CAPITAL CASE

No._____

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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David Keen,
*Petitioner,*
v.

STATE OF TENNESSEE
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

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# PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTION PRESENTED

When Mr. Keen first attempted to prove his ineligibility for execution, the Tennessee Supreme Court held that the state has "no business executing the intellectually disabled," and invited Mr. Keen to continue to pursue relief. *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012). Subsequently, the Tennessee courts have held that there is no statutory remedy available for prisoners like Mr. Keen. *Payne v. State*, 493 S.W. 3d 478, 492 (Tenn. 2016); *Dellinger v. State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701 at *6 (Tenn. Crim. App. April 17, 2019). Twice the Tennessee Supreme Court invited the Tennessee legislature to "create a procedure that accommodates prisoners on death row whose intellectual disability claims cannot be raised under [current Tennessee law]." *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012); *accord Payne v. State*, 493 S.W. 3d 478, 492 (Tenn. 2016). However, as the Court of Criminal Appeals recently noted, "[t]he General Assembly is in its seventh session since *Keen* was filed and no legislation establishing a procedure mentioned in *Keen* has become law." *Dellinger*, 2019 WL 1754701 at *6.

The question presented by this petition is:

> Does the Constitution permit Tennessee to evade the mandate of *Atkins v. Virginia*, 536 U.S. 304 (2002) by legislative inaction and judicial abdication?

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

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The Shelby County Criminal Court denied Mr. Keen's motion to reopen on May 8, 2018. App. 001. The Tennessee Court of Criminal Appeals ("CCA") denied Mr. Keen's application for permission to appeal on February 21, 2019. App. 033. The Tennessee Supreme Court denied discretionary review. App. 038.

## RELATED PROCEEDINGS

The Tennessee courts affirmed the judgment in Mr. Keen's criminal case. *State v. Keen*, 31 S.W.3d 196 (Tenn. 2000). This Court denied a petition for writ of certiorari. *Keen v. Tennessee*, 532 U.S. 907 (2001). The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. *Keen v. State,* No. W2004–02159–CCA–R3–PD, 2006 WL 1540258, at *53 (Tenn. Crim. App. June 5, 2006), *perm. app. denied* (Tenn. Oct. 30, 2006). The federal district court denied federal habeas relief. *Keen v. Carpenter*, 2:07-cv-02099 (W.D. Tenn. 2015). The United States Court of Appeals for the Sixth Circuit has stayed the appeal of that denial pending the resolution of Mr. Keen's intellectual disability claims in state court. *Keen v. Westbrooks*, No. 15-5597, R. 26-1 (6th Cir. 2017).

## JURISDICTION

The Tennessee Supreme Court denied permission to appeal on August 14, 2019. The mandate of the Tennessee Supreme Court issued on August 15, 2019. On November 6, 2020, the Circuit Justice granted Mr. Keen an extension of time until January 17, 2020 to file this petition. Mr. Keen has timely filed this petition. This Court has jurisdiction under 28 U.S.C. §1257.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution. The Eighth Amendment provides in pertinent part: "[N]or [shall] cruel and unusual punishments [be] inflicted." The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Tennessee courts have rejected every attempt by counsel for Mr. Keen to present proof that he is intellectually disabled and ineligible for execution. Counsel has presented the claim pursuant to every procedural vehicle available under state law, yet Tennessee courts have found all to be inapt. In 2010, counsel filed a motion to reopen in the state post-conviction trial court under Tennessee Code Annotated § 40-30-117 to present this new evidence of intellectual disability. The Tennessee Supreme affirmed the trial court's denial of relief, finding that the post-conviction procedures act did not permit review of the claim. *Keen v. State,* 398 S.W.3d 594 (Tenn. 2012); *David Keen v. State,* No. W2011-00789-CCA-R28-PD (Tenn. Crim. App. June 29, 2011). Although the Tennessee courts held that the motion to reopen was not the proper procedural vehicle to adjudicate his claim, they reaffirmed that the public policy of the State of Tennessee opposes the execution of all individuals with intellectual disability and invited Mr. Keen to continue to pursue relief and invited the

Tennessee General Assembly to create a procedural vehicle for his claim:

> We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled. Our holding today is only that Tenn. Code Ann. § 40-30-117(a)(l) and (2) do not provide Mr. Keen with a vehicle to assert that he is intellectually disabled. *Our decision does not foreclose any other remedy currently available to Mr. Keen. If he is indeed intellectually disabled, this issue deserves to be heard.* Likewise, it does not foreclose the ability of the General Assembly to create a procedure that accommodates prisoners on death row whose intellectual disability claims cannot be raised under Tenn. Code Ann. § 40-30-ll7(a)(l) or (2).

*Keen,* 398 S.W.3d at 613 (emphasis added).

In 2015, Mr. Keen filed a petition for writ of *error coram nobis* again seeking to present evidence of his intellectual disability. The state post-conviction trial court denied that petition as untimely, and the appellate courts affirmed. *Keen v. State,* No. W2016-02463-CCA-R3-ECN, 2017 WL 3475438 (Tenn. Crim. App. Aug. 11, 2017), *perm. app. denied* (Tenn. Dec. 11, 2017).

In January 2018, Mr. Keen again filed a motion to reopen to present evidence of his intellectual disability. The post-conviction trial court denied Mr. Keen's motion to reopen, and the Tennessee Court of Criminal Appeals denied his application for permission to appeal, both reasoning that "*Moore* did not announce a new constitutional rule requiring retrospective application to permit reopening of the post-conviction petition in this Petitioner's case." CCA 2019 Order, App. 033; *accord* Trial Court Order, App. 001 at 30. The CCA also held that "the Petitioner cannot now claim new

scientific evidence of intellectual disability pursuant to Code § 40-30-117(a)(2) as that claim is foreclosed by existing precedent and the law of the case." CCA 2019 Order, App. 033.

Mr. Keen has attempted to make his intellectual disability claim conform to one of the existing procedural mechanisms available under Tennessee law. If Tennessee courts are correct that none of them fit, Tennessee is constitutionally required to create a procedural mechanism by which he can bring his claim that he is categorically ineligible for the death penalty because of his intellectual disability. Either the Tennessee legislature or the courts could create this mechanism, but both have failed to do so. Indeed, the Tennessee Supreme Court has acknowledged its inherent authority to create procedural mechanism for the adjudication of constitutional claims where none yet exists under state law. *State v. Hall*, E1997-00344-SC-DDT-DD (Tenn. December 3, 2019) (citing *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999)). Yet the state courts continually refuse to do so for Mr. Keen's intellectual disability claim. Despite Mr. Keen's argument that, under *Moore*, Tennessee's failure to provide a remedy for the adjudication of the claim would render the post-conviction statute unconstitutional, the trial court did not address the constitutional implications of a finding that the case could not be reopened. App. 001 at 4-6. The CCA held that "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." App. 033. The Tennessee Supreme Court simply refused review. App. 038.

The Tennessee courts have closed the courthouse doors to Mr. Keen. Without clarification from this Court, Tennessee will not only execute an intellectually disabled man, but will, through inaction, limit the constitutional protection recognized by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002).

## REASON THE WRIT SHOULD BE GRANTED

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

No less than three times since *Atkins v. Virginia* was decided, this Court has reaffirmed its categorical exclusion of the intellectually disabled from execution and insisted that the States cannot create legal standards that prevent the vindication of meritorious ID claims. *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Hall v. Florida*, 134 S. Ct. 1986 (2014). Here, Tennessee simply refuses to apply any standard at all, and, due to legislative inertia and judicial abdication, refuses to grant Mr. Keen a merits hearing.

In Montgomery *v. Louisiana,* 136 S. Ct. 718 (2016), this Court held that states must provide a forum for vindication of a constitutional protection: "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." *Id.* at 732.

The Tennessee Court of Criminal Appeals recognized the significance of *Montgomery* in denying relief to another inmate trying to find a procedural mechanism to adjudicate his intellectual disability claim:

> We do not dispute that *Montgomery v. Louisiana* may very well entitle Petitioner to relief. However, this relief cannot be granted through Tennessee Rule of Criminal Procedure 36.1.

*Dellinger v. State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701 at *7 (Tenn. Crim. App. April 17, 2019). The court then proceeded to find each other procedural mechanism under which he attempted to proceed to be inapt.

Though the Tennessee Supreme Court has twice stated that Tennessee has no interest in executing the intellectually disabled, it has failed to either identify or create a procedural vehicle for the vindication of such claims. *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012) ("We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled."); *accord Payne v. State*, 493 S.W.3d 478 (Tenn. 2016) (same). The Tennessee courts' refusal to identify a remedy has closed the door to numerous intellectually disabled inmates' exemption claims, threatening to undermine *Atkins*. *See, e.g. Ivy v. State*, No. W2016-02454-CCA-R3-ECN, 2018 WL 625127 (Tenn. Crim. App. Jan. 30, 2018), *appeal denied* (May 18, 2018), *cert. denied*, 139 S. Ct. 804 (2019) (finding that all avenues pursued by that defendant were procedurally invalid and declining to identify an available procedure); *Sims v. State*, No. W2014-00166-CCA-R3-PD, 2014 WL 7334202 (Tenn. Crim. App. Dec. 23, 2014) (finding there is no independent cause of action to present a claim of intellectual disability—outside of that provided for at the initial trial stage); *Payne*

*v. State,* No. W2013-01248-CCA-R3-PD, 2014 WL 5502365 (Tenn. Crim. App. Oct. 30, 2014); *Chalmers v. State*, No. W2013-02317-CCA-R3-PD, 2014 WL 2993863 (Tenn. Crim. App. June 30, 2014); *Suttles v. State*, No. E2013-01016-CCA-R3-PD, 2014 WL 2902271 (Tenn. Crim. App. June 25, 2014); *Jahi v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502 (Tenn. Crim. App. Mar. 13, 2014); *Porterfield v. State*, No. W2012-00753-CCA-R3-PD, 2013 WL 3193420 (Tenn. Crim. App. June 20, 2013); *Howell v. State*, No. W2009-02426-CCA-R3-PD, 2011 WL 2420378 (Tenn. Crim. App. June 14, 2011), *abrogated by Moore v. Texas*, 137 S. Ct. 1039 (2017); *Sims v. State*, No. W2008-02823-CCA-R3-PD, 2011 WL 334285 (Tenn. Crim. App. Jan. 28, 2011); *Smith v. State*, No. E2007-00719-CCA-R3-PD, 2010 WL 3638033 (Tenn. Crim. App. Sept. 21, 2010), *aff'd in part, vacated in part*, 357 S.W.3d 322 (Tenn. 2011); *Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009) (recognizing that under Tennessee law, inmate with I.Q. scores of 70, 73, and 75 did not qualify as intellectually disabled, but that under this standard, "it is our view that some mentally retarded defendants are likely to be executed in Tennessee"); *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006); *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005).

In light of the absence of any process for raising post-conviction *Atkins* claims, the Tennessee Supreme court has twice invited the legislature to create a procedural remedy – to no avail. *Payne v. State*, 493 S.W. 3d 478, 492 (Tenn. 2016) (encouraging the General Assembly "to consider whether another appropriate procedure should be

enacted") *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012) (noting the ruling "does not foreclose the ability of the [Tennessee] General Assembly to create a procedure that accommodates prisoners on death row whose intellectual disability claims cannot be raised under Tenn. Code Ann. § 40-30-117(a)(1) or (2)").

In the most recent discussion of the issue, the Court of Criminal Appeals highlighted the legislature's inaction:

> It has been a few months more than eight years since *Keen* was filed on December 20, 2012. The General Assembly is in its seventh session since *Keen* was filed and no legislation establishing a procedure mentioned in *Keen* has become law.

*Dellinger v. State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701 at *6 (Tenn. Crim. App. April 17, 2019).

Mr. Keen is ineligible for execution because he is intellectually disabled. He submitted to the state courts reports by two eminently qualified experts who each conclude that Mr. Keen's functional IQ is within the intellectually disabled range. Daniel Reschly, Ph.D., of Vanderbilt University, tested his IQ in 2010 using the WAIS-IV. Mr. Keen's full-scale raw IQ on that test was 67, which puts his IQ in the bottom 2% of the population. In 2008, Paul Connor, Ph.D., a neuropsychologist who specializes in Fetal Alcohol Spectrum Disorders, administered the WAIS-III. Mr. Keen's adjusted full-scale IQ on that test was 70.7. Both Dr. Reschley and Dr. Connor concluded that Mr. Keen met the standard for a diagnosis for intellectual disability.

The disability indicated by these scores is supported by the fact that Mr. Keen

had significant adaptive deficits prior to age eighteen. A social services report documented Mr. Keen's problems with language before he was three years old. Early records show that his adoptive parents reported that when they adopted him at age 4.5, he did not know colors by name or speak clearly. He struggled with reading and writing since early childhood. He was retained in kindergarten, was in special education, had consistently poor grades, and dropped out of high school in the middle of his junior year with Ds and Fs in his core subjects. Mr. Keen also has always had significant issues with money, time, and number concepts. Mr. Keen had a "pattern of excessive activity level, distractibility, inattention along with difficulties in understanding social relationships due to cognitive deficits" which stemmed from the time he was a toddler into his high school years. "These difficulties frequently interfered with the formation of normal peer relationships." Mr. Keen's teachers and adoptive parents persistently observed that he had very few close friends; kids made fun of, ridiculed, and ostracized him; he was unable to understand social cues; and he tended to make friends with younger children. As Dr. Reschly noted, "these symptoms are typically comments about persons with mild mental retardation who struggle to perform tasks they do not understand due to significant intellectual limitations." Dr. Reschly also found that Mr. Keen "appears to have suffered from his gullibility and naiveté" based on reports in mental health records. "[I]t appears that Mr. Keen could not understand the likely

consequences of his behavior due to limitations in thinking and mental processing."

Though proof of etiology is never required for a diagnosis of intellectual disability, experts have diagnosed Mr. Keen with Fetal Alcohol Spectrum Disorder, a likely cause of his disability. Richard Adler, M.D., who diagnosed Mr. Keen, concluded:

> In [Mr. Keen's] case, the amount of data present is of a type and nature much more extensive than required by the published and well-accepted diagnostic criteria. In this case, there is a childhood photograph consistent with FAS, facial features present on examination, extensive childhood records, neuropsychological testing that shows domains of impairment between two and three times the number required, and sophisticated neuroradiological studies (e.g., volumetric and morphometric analysis of the MRI). Thus, *the diagnoses rendered here are established via an abundance of evidence that is obtained from a multitude of sources, a variety of methods—ultimately representing a prominent degree of convergence*.

Mr. Keen's proof of his colorable claim is overwhelming; no one has claimed otherwise. Despite the unrebutted proof that Mr. Keen is intellectually disabled and exempt from execution, Tennessee courts have completely shut him out of for want of a procedural remedy. The Court should not permit Tennessee permitted to execute Mr. Keen, as States may not execute anyone in "the entire category of [intellectually disabled] offenders." *Roper v. Simmons*, 543 U.S. 551, 563–564 (2005).

Where there is a constitutional right there must be a remedy. Such is a bedrock principle of our judicial system. *Marbury v. Madison*, 1 Cranch 137, 162 (1803) ("The very essence of civil liberty certainly consists in the right of every individual 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*, 136 S. Ct. 718 (2016). *Moore, Brumfield, Hall* and *Atkins* place a constitutional obligation on the State of Tennessee to provide a forum for the adjudication of Mr. Keen's intellectual disability exemption claim.

This Court must now allow Tennessee to subvert the constitutional protections recognized by this Court in *Atkins*; the courtroom doors should be opened to Mr. Keen.

## CONCLUSION

The writ should be granted.

Respectfully submitted,

*/s/ Kelley J. Henry*
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certiorari, and accompanying appendix, were served upon counsel for Respondent, Zachary Hinkle, 425 Fifth Avenue North, Nashville, Tennessee, 37203, via email and United States Mail, this 17th day of January, 2020.

*/s/ Kelley J. Henry*
Kelley J. Henry