NO. 19-7369

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID KEEN,
Petitioner,

v.

TENNESSEE,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

RESTATEMENT OF THE QUESTIONS PRESENTED

I

Does this Court have jurisdiction to decide whether its opinion in *Moore v. Texas* requires Tennessee to grant successive collateral review of a criminal judgment when the order of the Tennessee Court of Criminal Appeals enforced a state statutory restriction on successive collateral review?

II

Did the decision of the Tennessee Court of Criminal Appeals thwart the constitutional prohibition against the execution of intellectually disabled offenders by declining to force an *Atkins* claim into the petitioner's chosen, but inapt, procedural vehicle?

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The order of the Tennessee Supreme Court denying petitioner's application for permission to appeal is unreported. Order, *Keen v. State*, No. W2018-01059-SC-R11-PD (Tenn. Aug. 20, 2019); (Pet's App'x, 038.) The order of the Tennessee Court of Criminal Appeals denying petitioner's application for permission to appeal from the denial of his motion to reopen state post-conviction proceedings is also unreported. Order, *Keen v. State*, No. W2018-01059-CCA-R28-PD (Tenn. Crim. App. Feb. 21, 2019); (Pet's App'x, 033-037.)

JURISDICTIONAL STATEMENT

The Tennessee Supreme Court denied petitioner's application for permission to appeal on August 20, 2019. (Pet's App'x, 038.) Justice Sotomayor extended the time for filing a petition for writ of certiorari until January 17, 2020. *Keen v. Tennessee*, No. 19-7369 (Nov. 13, 2019). Petitioner filed his petition on January 17, 2020. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet., 1.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

28 U.S.C. § 1257(a) provides:

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

> any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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

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

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

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

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

STATEMENT OF THE CASE

On March 17, 1990, the petitioner raped and strangled Nicki Read, the eight-year-old daughter of his girlfriend, and discarded her body in a river. *State v. Keen*, 926 S.W.2d 727, 730 (Tenn. 1994). The petitioner pled guilty to first-degree felony murder and aggravated rape. *Id.* at 729. A Shelby County, Tennessee, jury sentenced him to death. *Id.* The Tennessee Supreme Court affirmed the petitioner's convictions but remanded the case for a new sentencing hearing. *Id.* at 744. It later denied the petitioner's request for rehearing. *Id.*

At the 1997 resentencing hearing, the petitioner presented testimony from Dr. John Ciocca that the petitioner's intellectual quotient ("IQ") score ranged between 104 and 110. *Keen v. State*, W2004-02159-CCA-R3-PD, 2006 WL 1540258, at *40 (Tenn. Crim. App. June 5, 2000), *perm. app. denied* (Tenn. Oct. 20, 2006). Dr. Ciocca diagnosed the petitioner as suffering from post-traumatic stress disorder, serious depression, and attention deficit disorder, and he stated the petitioner exhibited some signs of pedophilia. *Keen*, 31 S.W.3d at 204. However, Dr. Ciocca did not diagnose the petitioner with intellectual disability, nor did the petitioner allege at that juncture that he was intellectually disabled. *Id.*; *Keen v. State*, 398 S.W.3d 594, 598-99 (Tenn. 2012).

The petitioner was again sentenced to death. *State v. Keen*, No. 02C01-9709-CR-00365, 1999 WL 61058, at *1 (Tenn. Crim. App. Feb. 10, 1999). The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court both affirmed that sentence. *State v. Keen*, 31 S.W.3d 196, 202 (Tenn. 2000); *Keen*, 1999 WL 61058, at *1. This Court denied certiorari. *Keen v. Tennessee*, 532 U.S. 907 (2001).

The petitioner filed a petition for post-conviction relief on May 3, 2001. *Keen*, 2006 WL 1540258, at *1. Seven months later, while the petitioner's post-conviction petition was pending, the Tennessee Supreme Court held that execution of the intellectually disabled violates the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution. *Van Tran v. State*, 66 S.W.3d 790, 807-08 (Tenn. 2001).[1] The following year, this Court reached the same conclusion regarding the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

The Shelby County Criminal Court conducted an evidentiary hearing on the petitioner's petition for post-conviction relief. *Keen*, 2006 WL 1540258, at *1. Dr. Tara Wass, whom the

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

petitioner offered as an expert in developmental psychology and fetal alcohol effects, noted that a test administered by the petitioner's school in 1972 estimated his IQ to be 84. *Id.* at *14, *16. Additionally, Dr. Pamela Auble, who was asked to evaluate the petitioner's level of mental function, stated her testing showed the petitioner's IQ was 73 "with some variability among the thirteen subtests." *Id.* at *25. Dr. Auble also "noted that the petitioner's IQ had been variable over the years, 105 when he was four years old, 92 when he was five years old, 84 in the third grade, 76 in the fifth grade, and 111 also in the fifth grade." *Id.* at * 26. Dr. Auble concluded that "[t]he general results of the tests were that [the petitioner] had what [Dr. Auble] would consider abnormalities in his functioning in several areas." *Id.* at *25. She also explained that the petitioner "had particular difficulty with time tests and with tests which had him learn and remember information that he was told." *Id.* However, the petitioner did not assert that he was ineligible for the death sentence due to an intellectual disability.[2] *See Keen*, 398 S.W.3d at 598-99.

The Shelby County Criminal Court denied post-conviction relief on August 2, 2004. *Keen*, 2006 WL 1540258, at *1. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal. *Id.* at *1, *53. This Court denied certiorari. *Keen v. Tennessee*, 550 U.S. 938 (2007).

In 2010, pursuant to Tenn. Code Ann. § 40-30-117(a)(2), the petitioner filed a motion to reopen his post-conviction proceedings. He claimed he had "new scientific evidence"—in the form of a new IQ test score of 67—that he was "actually innocent" because Tenn. Code Ann. §

[2] The petitioner presented expert testimony at the post-conviction hearing to support his claim that his trial counsel was ineffective for failing to investigate and present mitigation proof at the sentencing hearing—notably that counsel failed to present evidence concerning the relationship between malnutrition and brain development and evidence related to fetal alcohol syndrome. *Keen*, 2006 WL 1540258, at * 38.

39-13-203(b) prohibited imposing the death penalty on persons with a functional IQ of 70 or below. *Keen*, 398 S.W.3d at 598. This motion to reopen marked the first time the petitioner asserted he was ineligible for the death penalty because he was intellectually disabled. *Id.* at 598-99. The Shelby County Criminal Court held "actual innocence under Tenn. Code Ann. § 40-30-117(a)(2) did not encompass ineligibility for the death penalty under Tenn. Code Ann. § 39-13-203(b)" and denied reopening. *Id.* at 599.

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

In 2011, the petitioner filed in the Tennessee Court of Criminal Appeals an application for permission to appeal the denial of his 2010 motion to reopen. *Keen*, 398 S.W.3d at 599. In addition to his claim that his IQ test constituted new scientific evidence of actual innocence, the petitioner argued that his post-conviction proceedings should be reopened under Tenn. Code Ann. § 40-30-117(a)(1) because *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), announced a new rule of constitutional criminal law that required retroactive application. *Id.* The Court of Criminal Appeals rejected both arguments and denied the petitioner's application for permission to appeal. *Id.* at 598, 599.

The petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, which was granted. *Id.* The Tennessee Supreme Court concluded that *Coleman* did not announce a new constitutional right that required retroactive application; it merely applied a

constitutional right that had been announced ten years earlier in *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001). *Id.* at 608-09. Additionally, the Tennessee Supreme Court held that the phrase "actually innocent of the offense" in Tenn. Code Ann. § 40-30-117(a)(2) "means nothing other than that the person did not commit the crime. . . . Intellectual disability does not equate to actual innocence." *Id.* at 612-13. This Court denied certiorari. *Keen v. Tennessee*, 571 U.S. 869 (2013).

In March 2014, this Court held, similarly to the Tennessee Supreme Court in *Coleman*, that under the Eighth Amendment, a capital defendant should be allowed to present evidence to demonstrate that his IQ is lower than the raw test score indicates when the raw score otherwise falls within the margin of error of a score demonstrating intellectual disability. *Hall v. Florida*, 572 U.S. 701, 704, 723 (2014).

In 2015, the petitioner filed a petition for writ of error coram nobis pursuant to Tenn. Code Ann. § 40-26-105(b), again claiming he was intellectually disabled. *Keen v. State*, No. W2016-02463-CCA-R3-ECN, 2017 WL 3475438, at *1 (Tenn. Crim. App. Aug. 11, 2017), *perm. app. denied* (Tenn. Dec. 11, 2017). His petition was denied. *Id.* On appeal, the Tennessee Court of Criminal Appeals held that intellectual disability claims could not be brought in a petition for writ of error coram nobis. *Id.* at *1. The court also held that the coram nobis petition was untimely. *Id.* at *2. The petitioner also argued that his alleged intellectual disability rendered his death sentence illegal under Tenn. R. Crim. P. 36.1. *Id.* at *3. However, the Tennessee Court of Criminal Appeals concluded the petitioner had waived that claim because he had not raised it in the trial court. *Id.* And because it may not provide advisory opinions, the court declined the petitioner's request for advice about the proper way to raise an intellectual disability claim. *Id.*

In 2016, the petitioner filed a second motion to reopen post-conviction proceedings, asserting "that his post-conviction petition should be reopened in light of Justice Breyer's

dissenting opinion in *Glossip v. Gross*, 135 S. Ct. 2726 (2015) and the United States Supreme Court's ruling in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)." Order at 1, *Keen v. State*, No. W2016-02377-CCA-R28-PD (Tenn. Crim. App. Mar. 18, 2017). The Shelby County Criminal Court denied the petitioner's motion to reopen. *Id.* at 1. The Tennessee Court of Criminal Appeals denied the petitioner's subsequent application for permission to appeal, holding that neither case provided the petitioner any relief. *Id.* at 1-2. The Tennessee Supreme Court also denied the petitioner's application for permission to appeal. Order, *Keen v. State*, No. W2016-02377-SC-R11-PD (Tenn. May 24, 2017).

The petitioner also filed a petition for writ of habeas corpus in the United States District for the Western District of Tennessee. The District Court denied the petition on May 5, 2015. Order, *Keen v. Carpenter*, No. 07-2099-SHM-dkv (W.D. Tenn. May, 5, 2015), ECF No. 131. The Sixth Circuit Court of Appeals granted a certificate of appealability for two claims. Order, *Keen v. Westbrooks*, No. 15-5597 (6th Cir. Nov. 11, 2017), ECF No. 21. However, on December 28, 2017, the Sixth Circuit stayed appellate proceedings "pending resolution of state court proceeding in light of *Moore v. Texas*." Order, *Keen v. Westbrooks*, No. 15-5597 (6th Cir. Dec. 28, 2017), ECF No. 26.

On December 12, 2017, the petitioner filed his third motion to reopen post-conviction proceedings, claiming that *Moore v. Texas*, 581 U.S. ____, 137 S. Ct. 1039 (2017), required Tennessee to provide "a remedy for the adjudication of [the petitioner's] claim that he is ineligible for execution because he is intellectually disabled." (Pet. App'x, 001, 006.) The Shelby County Criminal Court concluded that *Moore* did "not stand for the proposition stated by the [p]etitioner." (Pet's App'x, 024.) It also concluded that *Moore* could not serve as basis for reopening post-

conviction proceedings under Tenn. Code Ann. § 40-30-117(a) because it did not announce a new constitutional law that required retroactive application. (Pet's App'x, 024-025, 030-031.)

The petitioner filed an application for permission to appeal in the Tennessee Court of Criminal Appeals, asserting *Moore* "created a new constitutional right that would provide an avenue of relief." (Pet's App'x, 035.) The Court of Criminal Appeals held that *Moore* did not establish a new constitutional right but rather applied the prior rulings announced in *Atkins v. Virginia* and *Hall v. Florida*.[3] (Pet's App'x, 035.) The court also declined the petitioner's invitation "to create a mechanism for collateral review of his intellectual disability claim" beyond the statutorily prescribed procedure. (Pet's App'x, 036.) The Tennessee Supreme Court denied the petitioner's subsequent application for permission to appeal. (Pet's App'x, 038.)

REASONS FOR DENYING THE WRIT

The petition should be denied because the Court does not have jurisdiction to decide the question presented, i.e., whether *Moore* requires Tennessee courts to grant successive collateral review of a criminal judgment. The state court's decision that petitioner's claim does not satisfy Tennessee's statutory criteria for successive collateral review did not resolve any federal question that would give this Court jurisdiction. In any event, the state court properly determined that *Moore*, which merely applied *Atkins* and *Hall*, did not announce a new rule of constitutional law. Moreover, *Moore* does not require Tennessee to create an additional procedural mechanism by which the petitioner can assert an intellectual disability claim. And the petitioner has not identified any split of authority for resolution by this Court.

[3] *Hall v. Florida*, 572 U.S. 701 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002).

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

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

Here, the state court's decision that successive collateral review is not available for petitioner's intellectual-disability claim did not involve an issue of constitutional dimension. It involved only a question of the applicability of a state statute. States have no constitutional obligation to provide any procedures for the collateral review of criminal judgments. *See Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Though not compelled by the Constitution, Tennessee provides several avenues to collaterally attack criminal judgments. Tennessee's Post-Conviction Procedure Act provides one such avenue. It makes post-conviction, collateral review available, but provides that a defendant may file only one petition for post-conviction relief. *See* Tenn. Code Ann. § 40-30-102(c).

However, as pertinent here, "[a] petitioner may move to reopen a post-conviction proceeding that has been concluded, under the limited circumstances set out in [Tenn. Code Ann.] § 40-30-117." Tenn. Code Ann. § 40-30-102(c). Reopening is available if (1) the claim in the motion to reopen is based on a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, (2) retrospective application of that right is

required, and (3) the motion to reopen is filed within one year of the qualifying appellate ruling. Tenn. Code Ann. § 40-30-117(a)(1). Tennessee's Post-Conviction Procedure Act also 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." Tenn. Code Ann. § 40-30-122.

Applying this statutory definition of the "announcement" of "a new rule of constitutional criminal law," the Tennessee Court of Criminal Appeals concluded that *Moore* did not announce a new rule of constitutional criminal law but, instead, was simply an application of existing precedent. That is, the court's decision did not resolve any Eighth Amendment claim but merely applied the Tennessee statute that restricts successive collateral attacks on criminal judgments. Thus, because the decision "rests on a state law ground that is independent of [any] federal question and adequate to support the judgment" this Court lacks jurisdiction to review the decision. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Montgomery v. Louisiana, 136 S. Ct. 718 (2016), does not confer jurisdiction in this case. Under *Montgomery*, "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.*

This holding does not control here. The question in *Montgomery* was whether an admittedly new rule must be applied retroactively. In this case, on the other hand, the state court held that *Moore* did not announce a new rule at all. That question turned not on whether *Moore* was "substantive" but on the relevant state statutes that define what constitutes a "new rule of constitutional criminal law." *See* Tenn. Code Ann. §§ 40-30-117(a)(1), -122. Although this

statutory definition was informed by *Teague v. Lane*, 489 U.S. 288 (1989),[4] the state court did not address any constitutional issues involved in retroactivity determinations, but merely applied a state statute that controls whether a state prisoner is entitled to a second state collateral review proceeding. *See Bush v. State*, 428 S.W.3d 1, 13, 19-20 (Tenn. 2014) (discussing the adoption of § 40-30-122).

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

II. Tennessee Is Not Constitutionally Compelled to Adjudicate an *Atkins* Claim in an Inapt Procedural Vehicle of the Petitioner's Choosing.

Even if this Court were to find that it has jurisdiction, certiorari should be denied because the state court correctly concluded that *Moore* merely applied *Atkins* and *Hall* and did not create a new rule of constitutional law requiring retroactive application. The petitioner argues that, under *Montgomery v. Louisiana* and *Moore v. Texas*, the States are constitutionally compelled to provide an avenue of collateral review to adjudicate an *Atkins* intellectual-disability claim. (Pet., 4-11; Pet's App'x, 005-006.)[5] By extension, he argues that Tennessee courts "limit the constitutional protection" announced in *Atkins* when they reject his proposed avenue for adjudication. (Pet., 5, 6.) Neither assertion is correct; therefore, the Court should deny his petition for certiorari.

[4] *Teague* provided that new rules do not apply retroactively unless they are (1) "substantive rules" which forbid "criminal punishment of certain primary conduct" or "a certain category of punishment for a class of defendants," or (2) new "watershed rules of criminal procedure." *Montgomery,* 136 S. Ct. at 729 (internal quotation marks omitted).

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

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

But *Montgomery* is inapplicable here because its holding is limited to situations in which collateral review is otherwise properly available. "If a state collateral proceeding *is open to a claim controlled by federal law*, the state court 'has a duty to grant relief that federal law requires.'" *Id.* at 731 (emphasis added) (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)). "In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, *assuming the claim is properly presented in the case*." *Id.* at 732 (emphasis added). Nowhere did *Montgomery* mandate that state courts adjudicate claims that were presented under facially inapplicable procedural vehicles.

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

brought for substantive adjudication in an improper procedural vehicle or create a new procedural mechanism for bringing the claim.[6]

Such a holding would conflict with the Court's well-settled law that state courts are not obligated under the federal Constitution to provide collateral review. "[Post-conviction relief] is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief . . . ." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); *see also Murray v. Giarrantano*, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring) ("Nothing in the Constitution requires the States to provide [post-conviction] proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551 . . . (1987), nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings."). This conclusion is even more compelling here because this was not the petitioner's first collateral proceeding; he already had a full and fulsome post-conviction review. He even presented evidence about his IQ scores during his post-conviction hearing, and, although *Van Tran* and *Atkins* were released while his post-conviction petition was pending in the trial court he still did not raise an intellectual-disability claim. *Keen*, 2006 WL 1540258, at *14, *16, *25, *26.

The petitioner chose a non-available, improper procedural vehicle—a motion to reopen post-conviction proceedings—to bring his intellectual-disability claim. The state courts were accordingly compelled to reject it.

[6] The petitioner also points to the Tennessee Supreme Court's order in *State v. Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Dec. 3, 2019), to suggest that the Tennessee Supreme Court has authority to create a new procedural mechanism for the petitioner to present an intellectual-disability claim. (Pet. at 10.) However, the *Hall* order does not support the petitioner's claim. In *Hall*, the court acknowledged that it had "previously created procedures *to fill otherwise procedural voids*," but "[e]xpansion of a statute is not within the purview of this Court." Order at 10, *State v. Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Dec. 13, 2019). The *Hall* order offers the petitioner no relief.

III. Tennessee Courts Properly Denied the Petitioner's Motion to Reopen Post-Conviction Proceedings Because *Moore* Did Not Announce a New Constitutional Rule Requiring Retroactive Application.

Tennessee allows petitioners to reopen a post-conviction petition if the claim is based on a new constitutional right requiring retroactive application. Tenn. Code Ann. § 40-30-117(a)(1). The state court correctly concluded that *Moore* merely applied *Atkins* and *Hall* and did not create a new rule of constitutional law requiring retroactive application.

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

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

In *Hall*, the Court considered Florida's attempt to enforce this restriction with a "rigid rule" that foreclosed exploration of intellectual disability unless the capital defendant had an IQ test score below 70. *Hall*, 572 U.S. at 704. The Court concluded that "Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Id.* at 724. Indeed, *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 719 (citing *Atkins*, 536 U.S. at

308, n.3, 309 n.5). The *Hall* Court made clear how thoroughly its holding was dictated by *Atkins*: "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, *were a fundamental premise of Atkins*." *Id.* at 720 (emphasis added).

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

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

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

IV. Petitioner Identifies No Relevant Split of Authority.

The Court should also deny the petition because the petitioner has not identified a split of authority on the question he has presented. (Pet. at 1-11.) In fact, he has not cited a single federal court of appeals decision or a single state-court decision holding that the state courts are constitutionally required to force an *Atkins* intellectual-disability claim into an improper procedural vehicle or create additional avenues of collateral review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, to counsel for petitioner: Kelly J. Henry, 810 Broadway, Suite 200, Nashville, TN 37203, on the 18th day of February 2020. I further certify that all parties required to be served have been served.

s/ Courtney N. Orr
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