards for intellectual disability, his 73 I.Q. test score prohibited his being found intellectually disabled under the law of *Howell*. His post-conviction petition was denied, and this Court affirmed.

[3] It must be noted that this case was issued after the *Coleman v. State* decision, *infra*, that gave trial courts the discretion to consider IQ tests' SEM and score correction for norm obsolescence. The trial court elected ***not*** to consider those factors in weighing Howell's evidence, and this Court affirmed that decision.

B. After the Tennessee Supreme Court revised *Howell*'s bright-line interpretation of the capital intellectual disability statute in *Coleman v. State* and granted courts discretion to consider I.Q. test scores within the SEM as evidence of intellectual disability, it denied petitioners like Mr. Chalmers whose post-conviction proceedings had ended the opportunity to have their claims re-examined under the new rule

In 2011, after the close of Mr. Chalmers's post-conviction litigation, the Tennessee Supreme Court "clarified" its ruling in *Howell* to more closely align the State's courts' consideration of IQ test evidence for purposes of capital ID claims with professional clinical norms.[4] In *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), the state supreme court reaffirmed the statute's bright-line 70-I.Q. cutoff and the requirement that petitioners produce evidence that their functional I.Q. is below 70 but gave trial courts discretion to accept evidence of a petitioner's I.Q. that considers SEM and score-correction for outdated I.Q. test scores. *Coleman*, 341 S.W.3d at 242 n.55, 247.

Mr. Chalmers filed a motion to reopen his post-conviction proceeding to litigate his ID claim under *Coleman*'s rule for considering IQ test scores. However, before the trial court could hear his motion, the state supreme court ruled that its decision in *Coleman* was only a matter of statutory interpretation that did not

[4] The Tennessee Supreme Court subsequently suggested that *Coleman* was not a change, but a "clarification" because lower courts had erred in their application of the rule of *Howell*. *See Keen v. State*, 398 S.W.3d 594, 603 ("several courts misconstrued our holding in *Howell*"); *Smith v. State*, 357 S.W.3d 322, 354 (Tenn., 2011) (trial courts and Court of Criminal Appeals "labored under a [] misconception that [standard margin of error concerning intelligence tests were contrary to the case law of this state and of no assistance to capital petitioners]"). It is not clear why the court did not grant review to correct that "misconception" in cases such as *Black*, *Sims*, or *Cribbs*, *supra* at 5.

establish a new constitutional right that would support a motion to reopen. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012). Mr. Chalmers's motion to reopen was denied.

II. In *Hall v. Florida*, the United States Supreme Court recognized a new rule that the Eighth Amendment requires assessing capital intellectual disability claims according to professional clinical standards, which prohibits denying such claims based on I.Q. test scores in the 71-75 point SEM

In *Hall v. Florida*, 572 U.S. __, the United States Supreme Court decided "how intellectual disability must be defined" in order to give force to the Eighth Amendment protection recognized in *Atkins*. The *Atkins* decision did not establish any parameters for the definition of intellectual disability. *Atkins*, 536 U.S. 304, 317 ("Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders. . . . '[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences'"), *quoting Ford v. Wainwright*, 477 U.S. 399, 405, 416–417 (1986). *See also Bobby v. Bies*, 556 U.S. 825, 831 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation "will be so impaired as to fall within [Atkins' compass].."). Establishment of standards was left to the states. *Atkins* at 317.

Hall examined the Florida Supreme Court's interpretation of that state's capital ID statute. The statute required proof of "significantly subaverage general intellectual functioning", which it defined as "performance that is two or more standard deviations below the mean" on an intelligence test. Fla. Stat. §921.137(1)(2013); *Hall*, 134 S.Ct. 1994. Though the text of the statute did not

address SEM, the Florida Supreme Court had interpreted the language as a bright-line cutoff. *See Hall*, 134 S.Ct. at 1994 ("That strict IQ test score cutoff of 70 is the issue in this case."). In this way, just like the *Howell* decision in Tennessee, Florida made an I.Q. test score of 70 or below the *sine qua non* of an intellectual disability claim.[5] *Compare Howell*; *Pruitt*, *supra* (*Howell* "held that the Tennessee legislature [decided] to include a 'bright-line' cutoff score of seventy.").

The Supreme Court ruled that a strict cut-off that requires capital petitioners to produce an IQ test score of 70 or below and does not consider scores within the SEM violates the Eighth Amendment because it "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 134 S.Ct. at 1990. The Court's decision announced a new rule that required determinations of intellectually disabled persons to abide by professional clinical standards, which recognize I.Q. test scores within the standard error of measure as evidence of ID (in addition to the other two diagnostic criteria). *Hall*, 134 S. Ct. at 2002 (Alito, j., dissenting) ("the Court [,]based largely on the positions adopted by private professional associations . . . sharply departs from the framework prescribed in prior Eighth Amendment cases. . . . The Court's approach in this case marks a new [] turn in our Eighth Amendment case law.").

[5] Florida prohibited petitioners from going forward with a claim and presenting evidence of adaptive deficits. Compared to Tennessee's adjudication of capital ID claims under the rule of *Howell*, this is a distinction without a difference. In either state, an intellectual disability claim that relied on an I.Q. test score within the 71-75 standard error of measure would have failed.

III. The Supreme Court's decision in *Moore v. Texas* applied the new constitutional rule of *Hall v. Florida* retroactively, and under Tenn. Code Ann. §40-30-117(a)(1) this permits Mr. Chalmers's motion to reopen

A. In *Payne v. State* the Tennessee Supreme Court held that the rule of *Hall* could not support a motion to reopen post-conviction proceedings because the Supreme Court had not applied the rule retroactively

In *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), the Tennessee Supreme Court considered the implications of the decision in *Hall* for intellectually disabled death row petitioners like Mr. Chalmers whose claims arose before the decisions in *Coleman* and *Hall*. The state high court ruled that *Hall* did not support motions to reopen.

The Tennessee Supreme Court did not find that *Hall* was not a new rule. Rather, based on the language of Tenn. Code Ann. § 40-30-117(a)(1)) that a petitioner may reopen post-conviction proceedings based on "a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required" (emphasis added), the Court ruled that *Hall* could benefit petitioners like Mr. Chalmers "only if it applied retroactively." *Payne*, 493 S.W.3d at 490-91. The Court found that "the United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review," and also declined, under its own authority, to hold that *Hall* applies retroactively within the meaning of Tenn. Code Ann.§ 40–30–117(a)(1). 493 S.W.3d at 490-91. On this basis, in 2016, the Tennessee Supreme Court ruled that *Hall* could not support a motion to reopen post-conviction proceedings.

B. In *Moore v. Texas* the United States Supreme Court took the action found lacking in *Payne* and applied the rule of *Hall* retrospectively to cases on collateral review

In *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017), the Supreme Court considered the Texas Court of Criminal Appeals' denial of a capital intellectual disability claim. Moore had been convicted in 1980, and, after federal habeas relief, was resentenced in 2004. *Moore*, 137 S.Ct. at 1045. He filed a petition for state court post-conviction relief, and, after a hearing in 2015, the trial court found that he was intellectually disabled based on current clinical standards. *Id.* The Texas Court of Criminal Appeals reversed on the ground that it was error for the post-conviction court not to use the criteria for intellectual disability that the state courts had created in 1992 (the "*Briseno* factors"). *Ex parte Moore*, 470 S.W.3d 481, 490–491 (Tex.Crim.App.2015)

The Supreme Court reversed the Texas high court by applying *Hall* retrospectively to Moore's post-conviction claim. The justices criticized Texas for "departing from clinical practice" in Moore's post-conviction proceeding by preferring "the consensus of Texas citizens on who should be executed" over medical and clinical standards. *Moore*, 137 S.Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'"). The Court held that the Texas Court of Criminal Appeals' conclusion that Moore was not intellectually disabled because he had scored 74 on an IQ test was "irreconcilable with *Hall*," and that, under *Hall*, "the lower end of Moore's score range falls at or below 70." *Id.* at 10-11. The Supreme Court then continued its

inquiry "in line with *Hall*'s requirement] that courts consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual functioning deficits." *Id.* at 12.[6]

Five days after applying *Hall* retrospectively in Moore's post-conviction proceeding, the Supreme Court did so in two federal habeas proceedings, granting certiorari and remanding the cases for consideration in light of *Moore* and application of *Hall*. *Martinez v. Davis*, No. 16-6445 (U.S.), Order (April 3, 2017); *Henderson v. Davis*, No. 15-7974 (U.S.), Order (April 3, 2017). *Accord Haliburton v. Florida*, No. 13-10790 (U.S.), Order (Oct. 6, 2014) (vacating the denial of post-conviction capital intellectual disability relief based on a 74 IQ test score *Haliburton v. State*, 123 So.3d 1146 (Fla. 2013) and remanding for reconsideration in light of *Hall*).

In these decisions, the United States Supreme Court has applied retrospectively the Eighth Amendment rule announced in *Hall* four times. This is the key to the lock *Payne* placed on motions to reopen under *Hall*.

C. Where the Supreme Court has applied the rule of *Hall* retroactively, it is proper grounds for Mr. Chalmers's motion to reopen

In light of the Tennessee Supreme Court's rationale in *Payne* that the rule of *Hall* does not support a motion to reopen because it had not been applied retrospectively, that ruling plainly no longer has force. The new rule announced in

[6] The Court also found error in the Texas court's analysis of Moore's adaptive behavior evidence because it examined his strengths, which contravenes "the medical community['s] focus[of] the adaptive-functioning inquiry on adaptive *deficits*." *Id.* at 12 (italics in original).

Hall did not exist at the time of Mr. Chalmers's trial or post-conviction proceeding. The United States Supreme Court has now applied that rule retrospectively in *Moore*, *Martinez*, and *Henderson*. That retrospective application means that *Moore* supports Mr. Chalmers's motion to reopen. Where Mr. Chalmers filed his motion to reopen his post-conviction proceeding within one year of *Moore*'s retrospective application of *Hall*, his motion is proper under the Post-conviction Procedure Act. Tenn. Code Ann. § 40-30-117(a)(1). *See e.g., Strouth v. State*, 999 S.W.2d 759 (Tenn. 1999) (petitioner filed motion to reopen post-conviction proceeding within one year of *Barber v. State*, 889 S.W.2d 186 (Tenn. 1994), which ruled that constitutional rule of *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) applied retrospectively).

III. Where the Shelby County Criminal Court below did not address the implications for the Tennessee Supreme Court's decision in *Payne v. State* of the retroactive application of *Hall v. Florida* in *Moore v. Texas*, this court should grant Mr. Chalmers's application to appeal

Mr. Chalmers, through counsel, raised the legal argument set forth in this application in the court below. See Att. B (Motion to Reopen Post-Conviction Proceeding). That court failed to address Mr. Chalmers argument. Instead, the criminal court judge denied Mr. Chalmers's motion on the ground that "*Moore* did not create a new rule of law requiring a hearing on Petitioner's intellectual disability." Att. A, p. 14. This would be dispositive if that was the sole basis for Mr. Chalmers's motion. However, this analysis missed the mark and does not address Mr. Chalmers's plainly meritorious argument based on the Tennessee Supreme Court's decision in *Payne*.

Mr. Chalmers explicitly set forth in his motion to reopen his argument that "For Purposes Of Tenn. Code Ann. §40-30-117(a)(1), *Hall v. Florida*, 572 U.S. __ (2017), Announced A New Rule Of Law That Was Given Retrospective Application In *Moore v. Texas*, Which Permits This Motion To Reopen." Att. B, p. 9. Within that subject heading, Mr. Chalmer set forth the cases and essential language that support his argument. Att. B, pp. 9-14. Thus, it was properly presented to the criminal court. Nevertheless, the lower court only addressed Mr. Chalmers's alternative basis for his motion to reopen, that *Moore* itself constitututed a new rule. Att. A, pp. 13-16.

Mr. Chalmers's argument based on *Hall*, *Payne*, and *Moore* plainly well taken. *Moore* answered the question that *Payne* asked about *Hall*. Where the retrospective application that the Tennessee Supreme Court found lacking has now been made in *Moore*, Mr. Chalmers's motion to reopen is plainly well-taken.

The Tennessee Supreme Court is "committed to the principle that Tennessee has no business executing persons who are intellectually disabled." *Keen v. State*, 398 S.W.3d 594, 613. Nevertheless, it is this Court that has often given the signal that the laws of the state are insufficient to uphold that principle.[7] In the wake of *Payne*, which was predicated on a void in Tenn. Code Ann.§ 40–30–117(a)(1) that

[7] It was this Court that recognized the risk created by *Howell*'s bright-line rule. *See* Smith v. State, No. E2007-00719-CCA-R3PD, 2010 WL 3638033, at *40 (Tenn. Crim. App. Sept. 21, 2010), aff'd in part, vacated in part, 357 S.W.3d 322 (Tenn. 2011)("We agree with the observation made in *Cribbs* that, "by refusing to consider ranges of error, it is our view that some mentally retarded defendants are likely to be executed in Tennessee."); Cribbs v. State, No. W200601381CCAR3PD, 2009 WL 1905454, at *40 (Tenn. Crim. App. July 1, 2009) ("by refusing to consider ranges of error, it is our view that some mentally retarded defendants are likely to be executed in Tennessee, particularly in a case similar to this one where the defendant's I.Q. is so close to the bright-line cutoff of 70."). Likewise, it was a judge of this Court that alerted the Tennessee Supreme Court to the gap between *Howell* and *Coleman* that trapped intellectually disabled capital petitioners. *See Payne v. State*, No. W2013-01248-CCA-R3PD, 2014 WL 5502365 (Tenn. Crim. App. Oct. 30, 2014), appeal granted (Feb. 13, 2015) (McMullen, j., concurring in part and dissenting in part).

Moore v. Texas has now filled, this Court should again alert the Tennessee Supreme Court to the need for reform.

This Court should grant Mr. Chalmers application and set this case for oral argument.

CONCLUSION

For the reasons set forth in *Payne v. State*, *Moore v. Texas* marks the restrospective application of *Hall v. Florida* that supports Mr. Chalmers's motion to reopen his post-conviction proceedings. The Shelby County trial court erred when it dismissed Mr. Chalmers's motion without addressing that argument.

This Court should grant Mr. Chalmers's application for permission to appeal, set the case for oral argument, and grant his motion to reopen.

Respectfully submitted,

Paul Bruno

Paul Bruno
BPR#17275
Bulloch, Fly, Hornsby & Evans, PLLC,
P.O. Box 398
Murfreesboro, TN 37133
Office: 615-896-4154
Facsimile: 615- 896-4152

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2018, I placed a copy of this pleading in the U.S. Mail for delivery to Steve Jones, District Attorney General for the 30th Judicial District, 201 N. Poplar, Memphis, Tennessee 38008; Michael Stahl, Assistant Attorney General, P.O. Box 20207, Nashville, TN 37202.

Paul Bruno

Paul Bruno

RESPONDENT'S APPENDIX E

Petitioner's application for permission to appeal, pursuant to Rule 11, W2018-01650-SC-R11-PD, filed in the Tennessee Supreme Court on March 14, 2019

IN THE TENNESSEE SUPREME COURT,
WESTERN SECTION, AT JACKSON

TYRONE CHALMERS,

Petitioner-Applicant

vs.

STATE OF TENNESSEE,

Respondent

No. SC-R11
C.C.A..No. W2018-01650-~~CCA-R28~~-PD
Shelby County No. C01-50

ORAL ARGUMENT REQUESTED
Under Tenn.S.Ct.R. 28(10)

APPLICATION FOR PERMISSION TO APPEAL

Paul Bruno
BPR#17275
Bulloch, Fly, Hornsby & Evans, PLLC,
P.O. Box 398
Murfreesboro, TN 37133

IN THE TENNESSEE SUPREME COURT,
WESTERN SECTION, AT JACKSON

TYRONE CHALMERS,	)	
	)	No. _____
Petitioner-Applicant	)	C.C.A..No. W2018-01650-CCA-R28-PD
	)	Shelby County No. C01-50
vs.	)	
	)	**ORAL ARGUMENT REQUESTED**
STATE OF TENNESSEE,	)	**Under Tenn.S.Ct.R. 28(10)**
	)	
Respondent	)	

APPLICATION FOR PERMISSION TO APPEAL

Paul Bruno
BPR#17275
Bulloch, Fly, Hornsby & Evans. PLLC.
P.O. Box 398
Murfreesboro, TN 37133

IN THE TENNESSEE SUPREME COURT.
WESTERN SECTION, AT JACKSON

TYRONE CHALMERS.	)	
	)	No. _____
Petitioner-Applicant	)	CCA No. W2018-01650-CCA-R28-PD
	)	Shelby County No. C01-50
vs.	)	
	)	**ORAL ARGUMENT REQUESTED**
STATE OF TENNESSEE,	)	**Under Tenn.S.Ct.R. 28(10)**
	)	
Respondent	)	

APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Tennessee Supreme Court 11, Tenn. Code Ann. 40-30-117(c) and Tenn.S.Ct.R. 28(10), Tyrone Chalmers seeks permission to appeal the decision of the Court of Criminal Appeals declining to review the Shelby County Criminal Court's August 10, 2018, denial of his motion to reopen his post-conviction proceeding. Att. A (Shelby Co); Att. B (CCA). This Court should grant Mr. Chalmers's application and schedule his case for oral argument.

DATE OF JUDGMENT

The court of criminal appeals decision denied relief on January 17. 2019. *Id.*

QUESTION PRESENTED

In *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039 (2017), the United States Supreme Court declared "States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders.'" 137 S. Ct. at 1051 (emphasis in original) (*quoting Roper v. Simmons*, 543 U.S. 551, 563-64 (2005)). *Moore's* dictate echoes the earlier prohibition regarding execution of the mentally incompetent. *See, Ford v.*

Wainwright, 477 U.S. 399 (1986). This Court recognized that the *Ford* decision created "an affirmative constitutional duty [for this Court] to ensure that no incompetent prisoner is executed." *Van Tran v. State*, 6 S.W. 3d, 257. 265 (Tenn. 1999). Here, the Supreme Court has extended the prohibition against execution to the intellectually disabled – creating another duty for this Court to fulfill. *Moore* places "an affirmative constitutional duty" on the State of Tennessee to provide a forum for the adjudication of Mr. Chalmers's intellectual disability claim. Therefore, the court of criminal appeals decision upholding the denial of Mr. Chalmers's petition presents the following question:

In light of *Moore*, which procedure will this Court identify as the most appropriate vehicle for the adjudication of Mr. Chalmers's *Atkins* claim?

STATEMENT OF FACTS

I. This Court is familiar with Mr. Chalmers's case – as Mr. Chalmers has run the gamut of capital intellectual disability litigation several times.

Mr. Chalmers satisfies the Tennessee statutory criteria for intellectual disability that make a person ineligible for the death penalty. Tenn. Code Ann. § 39-13-203. The State has never disputed that as he has tried repeatedly to present his claim to the courts. The State has only said there is no procedural vehicle for Tennessee courts to hear his evidence.

Mr. Chalmers has significantly sub-average intellectual functioning that was manifest during his childhood. This is evidenced, in part, by his clinically accurate I.Q. test scores: 73 on a Wechsler Intelligence Scale for Children-Revised ("WISC-

R") that was administered in 1985 as part of his special education in Memphis City Schools; a 75 on a WAIS-IV; and a 66 on a Stanford-Binet V.[1] As a child in school. Mr. Chalmers repeated the first grade and was enrolled in special education from second grade through high school, where he earned a "resource diploma." His reading ability never advanced beyond a fourth grade level, and he took the verbal competency test required for high school graduation seven times before he earned a passing score. Mr. Chalmers also exhibits substantial adaptive deficits: gullibility in social relationships; he could not tell time on an analog watch; he could not use money; he could not navigate his way beyond a one-mile radius from his mother's home. He exhibited all of these indications of intellectual disability before he was 18 years old. *See* Att. C, Ex. A (Aff. Of Dan Reschly, Ph.D.).

A. In 2003, at the time of Mr. Chalmers's post-conviction proceeding, Tennessee courts enforced the bright-line rule set forth in *Howell v. State* that prohibited capital petitioners from proving intellectual disability if they had IQ scores above 70, even if within the 71-75 point standard error of measure like Mr. Chalmers's 73 and 75 scores

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[1] The raw scores on these tests were corrected according to the professional clinical practice of adjusting scores to account for documented increases in average IQ's over time and consequent obsolescence of the original scoring norms. This component of IQ test score analysis is commonly referred to as "the Flynn Effect." *See* Motion to Reopen Ex. A (Affidavit of Dan Reschly, Ph.D.) at ¶¶ 36-38, 67-74. *See also Coleman v. State*, 341 S.W.3d 221, 242 n. 55 (Tenn. 2011) ("The [American Association on Intellectual and Developmental Disabilities] currently recognizes ten potential 'challenges' to the reliability and validity of I.Q. test scores. Among these challenges [is] the Flynn Effect []. . . . . Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward."); Geraldine W. Young, "A More Intelligent and Just *Atkins*: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability," 65 Van. L. Rev. 61 (2012).

In his post-conviction proceeding in 2003. Mr. Chalmers moved to amend his post-conviction petition to include a claim that he is intellectually disabled based on the Tennessee Supreme Court's decision in *Van Tran v. State*. 66 S.W.3d 790 (Tenn. 2001), and the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). That claim was predicated, in part, on his special education 73 I.Q. test score, which proves significantly sub-average intellectual functioning and onset of his condition before the age of 18, as required by the first and third prongs of the Tennessee capital ID statute. Tenn. Code Ann. § 39-13-203(a)(1), (3).

Before Mr. Chalmers's post-conviction hearing was held, the Tennessee Supreme Court imposed a strict interpretation of the "functional IQ of 70 or below" language in the capital ID statute. In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Court ruled that the statute intended a bright-line I.Q. cutoff determined by a petitioner's raw I.Q. test score, with no consideration of I.Q. tests' standard error of measurement (SEM) or score correction for inaccurate norms:

> to be considered mentally retarded, a defendant *must* have an I.Q. of seventy or below. *The statute makes no reference to a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy.* Therefore, we decline to 'read in' such provisions [] in order to extend the coverage of the statute.

Howell, 151 S.W.3d at 458 (emphasis added).[2] *See also Porterfield v. State*. No. W2012–00753–CCA–R3–PD, 2013 WL 3193420, at *22-23 (Tenn. Crim. App. June

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[2] *Howell's* bright-line rule was presaged by two decisions from this Court. In *Warren v. State*, No. M1999-1319-CCA-R3-PC, 2000 WL 1133558 (Tenn. Crim. App. Aug. 10, 2000), the petitioner raised a claim of ineffective assistance for his trial counsel's advising him to plead guilty to avoid capital prosecution instead of

20, 2013) (*Howell* held "that the demarcation of an I.Q. score of 70 was a 'brightline' rule *that must be met*") (emphasis added); *State v. Pruitt*, No. W2009–01255–CCA–R3–DD, 2011 WL 2417856, at *24 (Tenn. Crim. App. June 13. 2011)(*Howell* "held that the Tennessee legislature's decision to include a 'bright-line' cutoff score of seventy provided 'a clear and objective guideline to be followed by courts'").

This Court enforced the bright line rule set forth in *Howell*, and the effect was that every petitioner with mild intellectual disability whose claim relied on I.Q. test scores within the 71-75 SEM was denied relief. *See Howell v. State*, No. W2009–02426–CCA–R3–PD, 2011 WL 2420378 (Tenn. Crim. App. June 14. 2011)[3]; *Sims v. State*, No. W2008–02823–CCA–R3–PD, 2011 WL 334285 (Tenn. Crim. App. Jan. 28, 2011) (though petitioner was ID under AAIDD standard that considers SEM scores, he was not under *Howell* bright-line cutoff); *Smith v. State*, No. E2007-00719-CCA-R3PD, 2010 WL 3638033 (Tenn. Crim. App. Sept. 21, 2010) (rejecting SEM and score-correction and denying claim for failure to provide an I.Q. test score ≤70 prior to age 18); *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 23, 2010) (refusing to consider scores within SEM

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challenging his eligibility to be executed on grounds of intellectual disability. This court found that trial counsel had not performed deficiently because petitioner had a 71 IQ test score and the capital ID statute required a 70 or lower. *See also Blair v. State*, No. W1999-01847-CCA-R3PC, 2000 WL 72031 (Tenn. Crim. App. Jan. 24. 2000) (same, where defendant had scores of 73 and 68).

[3] It must be noted that this case was issued after the *Coleman v. State* decision, *infra*, that gave trial courts the discretion to consider IQ tests' SEM and score correction for norm obsolescence. The trial court elected ***not*** to consider those factors in weighing Howell's evidence, and this Court did not review that decision.

and denying claim for failure to prove IQ<71); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009) (same); *Black v. State*, No. M2004–01345–CCA–R3–PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005) (same). Some of these petitioners had their claims denied despite having <71 I.Q. test scores because there were SEM scores in the record.

Thus, though Mr. Chalmers presented evidence at his post-conviction hearing of substantially diminished intelligence and adaptive behavior deficits that satisfied the clinical standards for intellectual disability, his 73 I.Q. test score prohibited his being found intellectually disabled under the law of *Howell*. His post-conviction petition was denied, and this Court affirmed.

B. After this Court revised *Howell*'s bright-line interpretation of the capital intellectual disability statute in *Coleman v. State* and granted courts discretion to consider I.Q. test scores within the SEM as evidence of intellectual disability, it denied petitioners like Mr. Chalmers whose post-conviction proceedings had ended the opportunity to have their claims re-examined under the new rule.

In 2011, after the close of Mr. Chalmers's post-conviction litigation, this Court "clarified" its ruling in *Howell* to more closely align the State's courts' consideration of IQ test evidence for purposes of capital ID claims with professional clinical norms.[4] *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011) reaffirmed the

[4] The Tennessee Supreme Court subsequently suggested that *Coleman* was not a change, but a "clarification" because lower courts had erred in their application of the rule of *Howell*. *See Keen v. State*, 398 S.W.3d 594, 603 ("several courts misconstrued our holding in *Howell*"); *Smith v. State*, 357 S.W.3d 322, 354 (Tenn.. 2011) (trial courts and Court of Criminal Appeals "labored under a [] misconception that [standard margin of error concerning intelligence tests were contrary to the case law of this state and of no assistance to capital petitioners]"). It is not clear

statute's bright-line 70-I.Q. cutoff and the requirement that petitioners produce evidence that their functional I.Q. is below 70 but gave trial courts discretion to accept evidence of a petitioner's I.Q. that considers SEM and score-correction for outdated I.Q. test scores. *Coleman*, 341 S.W.3d at 242 n.55, 247.

Mr. Chalmers filed a motion to reopen his post-conviction proceeding to litigate his ID claim under *Coleman*'s rule for considering IQ test scores. However. before the trial court could hear his motion, this court ruled that its decision in *Coleman* was only a matter of statutory interpretation that did not establish a new constitutional right that would support a motion to reopen. *Keen v. State*. 398 S.W.3d Mr. Chalmers filed the instant motion to re-open following the Supreme Court's issuance of *Moore v. Texas*, aruging that as *Moore* applied *Hall* retroactively to Moore's case, Mr. Chalmers was, likewise, entitled to retroactive application of *Hall* to his case. The Shelby County court denied his motion and the Court of Criminal Appeals denied his application to appeal, reasoning that *Moore* was not a new right of Consitutional law, but rather is derivative of *Atkins*. Att. A (Shelby Co); Att B (CCA).

Respectfully, these decisions beg a certain question: if the right is not new. because it is derivative of constitutional protections existing at the time of Mr. Chalmers' post-conviction proceeding, what is the remedy for a petitioner such as

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why the court did not grant review to correct that "misconception" in cases such as *Black*, *Sims*, or *Cribbs*, *supra* at 5.

Mr. Chalmers whose eligibility for the death penalty was determined using an unconsitutional standard?

REASONS FOR GRANTING THE APPLICATION

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

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

Adhering to the rule of *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) that states may not fail to provide a forum for vindication of a constitutional protection. *Moore* holds that states may not fail to provide an appropriate forum for the adjudication of intellectual disability claims. *Moore* adds to *Montgomery* that the Eighth Amendment requires application of the current clinical, scientific standards to the determination of exemption from execution under *Atkins*. Just as Mr. Moore was entitled to have evidence of his intellectual disability assessed in accordance with the current clinical standards set forth in DSM-5 and AAIDD-11, *Moore v.*

Texas mandates that Mr. Chalmers receive that same review of his intellectual disability claim.

Where there is a constitutional right there must be a remedy. Such is a bedrock principle of our judicial system. *Marbury v. Madison*. 1 Cranch. 137, 162 ("The very essence of civil liberty certainly consists in the right of every indicial to claim the protection of the laws whenever he receives an injury"). When there is a constitutional limitation on the state's power to act, the courts are constitutionally obligated to provide a substantive opportunity to determine whether that limitation applies. *Montgomery v. Louisiana*, 138 S.Ct. 718 (2016). This Court has recognized that where the constitution exempts a certain class of individuals from execution. the Judiciary "has an affirmative constitutional duty" to enforce that exemption. *Van Tran*, 6 S.W.3d at 265.[5] *Moore* places a constitutional obligation on the State of Tennessee to provide a forum for the adjudication of Mr. Chalmers's intellectual disability exemption claim.

This Court also has "an obligation to interpret statutes in a way that preserves their constitutionality." *Jackson v. Smith*, 387 S.W.3d 486. 495 (Tenn. 2012) (*citing Jordan v. Knox Cnty.*, 213 S.W.3d 751, 780–81 (Tenn.2007)). Justice Wade wrote in regard to this issue: "[T]o interpret section 40–30–117(a)(2) in a

[5] This Court recently reaffirmed the power of the Judiciary in *Moore-Pennoyer v. State*, 515 S.W.3d 271, 276–77 (Tenn. 2017) ("as the constitutionally designated repository of judicial power that exercises supervisory authority over the Judicial Department, this Court, and only this Court, has the authority to prescribe rules. policies, and procedures relating to matters essential to the judicial function. *See* Tenn. Const. Art. II, § 2").

manner that deprives a petitioner of an evidentiary hearing and an adjudication on the merits risks putting to death an intellectually disabled individual in violation of the state and federal constitutions." *Keen v. State*, 398 S.W.3d 594. 623 (Tenn. 2012) (Wade, dissenting). "If possible, we should avoid an interpretation of legislation that 'places it on a collision course' with the state or federal constitutions." *Id.* (*quoting Jackson*, 387 S.W.3d at 495).

Historically, this Court has fulfilled its obligation to provide a procedure for the adjudication of newly recognized constitutional rights. In *Van Tran*, this Court recognized that the State of Tennessee was required to provide a remedy for the adjudication of a claim under *Ford v. Wainwright*. 477 U.S. 399 (1986), but found no available procedure under state law. However, that no procedure existed did not "end the inquiry." *Van Tran*, 6 S.W.3d at 264. Rather than avoid the issue. the Court invoked its constitutional and statutory authority to provide a procedure for the adjudication of *Ford* claims. The same must be done here. Just like *Ford*, *Moore* places a constitutional obligation on the State of Tennessee to provide a forum for the adjudication of Mr. Chalmers's intellectual disability claim.

Moore, Montgomery and *Van Tran*, as well as the bedrock protections of constitutional due process, require that the procedural barricades be removed. and that Mr. Chalmers be given a merits hearing on his claim of intellectual disability. At the very least, this body of law warrants further review in this Honorable Court so that this significant constitutional issue may be addressed on its merits.

II. This Court should identify a procedural vehicle for the adjudication of Mr. Chalmers's meritorious claim that he is constitutionally ineligible for the

death penalty.

Here, due process and equity demand that Mr. Chalmers be given an opportunity to present his claim. Mr. Chalmers's case is analogous to *Brumfield* v. Cain, 135 S.Ct 2269 (2018), where the United States Supreme Court found a hearing was mandated. The Court 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 was 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 had adaptive behavior deficits where he had low birth weight, was diagnosed as learning disabled and placed in special education classes, read at the fourth 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. Where Mr. Chalmers has presented proof at least as strong as the proof found to require a hearing in *Brumfield*, Tennessee Courts are obligated to provide a procedural remedy that affords him a due process hearing.

Tennessee is constitutionally obligated to enforce the decisions of the United States Supreme Court. *Marbury v. Madison*, 5 U.S. 137 (1803). Under Tennessee law, this Court has a plethora of procedural options it may designate as the appropriate vehicle for the adjudication of Mr. Chalmers's claim. Indeed. the Court

may designate any of the procedures discussed here or as it did in *Van Tran*, fashion a new procedure allowing Tennessee courts to apply *Moore* to Mr. Chalmers's case.

III. **If it finds that none of the existing remedies allow for the adjudication of Mr. Chalmers's claim, this Court must create a new procedural remedy as it did in *Van Tran*.**

If the Court finds that none of the previously recognized procedural vehicles is available to petitioners such as Mr. Chalmers, then the Court has constitutional obligation and authority to fashion one and should do so. *See Van Tran, supra*; *Moore-Pennoyer v. State*, supra, n. 2. Failure to correct the current untenable state of the law is to violate the Eighth and Fourteenth Amendments to the United States Constitution, and Art. 1, §§ 8 and 16 of the Tennessee Constitution.

CONCLUSION

This Court should grant Mr. Chalmers application and set this case briefing and oral argument.

Respectfully submitted,

Paul Bruno

Paul Bruno
BPR#17275
Bulloch, Fly, Hornsby & Evans, PLLC,
P.O. Box 398
Murfreesboro, TN 37133
Office: 615-896-4154
Facsimile: 615- 896-4152

CERTIFICATE OF SERVICE

I certify that on the 18th day of March, 2019, I placed a copy of this pleading in the U.S. Mail for delivery to Steve Jones, District Attorney General for the 30th Judicial District, 201 N. Poplar, Memphis, Tennessee 38008; Michael Stahl, Assistant Attorney General, P.O. Box 20207, Nashville, TN 37202.

Paul Bruno

Paul Bruno