

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON**

**DAVID KEEN v. STATE OF TENNESSEE**

**Shelby County Criminal Court  
P-25157**

**No. W2018-01059-CCA-R28-PD**

**Date Printed: 02/21/2019**

**Notice / Filed Date: 02/21/2019**

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**NOTICE - Case Dispositional Decision - Application to Reopen Denied/Dismissed**

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The Appellate Court Clerk's Office has entered the above action.

If an application for permission to appeal in the Tennessee Supreme Court is made pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and five copies of the application with the Appellate Court Clerk. \*\* You must attach a copy of the Opinion/Order of the Court of Criminal Appeals to each application. The application must be filed within 60 days after the Court's judgment was filed.

**No extensions will be granted.**

James M. Hivner  
Clerk of the Appellate Courts

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FILED

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**Criminal Court for Shelby County  
No. P-25157**

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**ORDER**

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. Tenn. Code Ann. § 40-30-117(c); see also Tenn. S. Ct. R. 28, § 10(B). The State has filed a response in opposition to the application.

In February 1991, the Petitioner pled guilty to first degree murder in the perpetration of the rape of eight-year-old Ashley (Nikki) Reed. A Shelby County jury sentenced the Petitioner to death. On direct appeal, the Tennessee Supreme Court reversed the sentence due to an error in the jury instructions and remanded the case for a new sentencing hearing. State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994). On August 15, 1997, a jury again sentenced the Petitioner to death, and our supreme court affirmed the sentence of death on direct appeal. State v. Keen, 31 S.W.3d 196, 202 (Tenn. 2000). In May 2001, the Petitioner sought post-conviction relief. Following an evidentiary hearing, the post-conviction court denied relief, and this Court affirmed the denial. See David Keen v. State, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258 (Tenn. Crim. App. June 5, 2006), perm. app. denied (Tenn. Oct. 30, 2006).

In August 2010, the Petitioner filed a motion to reopen post-conviction proceedings alleging that new scientific evidence of his intellectual disability established his "actual innocence" of the jury's sentencing verdict. See Tenn. Code Ann. § 40-30-117(a)(2). The post-conviction court denied relief, and this Court denied the Petitioner's application for permissive review. David Keen v. State, No. W2011-00789-CCA-R28-PD (Tenn. Crim. App., at Jackson, June 29, 2011). The Tennessee Supreme Court granted the Petitioner's application for review but ultimately affirmed the post-conviction court and this Court's denial of relief. Keen v. State, 398 S. W.3d 594 (Tenn. 2012) (holding that the post-conviction court properly denied the Petitioner's motion to reopen because

Coleman v. State, 341 S.W.3d 221 (Tenn. 2011), did not establish a new constitutional right requiring retrospective application pursuant to Code section 40-30-117(a)(1) and a claim of actual innocence made pursuant to Code section 40-30-117(a)(2) does not include a claim of ineligibility for the death penalty).

In 2015, the Petitioner filed a petition for writ of error coram nobis, alleging that newly-discovered evidence of his intellectual disability precluded the imposition of the death penalty in his case. The coram nobis court, relying on Payne v. State, 493 S.W.3d 478 (Tenn. 2016), denied relief. On direct appeal, this Court affirmed the court's judgment on appeal, declining the Petitioner's urging to overrule Payne and further concluding that the coram nobis petition was untimely filed "by nearly two decades." David Keen v. State, No. W2016-02463-CCA-R3-ECN, 2017 WL 3475438, at \*2 (Tenn. Crim. App. Aug. 11, 2017), perm. app. denied (Tenn. Dec. 11, 2017). This Court also declined the Petitioner's request to advise him of the "proper way to raise the claim of intellectually disabled." Id. at \*3.

On December 12, 2017, the Petitioner filed a motion to reopen his petition for post-conviction relief, relying upon the United States Supreme Court decision in Moore v. Texas, 137 S. Ct. 1039 (2017), which he argues created a newly established constitutional right that must be applied retroactively precluding the imposition of the death penalty for intellectually disabled defendants. Tenn. Code Ann. § 40-30-117(a)(1). The post-conviction court denied the motion to reopen, and the Petitioner has timely filed an application for permission to appeal with this Court. Tenn. Code Ann. § 40-30-117; see also Tenn. S. Ct. R. 28, § 10(B).

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
- (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.

The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. Id. at (c).

The Petitioner asserts that he is entitled to relief under Tennessee Code Annotated section 40-30-117(a)(1) in that the decision of the United States Supreme Court in Moore created a new constitutional right that would provide an avenue of relief. In particular, he contends that Moore established the right not to be executed if a defendant is intellectually disabled under current medical standards. This Court must first assess whether the Moore decision created a new constitutional right that would afford any relief to the Petitioner. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

“For purposes of this part, 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.”

Further, the courts have determined that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] . . . if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” Teague v. Lane, 109 S. Ct. 1060, 1070 (1989) (citations omitted); see also Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001).

In Moore, the Supreme Court held the analysis by the Texas Court of Criminal Appeals (“TCCA”) of the intellectual disability of the defendant was unconstitutional. Moore, at 1044. The TCCA utilized factors created in Ex Parte Jose Garcia Briseno, 135 S.W.3d 1 (Texas Crim. App. 2004), to determine if Moore was intellectually disabled. In its ruling, the Supreme Court did not establish a newly created constitutional right to be retroactively applied but rather based its decision upon an application of its prior rulings in Atkins v. Virginia, 122 S. Ct. 2242 (2002), and Hall v. Florida, 134 S. Ct. 1986 (2014). The Supreme Court found error in the TCCA’s use of its own self-created factors to determine the intellectual disability of the defendant rather than “the generally accepted, uncontroversial intellectual-disability diagnostic definition.” Moore, at 1045. The Supreme Court stated that the TCCA’s “conclusion that Moore’s IQ scores established that he is not intellectually disabled is irreconcilable with Hall. Hall instructs that, where an IQ score is close to, but above 70, courts must account for the test’s ‘standard error of measurement.’” Id. at 1049 (citing Hall, 134 S. Ct. at 1995, 2001).

Moore is clearly derivative of Atkins and Hall and applied the standards created in the prior cases to the specific proceedings of the TCCA, abrogating the prior TCCA ruling in Briseno. The Supreme Court stated

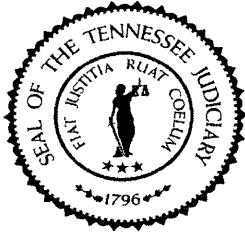
“By design and in operation, the Briseno factors “creat[e] an unacceptable risk that persons with intellectual disability will be executed,” Hall, 572 U.S. at —, 134 S. Ct. at 1990. After observing that persons with “mild” intellectual disability might be treated differently under clinical standards than under Texas’ capital system, the CCA defined its objective as identifying the “consensus of Texas citizens” on who “should be exempted from the death penalty.” Briseno, 135 S.W.3d at 6 (emphasis added). Mild levels of intellectual disability, although they may fall outside Texas citizens’ consensus, nevertheless remain intellectual disabilities, see Hall, 572 U.S., at — — —, 134 S. Ct. at 1998-99; Atkins, 536 U.S. at 308, and n.3, 122 S. Ct. 2242; AAIDD–11 at 153, and States may not execute anyone in “the entire category of [intellectually disabled] offenders,” Roper, 543 U.S. at 563-564, 125 S. Ct. 1183 (emphasis added); see supra, at 1048.”

Moore at 1051. As with the prior Supreme Court ruling in Hall, the Moore decision did not enlarge the class of individuals affected by the Supreme Court ruling in Atkins but directed the application of the principles established in Atkins. Therefore, it follows that the Supreme Court’s decision in Moore did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this Petitioner’s case. Moore does not create a right under which the Petitioner may be granted relief as any proceeding would be predicated upon the exercise of the right established in Atkins. See also Pervis Tyrone Payne v. State, No. W2018-01048-CCA-R28-PD (Tenn. Crim. App., at Jackson, Jan. 4, 2019) (Order); Vincent Sims v. State, No. W2017-02396-CCA-R28-PD (Tenn. Crim. App., at Jackson, Apr. 24, 2018) (Order), perm. app. denied (Tenn. Aug. 8, 2018); Akil Jahi aka Preston Carter v. State, No. W2017-02527-CCA-R28-PD (Tenn. Crim. App., at Jackson, Apr. 24, 2018) (Order), perm. app. denied (Tenn. Sept. 17, 2018); Michael Eugene Sample v. State, No. W2017-02370-CCA-R28-PD (Tenn. Crim. App., at Jackson, Apr. 23, 2018)(Order), perm. app. denied (Tenn. Sept. 17, 2018); James Dellinger v. State, No. E2018-00130-CCA-R28-PD (Tenn. Crim. App., at Knoxville, Apr. 19, 2018)(Order), perm. app. denied (Tenn. Aug. 8, 2018).

Moreover, the Petitioner’s invitation for this Court to create a mechanism for collateral review of his intellectual disability claim, beyond that which is statutorily prescribed, is declined. Likewise, the Petitioner cannot now claim new scientific evidence of intellectual disability pursuant to Code section 40-30-117(a)(2) as that claim is foreclosed by existing precedent and the law of the case.

The Petitioner has failed to satisfy any ground for reopening a post-conviction petition. Accordingly, the post-conviction court did not abuse its discretion in denying the motion to reopen and the Petitioner's application for permission to appeal is DENIED. Tenn. Code Ann. § 40-30-117(c) (stating that "[t]he court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion"). Because it appears that the Petitioner is indigent, the costs on appeal are taxed to the State of Tennessee.

JUDGE J. ROSS DYER  
PRESIDING JUDGE JOHN EVERETT WILLIAMS  
JUDGE CAMILLE R. McMULLEN



Court of Criminal Appeals – Western Division  
Appellate Court Clerk's Office - Jackson  
Supreme Court Building  
6 Hwy 45 Bypass  
Jackson, TN 38301  
(731) 423-5840

Amy Harwell  
Office of Federal Public Defender  
810 Broadway - Suite 200  
Nashville TN 37203

Re: W2018-01059-CCA-R28-PD - DAVID KEEN v. STATE OF TENNESSEE

Notice: Case Dispositional Decision - Application to Reopen Denied/Dismissed

Attached to this cover letter, please find the referenced notice issued in the above case. If you have any questions, please feel free to call our office at the number provided.

cc: Amy Harwell  
Zachary Thomas Hinkle  
Judge Chris Craft