CAPITAL CASE

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

David Keen,
Petitioner,
v.

STATE OF TENNESSEE
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX CONTENTS

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VIII

Filed 5-8-18
Richard DeSaussure, Clerk
BY _____ D.C.

DAVID KEEN,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

P-25157

ORDER DENYING "MOTION TO REOPEN POST-CONVICTION PETITION"

I. Introduction

This matter is before the Court on Petitioner's December 12, 2017, motion to reopen his petition for post-conviction relief. Petitioner, David Keen, by and through counsel, has filed this motion to reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is entitled to relief based upon a new rule of law as announced in the United States Supreme Court's opinion in *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039 (2017). The State filed a written response January 5, 2018, and additional filings by both parties followed.

After reviewing the parties' filings and the relevant authorities, and for the reasons stated within this order, the instant Motion to Reopen is hereby DENIED.

II. Procedural History[1]

Trial

Mr. Keen pled guilty to the March 1990 first degree murder and aggravated rape of the eight-year-old daughter of his then-girlfriend. Following a February 1991 sentencing hearing, a Shelby County jury convicted Petitioner of first degree murder and sentenced him to death. On direct appeal, the Tennessee Supreme Court reversed Petitioner's death sentence based upon the trial court's improperly instructing the jury at the sentencing phase of the trial. *See State v. Keen*, 926 S.W.2d 727 (1994).

Following remand, another capital sentencing trial was held, and a Shelby County jury again sentenced the Petitioner to death. This death sentence was affirmed on direct appeal. *State v. Keen*, 31 S.W.3d 196 (Tenn. 2000).

Post-Conviction

Mr. Keen subsequently filed a timely petition for post-conviction relief. In August 2004, following a hearing, this court issued a written order denying the post-conviction petition. The Court of Criminal Appeals affirmed this decision on direct appeal. *See David Keen v. State*, No. W2004-02159-CCA-R3-PD (Tenn. Crim. App. June 5, 2006). On October 30, 2006, the Tennessee Supreme Court denied the Petitioner's application for permission to appeal.

Federal Habeas Corpus Proceedings

Mr. Keen subsequently filed a timely petition for a writ of habeas corpus in federal court. The United States District Court for the Western District of Tennessee denied that petition. *See Keen v. Carpenter*, No. 07-2099-SHM-dkv (W.D. Tenn. May 5, 2015). Mr.

[1] Judge John P. Colton, Jr. (ret'd) presided over the Petitioner's trial. This court presided over his post-conviction proceedings and all subsequent proceedings involving the Petitioner.

Keen's appeal to the Sixth Circuit Court of Appeals is pending.

Other State Court Proceedings

Mr. Keen has filed two prior unsuccessful motions seeking to reopen his post-conviction proceeding. In August 2010, Mr. Keen filed a motion to reopen based upon what he claimed to be newly discovered evidence of intellectual disability which he asserted rendered him ineligible to be executed. This court denied the motion, and the Tennessee Court of Criminal Appeals[2] and Tennessee Supreme Court affirmed this court's ruling. *See Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).[3]

In 2016, Mr. Keen filed a motion to reopen his post-conviction proceeding arguing he was entitled to relief based upon the United States Supreme Court's majority opinions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *Montgomery v. Louisiana*, 136 S. Ct. 718 2016), and Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). This court issued an order denying relief, and the appellate courts denied permission to appeal. *David Keen v. State*, No. W2016-02377-CCA-R28-PD (Tenn. Crim. App. Mar. 8, 2017), *perm. app. denied*, (Tenn. May 24, 2017).

Additionally, in 2015 Mr. Keen filed a petition for writ of error coram nobis, again claiming newly discovered evidence of his intellectual disability entitled him to relief from his sentence of death. This Court dismissed the coram nobis petition as untimely, and the Court of Criminal Appeals affirmed this Court's ruling. *See David Keen v. State*, No. W2016-02463-CCA-R3-ECN (Tenn. Crim. App. Aug. 11, 2017), *perm. app. denied*, (Tenn. Dec. 11, 2017).

[2] *See David Keen v. State*, No. W2011-00789-CCA-R28-PD (Tenn. Crim. App. June 29, 2011).
[3] This prior proceeding will be explored in greater detail later in this order.

III. Applicable Law

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

> Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief . . . within one (1) year of the final action of the highest state appellate court to which an appeal is taken . . . ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, . . . a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." Id. These limited circumstances include the following:
>
> > (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. Such 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;
> >
> > (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 in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such 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.
>
> (Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:
>
> > The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law

> or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003) (some alterations added). *Moore* was decided March 28, 2017, so Petitioner's motion is timely.

The post-conviction statutes further provide,

> [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. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122. Furthermore, "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." *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718, 729 (2016).

A motion to reopen "*shall be denied* unless the factual allegations, if true, meet the requirements of [Tenn. Code Ann. § 40-30-117](a)." Tenn. Code Ann. § 40-30-117(b) (emphasis added).

IV. Analysis

Petitioner's Claims under Moore

Petitioner summarizes his current claims as follows:

> The Supreme Court in *Moore* gives explicit direction to states that they are required to consider a death row inmate's claim that s/he is ineligible for the death penalty due to intellectual disability. The *Moore* Court instructs that the Eighth

> Amendment "'restrict[s] . . . the State's power to take the life of *any* intellectually disabled individual.'" *Moore,* 137 S. Ct. at 1048 *(quoting Atkins v. Virginia,* 536 U.S. 304, 321 (2002) (emphasis added in *Moore).* Relying on *Roper v. Simmons,* the *Moore* Court reminds states that the Eighth Amendment's prohibition on cruel and unusual punishment places a "'duty [on] the government to respect the dignity of all persons.'" *Id. (quoting Hall v. Florida,* 572 U.S. at ___, 134 S. Ct. 1986, 1992 (2014), *quoting Roper,* 543 U.S. at 550). Tennessee cannot discharge its duty to respect the dignity of David Keen unless it provides a remedy for the adjudication of his claim that he is ineligible for execution because he is intellectually disabled.

Keen 2017 motion to reopen, at 3-4. As the petitioner notes, this issue is slightly different than claims raised earlier by other death row petitioners who argued *Moore* entitled them to reopen their post-conviction proceedings. For instance, in a *Moore* claim filed in this Court, Shelby County death row inmate Vincent Sims argued as follows:,

> *Moore* now requires this Court to adjudicate [Petitioner's] intellectual disability claim using current medical standards for intellectual disability included in the American Association on Intellectual and Developmental Disabilities' *Intellectual Disability: Definition, Classification, and Systems of Support* (11th ed. 2010) (AAIDD-11) and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5).
>
> Because *Moore* establishes a new substantive rule of law to which courts must give (and have given) retroactive effect, *Moore* is retroactive under [Tennessee Code Annotated section] 40-30-117(a)(1). . . . [Petitioner] is intellectually disabled under the Eighth Amendment and *Moore*. [Petitioner] therefore is entitled to proceed via this motion to reopen, and he is entitled to post-conviction relief.

Vincent Sims v. State, Shelby Co. Crim. Ct. (Div. VIII) No. P-25898, Motion to Reopen, at 1-2 (filed July 25, 2017).

To place Mr. Keen's issues in the proper context, the court will now summarize previous federal and state case law related to intellectual disability claims as well as the petitioner's previous motion to reopen, in which he raised intellectual disability-based challenges to his death sentence.

Relevant Case Law

Intellectual Disability and the Death Penalty: Early History

The Tennessee Supreme Court's opinion in the appeal of Mr. Keen's 2010 motion to reopen summarizes the early history of intellectual disability jurisprudence in death penalty cases:

> In 1990, the Tennessee General Assembly decided that intellectually disabled persons who commit first degree murder should not be executed. Tenn. Code Ann. § 39–13–203(b). Tenn. Code Ann. § 39–13–203(a) defines "intellectual disability" in terms of a three-part test. In order to be found intellectually disabled, a person must demonstrate: "(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age." In addition, Tenn. Code Ann. § 39–13–203(c) provides that "[t]he burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is upon the defendant. The determination of whether the defendant had intellectual disability at the time of the offense of first degree murder shall be made by the court."
>
> This Court previously addressed motions to reopen in *Van Tran v. State,* 6 S.W.3d 257 (Tenn. 1999). In 1995, death row inmate Heck Van Tran filed a petition for post-conviction relief, asserting that he could not be executed because of the prohibition on executing intellectually disabled persons in Tenn. Code Ann. § 39–13–203(b). At the hearing on Mr. Van Tran's petition, two psychologists presented conflicting opinions regarding whether Mr. Van Tran's I.Q. was 67 or 72. Their opinions were based on Mr. Van Tran's performance on the Wechsler Adult Intelligence Scale Revised ("WAIS–R"). The post-conviction court credited the higher score offered by the state's psychologist and dismissed Mr. Van Tran's petition. Both the Court of Criminal Appeals and this Court affirmed the post-conviction court's decision. *Van Tran v. State,* No. 02C01–9803–CR–00078, 1999 WL 177560, at *6 (Tenn. Crim. App. Apr. 1, 1999); *Van Tran v. State,* 6 S.W.3d 257, 274.
>
> Mr. Van Tran was re-tested in 1999 using the newer third edition of the Wechsler Adult Intelligence Scale ("WAIS–III"). At that time, the psychologist who administered this test determined that Mr. Van Tran's full-scale I.Q. was actually 65. In February 2000, Mr. Van Tran filed a motion to reopen his post-conviction proceeding, arguing that this new test result constituted "new scientific evidence" of his actual innocence under Tenn. Code Ann. § 40–30–117(a)(2). The post-conviction court denied his motion, and the Court of Criminal Appeals declined to grant him permission to appeal.

We accepted Mr. Van Tran's appeal. Following oral argument, we requested the parties to file supplemental briefs addressing the issue of whether executing an intellectually disabled person violated the "cruel and unusual punishments" clauses of the Eighth Amendment to the United States Constitution or Article I, § 16 of the Tennessee Constitution. *Van Tran v. State,* 66 S.W.3d 790, 794 (Tenn. 2001).

This Court granted Mr. Van Tran's motion to reopen his post-conviction proceeding based on the first prong of Tenn. Code Ann. § 40–30–117(a), which provides for relief when an appellate court announces a new "constitutional right." Applying the three-prong test for determining whether a particular punishment is "cruel and unusual," we held that executing intellectually disabled persons violated "the evolving standards of decency that mark the progress of a maturing society." *Van Tran v. State,* 66 S.W.3d at 812. Our conclusion was buttressed by the fact that after the United States Supreme Court upheld the execution of mentally disabled individuals in *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989), sixteen states and the federal government had passed legislation prohibiting the practice. *Van Tran v. State,* 66 S.W.3d at 802. We also held that such executions were "grossly disproportionate" and served "no valid penological purpose." We therefore found that executing an intellectually disabled defendant would violate the state and federal constitutions. *Van Tran v. State,* 66 S.W.3d at 812.

We also determined that the holding in *Van Tran* should apply retroactively. This finding involved a two-part analysis. The first question was whether the "constitutional right" is actually "new." A constitutional rule is considered "new" when "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Van Tran v. State,* 66 S.W.3d at 811 (quoting *Teague v. Lane,* 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989)). Second, a new constitutional right is applied retroactively when it "materially enhances the integrity and reliability of the fact finding process of the trial." *Van Tran v. State,* 66 S.W.3d at 811 (citing *Meadows v. State,* 849 S.W.2d 748, 755 (Tenn. 1993)); *see also* Tenn. Code Ann. § 40–30–122 (2006) (citing the federal standard for retroactivity under *Teague v. Lane,* 489 U.S. at 307, 109 S. Ct. 1060). Applying these standards, we determined that our holding in *Van Tran* was new, and that it warranted retroactive application. *Van Tran v. State,* 66 S.W.3d at 811.

The following year, the United States Supreme Court overruled its holding in *Penry v. Lynaugh.* In *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), the Supreme Court employed an analysis similar to the one we used in *Van Tran* and likewise held that executing intellectually disabled persons constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. *Atkins v. Virginia,* 536 U.S. at 321, 122 S. Ct. 2242.

In December 2002, relying on the recent holdings of *Van Tran* and *Atkins* as new, retroactive constitutional rules, condemned prisoner Michael Wayne Howell filed a motion to reopen his post-conviction proceeding under Tenn. Code Ann. § 40–30–117(a)(1). *Howell v. State,* 151 S.W.3d 450, 453 (Tenn. 2004). The post-conviction court and Court of Criminal Appeals denied Mr. Howell's motion. However, we remanded Mr. Howell's intellectual disability claim to the post-conviction court for consideration under the "colorable claim" standard of Tenn. Sup.Ct. R. 28, §§ 2(H), 6(B)(6) (2012), rather than the "clear and convincing evidence" standard of Tenn. Code Ann. § 40–30–117(a)(4). *Howell v. State,* 151 S.W.3d at 460–63. Mr. Howell's position was unusual and almost unique: he was "able, for the first time in his motion to reopen . . ., to claim ineligibility for the death penalty" under the newly-decided *Van Tran* and *Atkins* decisions. *Howell v. State,* 151 S.W.3d at 453. Therefore, under these very specific facts, we held that applying the stringent "clear and convincing" evidence standard would violate due process notions of fundamental fairness. *Howell v. State,* 151 S.W.3d at 462–63.

We also addressed shortcomings in the expert proof Mr. Howell submitted to support his claim that he was intellectually disabled. The psychologist who examined Mr. Howell administered the WAIS–III, as well as the Stanford–Binet Intelligence Test–Fourth Edition and the Comprehensive Test of Nonverbal Intelligence ("CTONI"). Although Mr. Howell's score on the WAIS–III was above 70, his scores on the other tests were below 70. Thereafter, the psychologist prepared an affidavit stating that an I.Q. test score of 70 actually represented "a band or zone of sixty-five to seventy-five." *Howell v. State,* 151 S.W.3d at 453. Accordingly, the psychologist opined that Mr. Howell's level of intellectual functioning was "within the [intellectual disability] range of intelligence." *Howell v. State,* 151 S.W.3d at 453–54. The post-conviction court relied completely on Mr. Howell's raw score on the WAIS–III, ignored the other tests, and found, without a hearing, that Mr. Howell had not put forth a prima facie case of intellectual disability. *Howell v. State,* 151 S.W.3d at 454–55, 459.

When Mr. Howell's case reached this Court, we noted that "[w]ithout question," intellectual disability "is a difficult condition to accurately define" and that "[g]enerally accepted definitions within the scientific community will no doubt be refined as our knowledge in this area advances." *Howell v. State,* 151 S.W.3d at 457. Nevertheless, we found that Tenn. Code Ann. § 39–13–203 was "perfectly clear and unambiguous" and that it made "no reference to . . . any range of scores above the score of seventy." *Howell v. State,* 151 S.W.3d at 458. After noting that the Tennessee General Assembly had adopted a more relaxed definition of intellectual disability in the social services context that contained no reference to I.Q. test scores, we concluded that the General Assembly intended "to have a different, more restrictive, standard apply to defendants in a capital prosecution." *Howell v. State,* 151 S.W.3d at 458. Accordingly, we found that the General Assembly "intended to create . . . a bright line rule" when it defined

"intellectual disability" in Tenn. Code Ann. § 39–13–203(a)(1) as having a "functional intelligence quotient (I.Q.) of seventy (70) or below." *Howell v. State,* 151 S.W.3d at 457–58.

With regard to Mr. Howell's argument that the post-conviction court erred by disregarding the scores from other tests besides the WAIS–III, we noted that the United States Supreme Court had referred to the WAIS–III as "the standard instrument in the United States for assessing intellectual functioning." *Atkins v. Virginia,* 536 U.S. at 309 n. 5, 122 S. Ct. 2242. However, we also found that

> there is nothing in the record to indicate that other tests, such as the Stanford–Binet Intelligence Test–Fourth Edition, or the CTONI are not also accurate I.Q. tests. A court may certainly give more weight to one test, but should do so only after *fully analyzing and considering all evidence presented.* . . . A review under [the colorable claim standard] would necessarily include giving full and fair consideration to all tests administered to the petitioner.

Howell v. State, 151 S.W.3d at 459 (emphasis added).

Regrettably, several courts misconstrued our holding in *Howell* that Tenn. Code Ann. § 39–13–203(a)(1) established a "bright line rule" for determining intellectual disability. They understood this language to mean that courts could consider *only* raw I.Q. scores. Accordingly, these courts tended to disregard any evidence suggesting that raw scores could paint an inaccurate picture of a defendant's actual intellectual functioning[. . . .] This was an inaccurate reading of *Howell,* in which we took pains to say that the trial court should "giv[e] full and fair consideration to all tests administered to the petitioner" and should "fully analyz[e] and consider[ ] all evidence presented" concerning the petitioner's I.Q. *Howell v. State,* 151 S.W.3d at 459.

The case of *Coleman v. State* provided us with an opportunity to clarify and reinforce our holding in *Howell.* We held that "the plain language of Tenn. Code Ann. § 39–13–203(a)(1) does not limit to raw test scores the evidence regarding whether a criminal defendant is a person with intellectual disability." *Coleman v. State,* 341 S.W.3d at 230. We also recognized that there was an "'imperfect fit' between the clinical community's and the legal system's view of intellectual disability." *Coleman v. State,* 341 S.W.3d at 230 (quoting American Psychiatric Ass'n, *Diagnostic and Statistical Manual on Mental Disorders* xxxiii (4th ed. text rev. 2000) ("DSM–IV–TR")). In addition, we noted that "[t]he term 'intellectual disability' does not refer to a single disorder or disease, but rather to a heterogeneous set of disabilities that affect the level of a person's functioning in defined domains," and that "[p]ersons with intellectual disabilities frequently have other psychological and physical disorders." Thus, "the definition of 'intellectual disability' embraces a heterogeneous population ranging from persons who are totally dependent to persons who are nearly independent." But all of them "have a

significantly reduced ability to cope with and function independently in the everyday world." *Coleman v. State,* 341 S.W.3d at 230–31.

We then considered the four prior cases in which we had been called on to interpret and apply Tenn. Code Ann. § 39–13–203—*State v. Smith,* 893 S.W.2d 908 (Tenn. 1994); *Van Tran v. State,* 66 S.W.3d 790 (Tenn. 2001); *Howell v. State,* 151 S.W.3d 450 (Tenn. 2004); and *State v. Strode,* 232 S.W.3d 1 (Tenn. 2007). From these cases, we gleaned "six principles" that have guided our approach to this statute:

> (1) The public policy of this State, reflected in the considered decision of the Tennessee General Assembly to enact Tenn. Code Ann. § 39–13–203, opposes the execution of persons with intellectual disabilities.
>
> (2) The scope of Tenn. Code Ann. § 39–13–203 is more restrictive than the definition of "intellectual disability" in Tenn. Code Ann. § 33–1–101(16) applicable to the provision of support services to persons with intellectual disabilities.
>
> (3) The Court will give effect to the plain and ordinary meaning of the statute's language.
>
> (4) The Court will decline to "read in" language into the statute that the General Assembly did not place there.
>
> (5) The Court's application of the statute may be guided and informed by the clinical standards, criteria, and practices customarily used to assess and diagnose intellectual disability.
>
> (6) In instances where the proper application of the statute is not clear, the Court may confirm its interpretation of the statute by considering its legislative history, prior interpretations of the statute, similar statutes in other jurisdictions, and the clinical standards, criteria, and practices customarily used to assess and diagnose intellectual disability.

Coleman v. State, 341 S.W.3d at 235–40 (footnotes omitted). With regard to the importance of raw I.Q. test scores, we observed that:

> While a person's I.Q. is customarily obtained using standardized intelligence tests, *see Van Tran v. State,* 66 S.W.3d at 795; DSM–IV–TR, at 41, the statute does not provide clear direction regarding how a person's I.Q. should be determined and does not specify any particular test or testing method that should be used. *Howell v. State,* 151 S.W.3d at 459. In fact, the statute does not even employ the words "test" or "score."

Coleman v. State, 341 S.W.3d at 241.

Therefore, we held that Tenn. Code Ann. § 39–13–203(a)(1) "does not require a 'functional intelligence quotient *test score* of seventy (70) or below,' " and that "the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below." *Coleman v. State,* 341 S.W.3d at 241. We also held that the trial court "is not required to follow the opinion of any particular expert" but that the trial court "must give full and fair consideration to *all the evidence presented,* including the results of all the I.Q. tests administered to the defendant." *Coleman v. State,* 341 S.W.3d at 242 (emphasis added).

We also noted in *Coleman* that the American Association on Intellectual and Developmental Disabilities ("AAIDD") recognizes ten potential "challenges" to the reliability and validity of I.Q. test scores, including the Flynn effect and the practice effect. *Coleman v. State,* 341 S.W.3d at 242 n. 55 (citing Am. Ass'n on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 36–41 (11th ed. 2010) ("AAIDD Manual")). In other words, we held that a court could find, based on expert testimony, that a defendant's actual I.Q. may be higher or lower than what a raw test score indicates:

> Because intelligence tests are indirect rather than direct measures of intelligence, experts in the field recognize that they, like other measures of human functioning, are not "actuarial determination[s]," that these tests cannot measure intelligence with absolute precision and that these tests contain a potential for error. The current consensus is that the standard error of measurement in well-standardized intelligence tests is approximately three to five points.

Coleman v. State, 341 S.W.3d at 245 (alteration in original) (footnotes omitted) (quoting AAIDD Manual, at 40).

We take the opportunity to reiterate that, in determining whether a defendant's functional I.Q. is 70 or below, a trial court should consider all the evidence that is admissible under the rules for expert testimony. *See State v. Copeland,* 226 S.W.3d 287, 301–02 (Tenn. 2007); Tenn. Code Ann. § 40–30–117(b). As we stated in *Coleman:*

> [I]f the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on

a consideration of those factors.

Coleman v. State, 341 S.W.3d at 242 n. 55 (footnote added).

> The case of *Smith v. State,* 357 S.W.3d 322 (Tenn. 2011) presented us with our first opportunity to apply *Coleman's* principles. Leonard Smith's case came to us via a petition for post-conviction relief, not a motion to reopen. Mr. Smith had been sentenced to death for a felony murder that occurred in 1995. Mr. Smith applied for post-conviction relief in 1999. *Van Tran, Atkins,* and *Coleman* were decided while his case was working its way through the courts. We vacated his death sentence. Because the judge who presided over Mr. Smith's sentencing hearing had previously prosecuted Mr. Smith in another matter during Mr. Smith's murder trial, we found that Mr. Smith's due process right to an impartial tribunal had been violated. *Smith v. State,* 357 S.W.3d at 345.
>
> We also held that Mr. Smith was entitled to a new hearing on whether he was intellectually disabled. At his first hearing, a psychologist opined that Mr. Smith was intellectually disabled when he committed the crime. The evidence indicated that Mr. Smith had brain injuries and a history of physical abuse, as well as alcohol and drug abuse. As a teenager, Mr. Smith's two scores on the Ammons Quick Test indicated an I.Q. of 70 and 84. His contemporaneous WISC test provided a full-scale I.Q. score of 80. Mr. Smith's 1989 WAIS–R score was 75, and his 2000 and 2002 WAIS–III scores were 77 and 65 respectively. His scores on academic tests were also very low. *Smith v. State,* 357 S.W.3d at 350–53.
>
> Although the post-conviction court found that Mr. Smith satisfied the second and third prongs of the test for intellectual disability, the court decided that he had not proven that he had an I.Q. of 70 or below before the age of eighteen. *Smith v. State,* 357 S.W.3d at 353. Significantly, the court stated that "testing performed before the age of eighteen reflects a functional IQ of 85," and that "the arguments for margin of error are contrary to case law of this state and of no assistance to the petitioner." *Smith v. State,* 357 S.W.3d at 353. We held that "the post-conviction court misapplied the applicable legal standard when it ruled that Smith's arguments regarding standard margin of error concerning intelligence tests were 'contrary to the case law of this state and of no assistance' to Smith." Therefore, we remanded the case to give Mr. Smith and the State an opportunity to present evidence regarding his functional intelligence quotient in light of *Coleman. Smith v. State,* 357 S.W.3d at 354.

Keen v. State, 398 S.W.3d at 600-06 (footnotes omitted, alteration added).

Keen's 2010 Motion to Reopen

In August 2010, Mr. Keen filed a motion to reopen his post-conviction proceedings based upon Tennessee Code Annotated section 40-30-117(a)(2), which as

stated above permits a petitioner to reopen post-conviction proceedings if "[t]he 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[.]" In Mr. Keen's view, the new scientific evidence was psychological testing which showed him to be intellectually disabled and, therefore, ineligible for the death penalty. In March 2011, this Court entered an order denying the motion to reopen, concluding ineligibility for the death penalty did not constitute "actual innocence of the offense or offenses for which the petitioner was convicted" for purposes of the post-conviction statute.

During the pendency of Mr. Keen's appeal to the Tennessee Court of Criminal Appeals, the Tennessee Supreme Court issued its opinion in *Coleman*. Accordingly, Mr. Keen amended his appeal to include a claim that *Coleman* announced a new rule of constitutional law which was required to be applied retroactively, entitling him to reopen his post-conviction proceedings under Tennessee Code Annotated section 40-30-117(a)(1).

The Court of Criminal Appeals denied Mr. Keen's application for permission to appeal. The appellate court concluded that "*Coleman* did not create a new constitutional rule of law but involved statutory construction based upon existing law that the parties and trial court had been practicing." *David Keen v. State*, No. W2011-00789-CCA-R28-PD, at 8 (Tenn. Crim. App. June 29, 2011). The intermediate court also affirmed this court's conclusion that Mr. Keen's intellectual disability claim did not entitle him to reopen his post-conviction proceedings based on actual innocence. *Id.* at 7.

The Tennessee Supreme Court granted Mr. Keen's subsequent application for permission to appeal. In denying the Petitioner relief, the Supreme Court first concluded that its *Coleman* holding was not a constitutional ruling:

> As we have already noted, our holding in *Van Tran*—that executing an intellectually disabled person violated the state and federal constitutions-announced a new constitutional right that required retrospective application. *Van Tran v. State,* 66 S.W.3d at 811. Indeed, our holding in *Van Tran* was explicitly constitutional and was expressly based on the "cruel and unusual punishments" clauses of the federal and state constitutions. Michael Angelo Coleman and Leonard Smith were among those who took advantage of the one-year window created by *Van Tran* for reopening post-conviction proceedings.
>
> *Coleman* was quite different from *Van Tran.* In *Coleman,* we were not called upon to interpret the constitution. Instead, *Coleman* concerned the interpretation of Tenn. Code Ann. § 39–13–203, the statute that defined intellectual disability in the context of the death penalty. *Coleman* supplemented *Howell* and clarified that "the trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional I.Q. at the time of the offense was seventy (70) or below." *Coleman v. State,* 341 S.W.3d at 241. We held in *Coleman* that the courts were not limited to raw test scores, but could also consider other factors, such as the Flynn effect, the practice effect, standard error of measurement, malingering, and cultural differences. *Coleman v. State,* 341 S.W.3d at 242 n. 55, 247. *Coleman* recognized no new constitutional right. The only constitutional right at issue in *Coleman* was the one we had already announced ten years earlier in *Van Tran.* Mr. Keen cannot piggyback *Coleman* on top of *Van Tran* in order to reopen the one-year statutory window for a constitutional rule that was articulated over a decade ago.
>
> Because we have determined that *Coleman*'s holding, which concerned the interpretation and application of Tenn. Code Ann. § 39–13–203, was not a constitutional ruling, there is no need to inquire whether that holding would qualify as a "new rule." Nor is there any use in discussing retroactivity. *See Teague v. Lane,* 489 U.S. 288, 301, 307, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989); *Meadows v. State,* 849 S.W.2d at 751, 755; *see also* Tenn. Code Ann. § 40–30–122 (2012). We also have no need to discuss whether Mr. Keen's claim would be subject to the "clear and convincing evidence" standard of Tenn. Code Ann. § 40–30–117(a)(4) or, as he argues, the "colorable claim" standard of Tenn. Sup.Ct. R. 28, §§ 2(H), 6(B)(6) that we applied in *Howell v. State,* 151 S.W.3d at 460–63.

Keen v. State, 398 S.W.3d at 608-09 (footnotes omitted).

In concluding that Mr. Keen's original "actual innocence" claim was without merit, the court stated as follows:

> To qualify as "actually innocent" under Tenn. Code Ann. § 40–30–117(a)(2), a petitioner must "demonstrate actual innocence of the underlying crimes for which he was convicted." *Van Tran v. State,* 66 S.W.3d at 822 (Barker, J., dissenting).

> On this point, Mr. Keen raises an additional argument. He insists that the "offense" of which he was convicted and of which he is actually innocent is the "offense" of "capital murder." While this argument might have traction in other jurisdictions, in Tennessee, there is no separate offense known as "capital murder." Tenn. Code Ann. § 39–13–202 defines "first degree murder," and Tenn. Code Ann. § 39–13–204 sets out the procedures for sentencing a defendant convicted of first degree murder. These statutes assign three possible sentences: imprisonment for life, imprisonment for life without the possibility of parole, and "punishment of death." Tenn. Code Ann. § 39–13–204(i) sets out the seventeen aggravating factors that authorize a jury to impose a sentence of death. It is clear from this statutory scheme that the underlying "offense" is "first degree murder," and that the death penalty is a sentencing consideration rather than an independent offense.
>
> To reopen post-conviction proceedings under Tenn. Code Ann. § 40–30–117(a)(2), a petitioner must present scientific evidence that he is "actually innocent of the offense." Because we cannot apply any "forced or subtle construction" to distort the "natural and ordinary meaning" of the statute's "clear and unambiguous" language, *Eastman Chem. Co. v. Johnson,* 151 S.W.3d at 507, we find that "actually innocent of the offense" means nothing other than that the person did not commit the crime. Here, Mr. Keen pleaded guilty to the rape and "first degree murder" of Nikki Reed. His "offense" at issue is "first degree murder." He is not alleging factual innocence of that offense. Intellectual disability does not equate to actual innocence. Mr. Keen's cause cannot be heard on a motion to reopen under Tenn. Code Ann. § 40–30–117(a)(2).

Keen v. State, 398 S.W.3d at 612-13 (footnotes omitted).

Hall v. Florida

The next significant United States Supreme Court opinion to address the standards applicable to an intellectual disability determination was *Hall v. Florida*, 134 S. Ct. 1986 (2014). In one of its several orders denying relief to death row petitioners who argued *Hall* entitled them to reopen their post-conviction proceedings, the Tennessee Court of Criminal Appeals offered this summary of *Hall*:

> In *Hall v. Florida*, 134 S. Ct. 1986 (2014), the United States Supreme Court held that the Florida courts' interpretation of the significantly subaverage intellectual functioning provision in Florida's intellectual disability statute is unconstitutional. Florida courts interpreted the statute as requiring a strict raw I.Q.

test score of 70 without considering the standard error of measurement. *Hall*, 134 S. Ct. at 1995-2000.

The Court noted that Florida's rule disregarded established medical practice by (1) considering "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence"; and (2) relying upon a "purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995. The Court further noted that the "inherent error in IQ testing" was acknowledged in *Atkins. Id.* at 1998. In *Atkins,* the Court cited to definitions of intellectual disability which rejected a strict IQ test score cutoff of 70. *Id.* at 1998-99 (citing *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 317). The Court in *Hall* stated that the Florida courts' interpretation of its intellectual disability statute ran "counter to the clinical definition cited throughout *Atkins*." *Id.* at 1999.

While the Court acknowledged that "the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed," the Court stated that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998. Rather, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999.

The Court held that the Florida courts' interpretation of its intellectual disability statute "'goes against the unanimous professional consensus" by failing to take into account the standard error of measurement and setting a strict I.Q. score cutoff at 70. *Id.* at 2000. The Court agreed "with medical experts 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." *Id.* at 2001.

We note that Tennessee was not listed in *Hall* as one of the nine states that mandate a strict I.Q. score cutoff at 70. Moreover, the Tennessee Supreme Court recently held that Tennessee's intellectual disability statute, "as currently interpreted," is "constitutionally sound under the Eighth Amendment." *State v. Rickey Alvis Bell*, [512 S.W.3d, 167, 184-86 (Tenn. 2015)]. The Court explained that "unlike the Florida Supreme Court, we have not interpreted our statute to bar the presentation of other proof of a defendant's intellectual disability in the event that the defendant cannot produce a raw I.Q. test score of less than 71." *Id.* [at 186].

Vincent Sims v. State, No. W2015-01713-CCA-R28-PD, at 8-11 (Tenn. Crim. App. Jan. 28, 2016) (order denying permission to appeal, hereinafter "Sims 2016 order") (alterations and footnote added); *perm. app. denied*, (Tenn. May 6, 2016).

Moore v. Texas

The *Moore* case involved a Texas man who was convicted of first degree murder and sentenced to death for the 1980 murder of a grocery store clerk. *Moore*, 137 S. Ct. at 1044. The conviction and sentence survived state direct appeal and post-conviction proceedings. However, during his federal habeas proceedings Mr. Moore was granted a new sentencing hearing based on ineffective assistance of counsel. *Id.* at 1044-45 (citing *Moore v. Johnson*, 194 F.3d 536, 622 (1999)). After a new sentencing hearing, Mr. Moore was again sentenced to death, and that sentence survived state direct appeal. *See Moore v. Texas*, 137 S. Ct. at 1045.

Mr. Moore later sought state post-conviction relief. The Supreme Court summarized the outcome of these proceedings as follows:

> In 2014, the state habeas court conducted a two-day hearing on whether Moore was intellectually disabled. See *Ex parte Moore,* No. 314483–C (185th Jud. Dist., Harris Cty., Tex., Feb. 6, 2015), App. to Pet. for Cert. 129a. The court received affidavits and heard testimony from Moore's family members, former counsel, and a number of court-appointed mental-health experts. The evidence revealed that Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. *Id.,* at 187a. At school, because of his limited ability to read and write, Moore could not keep up with lessons. *Id.,* at 146a, 182a–183a. Often, he was separated from the rest of the class and told to draw pictures. *Ibid.* Moore's father, teachers, and peers called him "stupid" for his slow reading and speech. *Id.,* at 146a, 183a. After failing every subject in the ninth grade, Moore dropped out of high school. *Id.,* at 188a. Cast out of his home, he survived on the streets, eating from trash cans, even after two bouts of food poisoning. *Id.,* at 192a–193a.
>
> In evaluating Moore's assertion of intellectual disability, the state habeas

court consulted current medical diagnostic standards, relying on the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual, see AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports (2010) (hereinafter AAIDD–11), and on the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (APA), see APA, Diagnostic and Statistical Manual of Mental Disorders (2013) (hereinafter DSM–5). App. to Pet. for Cert. 150a–151a, 202a. The court followed the generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"—*i.e.,* a score of roughly 70—adjusted for "the standard error of measurement," AAIDD–11, at 27); (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing circumstances," *Hall v. Florida,* 572 U.S. ——, ——, 134 S. Ct. 1986, 1994, 188 L.Ed.2d 1007 (2014)); and (3) the onset of these deficits while still a minor. See App. to Pet. for Cert. 150a (citing AAIDD–11, at 1). See also *Hall,* 572 U.S., at ——, 134 S. Ct., at 1993–1994.

Moore's IQ scores, the habeas court determined, established subaverage intellectual functioning. The court credited six of Moore's IQ scores, the average of which (70.66) indicated mild intellectual disability. App. to Pet. for Cert. 167a–170a. And relying on testimony from several mental-health experts, the habeas court found significant adaptive deficits. In determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical). See AAIDD–11, at 43. Moore's performance fell roughly two standard deviations below the mean in *all three* skill categories. App. to Pet. for Cert. 200a–201a. Based on this evidence, the state habeas court recommended that the CCA reduce Moore's sentence to life in prison or grant him a new trial on intellectual disability. See *id.,* at 203a.

The [Texas Court of Criminal Appeals ("CCA")[4]] rejected the habeas court's recommendations and denied Moore habeas relief. See 470 S.W.3d 481. At the outset of its opinion, the CCA reaffirmed *Ex parte Briseno,* 135 S.W.3d 1 (Tex. Crim. App.2004), as paramount precedent on intellectual disability in Texas capital cases. See 470 S.W.3d, at 486–487. *Briseno* adopted the definition of, and standards for assessing, intellectual disability contained in the 1992 (ninth) edition of the American Association on Mental Retardation (AAMR) manual, predecessor to the current AAIDD–11 manual. See 135 S.W.3d, at 7 (citing AAMR, Mental Retardation: Definition, Classification, and Systems of Supports (9th ed. 1992) (hereinafter AAMR–9)).

Briseno incorporated the AAMR–9's requirement that adaptive deficits be

[4] As the Supreme Court noted, "The CCA is Texas' court of last resort in criminal cases." *See Moore,* 137 S. Ct. at 1044 n.1. Additionally, "Under Texas law, the CCA, not the court of first instance, is 'the ultimate factfinder' in habeas corpus proceedings." *Id.* at 1044 n.2.

"related" to intellectual-functioning deficits. 135 S.W.3d, at 7 (quoting AAMR–9, at 25). To determine whether a defendant has satisfied the relatedness requirement, the CCA instructed in this case, Texas courts should attend to the "seven evidentiary factors" first set out in *Briseno*. 470 S.W.3d, at 489. No citation to any authority, medical or judicial, accompanied the *Briseno* court's recitation of the seven factors. See 135 S.W.3d, at 8–9.

The habeas judge erred, the CCA held, by "us[ing] the most current position, as espoused by AAIDD, regarding the diagnosis of intellectual disability rather than the test . . . in *Briseno*." 470 S.W.3d, at 486. This Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), the CCA emphasized, "left it to the States to develop appropriate ways to enforce the constitutional restriction" on the execution of the intellectually disabled. 470 S.W.3d, at 486. Thus, even though "[i]t may be true that the AAIDD's and APA's positions regarding the diagnosis of intellectual disability have changed since *Atkins* and *Briseno,*" the CCA retained *Briseno*'s instructions, both because of "the subjectivity surrounding the medical diagnosis of intellectual disability" and because the Texas Legislature had not displaced *Briseno* with any other guideposts. 470 S.W.3d, at 486–487. The *Briseno* inquiries, the court said, "remai[n] adequately 'informed by the medical community's diagnostic framework.' " 470 S.W.3d, at 487 (quoting *Hall,* 572 U.S., at ——, 134 S. Ct., at 2000).

Employing *Briseno,* the CCA first determined that Moore had failed to prove significantly subaverage intellectual functioning. 470 S.W.3d, at 514–519. Rejecting as unreliable five of the seven IQ tests the habeas court had considered, the CCA limited its appraisal to Moore's scores of 78 in 1973 and 74 in 1989. *Id.,* at 518–519. The court then discounted the lower end of the standard-error range associated with those scores. *Id.,* at 519; see *infra,* at 1048 – 1050 (describing standard error of measurement). Regarding the score of 74, the court observed that Moore's history of academic failure, and the fact that he took the test while "exhibit[ing] withdrawn and depressive behavior" on death row, might have hindered his performance. 470 S.W.3d, at 519. Based on the two scores, but not on the lower portion of their ranges, the court concluded that Moore's scores ranked "above the intellectually disabled range" (*i.e.,* above 70). *Ibid.*; see *id.,* at 513.

"Even if [Moore] had proven that he suffers from significantly sub-average general intellectual functioning," the court continued, he failed to prove "significant and related limitations in adaptive functioning." *Id.,* at 520. True, the court acknowledged, Moore's and the State's experts agreed that Moore's adaptive-functioning test scores fell more than two standard deviations below the mean. *Id.,* at 521; see *supra,* at ——. But the State's expert ultimately discounted those test results because Moore had "no exposure" to certain tasks the testing included, "such as writing a check and using a microwave oven." 470 S.W.3d, at 521–522. Instead, the expert emphasized Moore's adaptive strengths in school, at

trial, and in prison. *Id.*, at 522–524.

> The CCA credited the state expert's appraisal. *Id.*, at 524. The habeas court, the CCA concluded, had erred by concentrating on Moore's adaptive weaknesses. *Id.*, at 489. Moore had demonstrated adaptive strengths, the CCA spelled out, by living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison. *Id.*, at 522–523. Those strengths, the court reasoned, undercut the significance of Moore's adaptive limitations. *Id.*, at 524–525.
>
> The habeas court had further erred, the CCA determined, by failing to consider whether any of Moore's adaptive deficits were related to causes other than his intellectual-functioning deficits. *Id.*, at 488, 526. Among alternative causes for Moore's adaptive deficits, the CCA suggested, were an abuse-filled childhood, undiagnosed learning disorders, multiple elementary-school transfers, racially motivated harassment and violence at school, and a history of academic failure, drug abuse, and absenteeism. *Ibid.* Moore's significant improvement in prison, in the CCA's view, confirmed that his academic and social difficulties were not related to intellectual-functioning deficits. *Ibid.* The court then examined each of the seven *Briseno* evidentiary factors, see *supra,* at 1046 – 1047, and n. 6, concluding that those factors "weigh[ed] heavily" against finding that Moore had satisfied the relatedness requirement. 470 S.W.3d, at 526–527.

Moore, 137 S. Ct. at 1045-48.

Mr. Moore appealed to the United States Supreme Court, which reversed. In concluding that the Texas CCA's intellectual disability assessment—particularly its reliance on the *Briseno* factors—violated the Eighth Amendment as interpreted by *Atkins*, *Hall*, and related cases, the Court first faulted the Texas CCA's refusal to apply a standard error of measurement to Mr. Moore's I.Q. tests, a decision which the Court described as "irreconcilable" with *Hall*'s requirement to consider the SEM. *Id.* at 1049 (citing *Hall*, 134 S. Ct. at 1995, 2001). The Court also noted, "In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths", which differed from the "medical community['s] focus[ing] the adaptive-functioning inquiry on adaptive *deficits*." *Moore*, 137 S. Ct. at 1050 (citations omitted).

In rejecting the Texas CCA's use of the *Briseno* factors, the Court stated as follows:

> 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 1998–1999; *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.
>
> Skeptical of what it viewed as "exceedingly subjective" medical and clinical standards, the CCA in *Briseno* advanced lay perceptions of intellectual disability. 135 S.W.3d, at 8; see *supra,* at 1046 – 1047, and n. 6. *Briseno* asks, for example, "Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?" 135 S.W.3d, at 8. Addressing that question here, the CCA referred to Moore's education in "normal classrooms during his school career," his father's reactions to his academic challenges, and his sister's perceptions of Moore's intellectual abilities. 470 S.W.3d, at 526–527. But the medical profession has endeavored to counter lay stereotypes of the intellectually disabled. See AAIDD–11 User's Guide 25–27; Brief for AAIDD et al. as *Amici Curiae* 9–14, and nn. 11–15. Those stereotypes, much more than medical and clinical appraisals, should spark skepticism.

Moore, 137 S. Ct. at 1051-52. The Court concluded,

> In Moore's case, the habeas court applied current medical standards in concluding that Moore is intellectually disabled and therefore ineligible for the death penalty. The CCA, however, faulted the habeas court for "disregarding [the CCA's] case law and employing the definition of intellectual disability presently used by the AAIDD." 470 S.W.3d, at 486. The CCA instead fastened its intellectual-disability determination to "the AAMR's 1992 definition of intellectual disability that [it] adopted in *Briseno* for *Atkins* claims presented in Texas death-penalty cases." *Ibid.* By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno,* including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the "medical community's diagnostic framework," *Hall,* 572 U.S., at ——, 134 S. Ct., at 2000.

> Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand.

Moore, 137 S. Ct. at 1353.

Application

Therefore, in determining whether Mr. Keen is entitled to relief, this Court must consider whether *Moore* announced a new rule of constitutional law which should be applied retroactively. The Tennessee Court of Criminal Appeals' order addressing Vincent Sims's *Hall*-based motion to reopen summarizes the standard for determining whether an opinion creates such a rule:

> For purposes of post-conviction proceedings, Tennessee Code Annotated section 40-30-122 provides that "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." This standard is similar to the standard announced in *Teague v. Lane*, in that a case establishes a new rule of constitutional law "when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put if 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." *Teague v. Lane*, 489 U.S. 288, 301 (1989); *see Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (distinguishing between "whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").
>
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> principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

Sims 2016 Order, at 11; *see also Van Tran*, 66 S.W.3d at 811.

Tennessee's appellate courts have not addressed the specific issue raised in the Petitioner's motion, nor have the appellate courts addressed *Moore* in any fashion as of this writing.[5] This court notes that two federal courts—one appellate court and one trial court—have concluded that *Moore* did not announce a new rule of law and does not require retroactive application. *See Williams v. Kelley*, 858 F.3d 464, 474-75 (8th Cir. 2017); *Smith v. Dunn*, No. 2:13-CV-00557-RDP (N.D. Ala. July 21, 2017). However, federal case law is persuasive authority at best. This court is more persuaded by prior Tennessee case law addressing intellectual disability claims and its own plain reading of *Moore*, has reviewed the specific *Moore* language quoted by the Petitioner and finds that it does not stand for the proposition stated by the Petitioner. Tennessee's intellectual disability statute and the holdings of *Van Tran* and *Atkins* established the constitutional rule that no intellectually disabled person shall be executed, and nothing in *Moore* changed or expanded upon that standard. As in his *Coleman*-based motion to reopen, in which the Tennessee Supreme Court concluded Mr. Keen was unable to "piggyback *Coleman* on top of *Van Tran* in order to reopen the one-year statutory window for a constitutional rule that was articulated over a decade" before his 2010 motion to reopen was filed, *see Keen*, 398 S.W.3d at 609, Mr. Keen also cannot use *Moore* to claim *Van*

[5] This Court is aware of three *Moore*-based motions to reopen which were denied in the trial courts and are now subjects of applications for permission to appeal in the Tennessee Court of Criminal Appeals. *See James Dellinger v. State*, No. E2018-00130-CCA-R28-PD (Tenn. Crim. App., application filed Jan. 22, 2018); *Michael Eugene Sample v. State*, No. W2017-02370-CCA-R28-PD (Tenn. Crim. App., application filed Dec. 4, 2017); *Vincent Sims v. State*, No. W2017-02396-CCA-R28-PD (Tenn. Crim. App., application filed Dec. 7, 2017). The appellate court has not issued final orders in any of these cases.

Tran's well-settled legal principles are now, somehow, new constitutional rules entitling him to reopen his post-conviction proceedings.

Perhaps more importantly, this Court notes several post-*Van Tran* Tennessee appellate opinions and orders which have addressed intellectual disability-based claims. These opinions and orders have concluded that apart from *Van Tran* and *Atkins*, the case law which followed the passage of Tennessee's intellectual disability statute did not create new constitutional rules but merely restated or applied well-settled legal principles related to the underlying constitutional rule at the heart of these proceedings—that intellectually disabled persons are ineligible for the death penalty. In this Court's view, *Moore* is another in a long line of cases which interpret and apply these principles but add no new constitutional rule to the prevailing jurisprudence.

This Court finds the Tennessee Court of Criminal Appeals' order addressing Vincent Sims's *Hall* claim to be particularly instructive given the Supreme Court's reliance on *Hall* in drafting *Moore*. In concluding that *Hall* did not entitle Mr. Sims to relief, the Court of Criminal Appeals stated as follows:

> We note . . . the Supreme Court held in *Hall* that Florida courts "misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Hall*, 134 S. Ct. at 2001. The Court in *Hall* relied extensively upon *Atkins* in striking down the strict I.Q. test score cutoff at 70 as unconstitutional. The Court in *Hall* noted that *Atkins* "itself acknowledges that the inherent error in IQ testing" and that *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 1998 (citing *Atkins*, 536 U.S. at 308 n.3, 309 n.5). The Court in *Hall* further explained, "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 1999.
>
> Accordingly, it does not appear that *Hall* announced a new rule. Rather, *Hall* appears to have clarified provisions in *Atkins* that the Florida courts had misconstrued. Regardless of whether *Hall* established a new rule of constitutional law, however, we conclude that the rule does not apply retroactively.

Tennessee Code Annotated section 40-30-122 provides:

> A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

The Tennessee Supreme Court recently held that this provision applies in determining the retroactivity of new constitutional rules in post-conviction proceedings. *Bush v. State*, 428 S.W.3d 1, 16 (Tenn. 2014). While *Hall* addresses provisions of the United States Constitution, "the states are not 'bound by federal retroactivity analysis when a new federal rule is involved.'" *Id.* at 13 n.6; *see Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). Moreover, the retroactivity standard in section 40-30-122 is similar to the federal standard of *Teague v. Lane*, 489 U.S. 288, 307 (1989). *Bush*, 428 S.W.3d at 19-20.

In examining whether a rule that "places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" pursuant to Tennessee Code Annotated section 40-30-122, our supreme court has noted that

> [e]xamples of this type of rule include *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003), in which the United States Supreme Court held that states could not criminalize homosexual intercourse between consenting adults, and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973), in which the United States Supreme Court held that states could not in most cases criminally penalize doctors for performing early-term abortions.

Bush, 428 S.W.3d at 17.

In *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), in which the United States Supreme Court held that retroactivity applies to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Hall*, however, only provides a new procedure "for ensuring that States do not execute members of an already protected group." *In re Henry*, 757 F.3d at 1161. The class protected by *Hall*, those with intellectual disabilities, is the same class protected by *Atkins*. See *Hall*, 134 S. Ct. at 1990 (citing to the holding in *Atkins* that the execution of intellectually disabled defendants violated the United States Constitution and holding that Florida's "rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional"). *Hall* did not expand this already protected class but

rather, "limited the states' power to define the class because the state definition did not protect the intellectually disabled as understood in *Atkins*." *In re Henry*, 757 F.3d at 1161 (citing *Hall*, 134 S. Ct. at 1986).

Even if *Hall* expanded the class described in *Atkins*, *Hall* did not categorically place the class beyond the state's power to execute. *Id.* Instead, *Hall* created a "procedural requirement that those with IQ test scores within the test's standard error would have the opportunity to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief." *Id.* (emphasis in original). Accordingly, *Hall* does not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *See* Tenn. Code Ann. § 40-30-122.

We next must determine whether the holding in *Hall* "requires the observance of fairness safeguards that are implicit in the concept of ordered liberty." *See id.* In this context, "safeguards" refer to "criminal procedural rules designed to guard against defendants being denied their due process right to a fundamentally fair adjudication of guilt." *Bush*, 428 S.W.3d at 18. Not all constitutionally-derived "fairness safeguards," however, warrant retroactive application in post-conviction cases. *Id.* Only those "fairness safeguards" that are "implicit in the concept of ordered liberty" are to be applied retroactively. *See* Tenn. Code Ann. § 40-30-122; *Bush*, 428 S.W.3d at 18.

The Tennessee Supreme Court has held that the General Assembly intended that the phrase "fairness safeguards that are implicit in the concept of ordered liberty" should be interpreted in a manner similar to the federal standard for retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Bush*, 428 S.W.3d at 20. The "fairness safeguards" in section 40-30 122 are "equivalent to the *Teague v. Lane* standard's 'watershed rules of criminal procedure' or 'those new procedures without which the likelihood of an accurate conviction is seriously diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313).

Accordingly, we must give retroactive effect to "only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Teague*, 489 U.S. at 311). The fact that a new rule is "'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313) (emphasis in original). The United States Supreme Court has recognized that this class of rules is "extremely narrow, and 'it is unlikely that any . . . ha[s] yet to emerge.'" *Id.* (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n. 7 (2001); *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)).

To qualify as a watershed rule of criminal procedure, a new rule must meet two requirements. "First, the rule must be necessary to prevent an

impermissibly large risk of an inaccurate conviction. . . . Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations and quotation marks omitted).

The United States Supreme Court has acknowledged that

> in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status. *See, e.g., Summerlin*, [542 U.S. at 352] (rejecting retroactivity for *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002)); *Beard v. Banks*, 542 U.S. 406, 124 S. Ct. 2504, 159 L.Ed.2d 494 (2004) (rejecting retroactivity for *Mills v. Maryland*, 486 U.S. 67, 108 S. Ct. 1860, 100 L.Ed.2d 384 (1988)); *O'Dell* [*v. Netherland*, 521 U.S. 151, 157, 117 S. Ct. 1969, 138 L.Ed.2d 351 (1997)] (rejecting retroactivity for *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L.Ed.2d 133 (1994)); *Gilmore v. Taylor*, 508 U.S. 333, 113 S. Ct. 2112, 124 L.Ed.2d 306 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v. Smith*, 497 U.S. 227, 110 S. Ct. 2822, 111 L.Ed.2d 193 (1990) (rejecting retroactivity for *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985)).

Id.

The only case in which the United States Supreme Court has identified as qualifying under this exception is *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *Wharton*, 549 U.S at 419. In *Gideon*, the Court held that counsel must be appointed for any indigent defendant charged with a felony. *Gideon*, 372 U.S. at 344-45. The Court explained that when an indigent defendant who seeks representation is denied such representation, an intolerably high risk of an unreliable verdict exists. *Id.*; *see Wharton*, 549 U.S. at 419.

The rule announced in *Hall* is not comparable to the rule announced in *Gideon*. The rule in *Hall* has a much more limited scope, and the relationship of the rule to the accuracy of the fact-finding process is less direct and profound. The issue is not whether *Hall* resulted in a net improvement in the accuracy of fact finding in criminal cases. *See Wharton*, 549 U.S. at 420. Rather, the question is whether the *Hall* rule is "one without which the likelihood of an accurate conviction is seriously diminished." *Id.* (citations omitted) (emphasis in original). *Hall* did not result in a change of this magnitude.

Hall also did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer*, 497 U.S. 242 (emphasis in original). It is insufficient to simply show that a rule is "based on a

'bedrock' right." *Whorton*, 549 U.S. at 420-21 (emphasis in original). Rather, in order to meet this requirement, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. In applying this requirement, the Supreme Court has looked to *Gideon* as an example and has not "'hesitated to hold that less sweeping and fundamental rules' do not qualify." *Id.* (quoting *Beard*, 542 U.S. at 418).

Hall did not expand the class already protected by *Atkins*, i.e., defendants who are intellectually disabled. Instead, *Hall* limited the power of the states to define that class. Accordingly, *Hall* did not "alter[ ] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *See id.*; *Sawyer*, 497 U.S. at 242.

The Petitioner has failed to establish that *Hall* applies retroactively to petitioners in post-conviction proceedings. Therefore, he may not rely upon *Hall* as a basis for reopening his petition for post-conviction relief.

Sims 2016 order, at 12-16.

This Court also notes that in fellow Shelby County death row inmate Pervis Payne's appeal of a *Hall* issue, the Tennessee Supreme Court concluded *Hall* neither entitled a petitioner to a hearing on intellectual disability nor applied retroactively:

At no point in *Hall* did the Supreme Court address the circumstances under which the defendant was entitled to the hearing. Rather, the issue before the Court was the type of evidence which the defendant was entitled to offer at the hearing otherwise provided. Thus, *Hall* does not address by what procedural avenue the Petitioner in this case might be afforded a hearing on his claim of intellectual disability. *Hall* does *not* stand for the proposition that the Petitioner *is* entitled to a hearing under the facts and procedural posture of this matter.

Moreover, even if *Hall* held that a condemned inmate must be afforded a hearing on a collateral claim that he is intellectually disabled, the decision would benefit the Petitioner only if it applied retroactively. However, the United States Supreme Court has not ruled that *Hall* is to be applied retroactively to cases on collateral review. The United States Courts of Appeal for the Eighth and Eleventh Circuits have concluded that *Hall* does *not* apply retroactively to cases on collateral review. *See Goodwin v. Steele,* 814 F.3d 901, 903–04 (8th Cir.2014) (per curiam); *In re Henry,* 757 F.3d 1151, 1159–61 (11th Cir.2014). The Petitioner has cited us to no federal appellate decision holding that *Hall* must be applied retroactively to cases on collateral review. We decline to hold that *Hall* applies retroactively within the meaning of Tennessee Code Annotated section 40–30–117(a)(1).

Payne v. State, 493 S.W.3d 478, 490-91 (Tenn. 2016).

Guided by the analysis supplied by Tennessee's appellate courts in addressing *Hall*, this Court concludes that *Moore* did not create a new rule of law, nor does it require retroactive application. As in *Hall*, the *Moore* opinion did not expand the class of persons to be considered intellectually disabled and, therefore, ineligible to be executed. The *Moore* holding does not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Tenn. Code Ann. § 40-30-122. And as in *Hall*, *Moore* did not provide a death row inmate is entitled to a hearing to establish his intellectual disability.

The *Moore* opinion also cannot be seen as a "watershed rule of criminal procedure" implicating the fundamental fairness and accuracy of a criminal proceeding. The United States Supreme Court has only identified *Gideon* as such a case. A reasonable argument could be made that *Van Tran* and *Atkins* are also such cases. *Moore*, however, is not such a case. Like *Hall* before it, *Moore* "did not expand the class already protected [against the death penalty as] intellectually disabled" but rather "limited the power of the states to define that class." Sims 2016 order at 16. *Moore* can better be characterized as an "application" of well-established precedent to Texas' intellectual disability test to render it invalid. The Tennessee Supreme Court has suggested that cases which merely apply or interpret the well-settled *Van Tran/Atkins* precedent do not create new rules of law. *See, e.g., Keen*, 398 S.W.3d at 608-09 (*Van Tran* created a new constitutional rule to be applied retroactively; "*Coleman*'s holding, which concerned the interpretation and application of [the intellectual disability statute], was not a constitutional ruling[.]"). Finally, Tennessee's intellectual disability test was not identified as constitutionally

suspect in *Hall* and in no way resembles the *Briseno*-driven determination rendered unconstitutional in *Moore*.

Accordingly, this Court concludes that *Moore* did not create a new constitutional rule to be applied retroactively. Petitioner is not entitled to reopen his post-conviction proceedings.

V. Conclusion

In the Tennessee Supreme Court's opinion following Mr. Keen's 2010 motion to reopen, the Court wrote,

> 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)(1) 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. § 40–30–117(a)(1) or (2).

Keen v. State, 398 S.W.3d at 613. Similarly, this Court's ruling does not pass judgment on the Petitioner's potential intellectual disability claims. Rather, this order concludes only that the *Moore* opinion does not entitle Mr. Keen to raise his intellectual disability claims within the narrow scope of the motion to reopen statute as asserted here.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the above-styled motion to reopen petition for post-conviction relief is hereby DENIED. As the Petitioner is indigent, the costs associated with these proceedings are hereby taxed to the State.

ENTERED this 8th day of May, 2018.

Chris Craft, Judge
Criminal Court, ~~Division~~ VIII.

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following persons by U.S. Mail on this, the 8th day of May, 2018:

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~~Clerk~~ / Deputy Clerk DIV. 8

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

DAVID KEEN v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-25157

No. W2018-01059-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 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

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

DAVID KEEN v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P-25157

No. W2018-01059-SC-R11-PD

ORDER

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

PER CURIAM