

CAPITAL CASE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DELLINGER,

Petitioner,

vs.

STATE OF TENNESSEE

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE QUESTION PRESENTED

Mr. Dellinger has a full-scale I.Q. of 69; he never could read, write, figure out which restroom to use, buy bread, or measure a board. His adaptive deficits were obvious and profound as a child, even before he was kicked in the head by a horse. No court has ever considered the proof of his disability, because the Tennessee courts have found, “as far as we are able to discern, Petitioner has no state court remedy in order to present his claim that the sentence of death is void due to his alleged intellectual disability.” Apx. 9a.

The Tennessee courts recognize that the state has “no business executing the intellectually disabled,” but, also hold that there is no present statutory remedy available for prisoners like Mr. Dellinger. Apx. 4a, 9a (citing *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012)). The Tennessee Supreme Court left it to the Tennessee legislature to “create a procedure that accommodates prisoners on death row whose intellectual disability claims cannot be raised under [current Tennessee law].” Apx. 9a (citing *Keen*, 398 S.W.3d at 613). The Court of Criminal Appeals noted that “[t]he General Assembly is in its seventh session since *Keen* was filed and no legislation establishing a procedure mentioned in *Keen* has become law.” Apx. 9a.

Mr. Dellinger’s case presents this question: May Tennessee evade the constitutional mandate of *Atkins v. Virginia*, 536 U.S. 304 (2002) via legislative inaction and judicial abdication? That is, may a state thwart the Constitutional prohibition against execution of the intellectually disabled by failing to provide a procedural vehicle for the adjudication of an *Atkins* exemption claim?

OPINIONS BELOW

The opinion of the Court of Criminal Appeals below is unreported. *Dellinger v. State*, No. E2018-00135-CCA-R3-ECN (Tenn.Crim.App. April 17, 2019); Apx. 1a. The Tennessee Supreme Court denied permission to appeal. *Dellinger v. State*, No. E2018-00135-SC-R11-ECN (Tenn. August 14, 2019); Apx. 12a.

RELATED PROCEEDINGS

Judgment in criminal case affirmed by *State v. Dellinger*, 2001 WL 220186 (Tenn. Crim. App. Mar. 7, 2001), and *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002). This Court denied a petition for writ of certiorari. 02-6354 (Dec. 16, 2002). Denial of post-conviction affirmed by *Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009). Habeas proceedings filed under *Dellinger v. Mays*, 3:09-cv-104 (E.D. Tenn.) are stayed pending the resolution of Mr. Dellinger's state claims. Prior state petitions for relief, under various legal theories were denied by the Tennessee Courts, and this Court denied certiorari. *Dellinger v. Tennessee*, 18-7332 (cert. denied Mar. 18, 2019).

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1257. The Tennessee Supreme Court denied permission to appeal on August 14, 2019. The mandate of the Tennessee Supreme Court issued on August 15, 2019. On November 6, 2019 the Circuit Justice granted Mr. Dellinger an extension of time until January 13, 2020 to file this petition. On January 15, 2020, the Clerk of the Supreme Court requested that a corrected petition be filed on or before March 15, 2020. This corrected petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Tennessee courts have repeatedly rejected every attempt made by counsel for Mr. Dellinger to present expert and lay proof that he is intellectually disabled and ineligible for execution. On April 10, 2012, counsel filed a motion to reopen post-conviction proceedings under Tennessee Code Annotated § 40-30-117 so that a claim that Mr. Dellinger is ineligible for execution could be heard. When the Tennessee Supreme Court issued *Keen v. State*, 398 S.W.3d 594 (2012) which appeared to foreclose the motion to re-open as a viable remedy, counsel amended the pleading,

adding a petition for writ of error *coram nobis*, a petition for a writ of *audita querela*, a motion for a declaratory judgment, claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and claims under the due process, law of the land, and open courts provisions of the United States and Tennessee Constitutions. The Motion to Reopen was denied without a hearing as being an inappropriate procedure to vindicate an intellectual disability claim. *James Dellinger v. State*, No. E2013-02079-CCA-R28-PD (Tenn.Crim.App. Jan. 16, 2014) (order), *perm. app. denied* (Tenn. May 15, 2014). While, the other six proffered avenues for relief were all found to be legally unavailable. *Dellinger v. State*, 2015 WL 4931576, at *8-17 (Tenn. Crim. App. August 18, 2015). The merits of Mr. Dellinger's claim were left unaddressed. *Id.*

After this Court issued *Moore v. Texas*, 137 S. Ct. 1039 (2017), Mr. Dellinger again sought relief on August 28, 2017, filing a motion to reopen, as well as a second petition for writ of error *coram nobis*, a motion under Tennessee Rule of Criminal Procedure 36.1, and a request for relief under any other remedy existing at common law. The Tennessee courts held that *Moore* is not retroactive and denied Mr. Dellinger's motion to reopen post-conviction proceedings. *Dellinger v. State*, No. E2018-00130-CCA-R28-PD. The Tennessee Supreme Court denied review. *Dellinger v. State*, No. E2018-00130-DC-R11-PD (Tenn. Aug. 8, 2018). This Court denied certiorari on March 18, 2019. (Case No. 18-7332).

That brings us to the case before this Court. The Tennessee Court of Criminal Appeals rejected the second petition for writ of error *coram nobis*, Rule

36.1 relief, and common law relief, holding that there are no procedural remedies available for the vindication of Mr. Dellinger's claim:

The door to a proceeding to now present Petitioner's claim of intellectual disability has been closed in post-conviction (initial proceedings and motion to reopen); error coram nobis; writ of audita querela; declaratory judgment; pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, process; law of the land; open courts provision of the United States and Tennessee Constitutions; and violations of double jeopardy.

As far as we are able to discern, Petitioner has no state court remedy in order to present his claim that the sentence of death is void due to his alleged intellectual disability.

Apx. 9a. The Tennessee courts held that courthouse doors are closed to Mr. Dellinger, and to all other similarly situated intellectually disabled prisoners. Without clarification from this Court, Tennessee will not only execute an intellectually disabled man, but will, in effect, limit the constitutional protection recognized by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002).

REASON THE WRIT SHOULD BE GRANTED

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

No less than three times since *Atkins v. Virginia* was decided, this Court has reaffirmed its categorical exclusion of the intellectually disabled from execution, and has insisted that the States cannot create legal standards that prevent the vindication of meritorious intellectual disability claims. *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Hall v. Florida*, 134 S. Ct. 1986

(2014). Here, Tennessee simply refuses to apply any standard at all, and, due to legislative inertia and judicial powerlessness, refuses to grant Mr. Dellinger a merits hearing.

Montgomery v. Louisiana, 136 S.Ct. 718 (2016) establishes that states must provide a forum for vindication of a constitutional protection, “[i]n 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.” 136 S.Ct. at 732.

The Tennessee Court of Criminal Appeals recognized the significance of *Montgomery*:

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

Apx. 7a.

The Tennessee Supreme Court has twice stated that Tennessee has no interest in executing the intellectually disabled, however it has failed to either identify or create a procedural vehicle for inmates such as Mr. Dellinger. *See Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012) (“We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled.”); *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016) (same). The Tennessee court’s refusal to identify a remedy has closed the door to multiple petitioners’ exemption claims, threatening to undermine *Atkins*. *E.g. Ivy v. State*, 2018 WL 625127 (Tenn.Crim.App. Jan. 30, 2018) (finding that all avenues pursued by that defendant

were procedurally invalid and declining to identify an available procedure); *Sims v. State*, 2014 WL 7334202 (Tenn.Crim.App. Dec. 23, 2014) (finding there is no independent cause of action to present a claim of intellectual disability—outside of that provided for at the initial trial stage); *Payne v. State*, 2014 WL 5502365 (Tenn.Crim.App. Oct. 30, 2014); *Chalmers v. State*, 2014 WL 2993863 (Tenn.Crim.App. Jun. 30, 2014); *Suttles v. State*, 2014 WL 2902271 (Tenn.Crim.App. Jun. 25, 2014); *Jahi v. State*, 2014 WL 1004502 (Tenn.Crim.App. Mar. 13, 2014); *Porterfield v. State*, 2013 WL 3193420 (Tenn.Crim.App. Jun. 20, 2013); *Howell v. State*, 2011 WL 2420378 (Tenn.Crim.App. Jun. 14, 2011); *Sims v. State*, 2011 WL 334285 (Tenn.Crim.App. Jan. 28, 2011); *Smith v. State*, 2010 WL 3638033 (Tenn.Crim.App. Sep. 21, 2010); *Cribbs v. State*, 2009 WL 1905454 (Tenn.Crim.App. Jul. 1, 2009) (recognizing that under Tennessee law, inmate with I.Q. scores of 70, 73, and 75 did not qualify as intellectually disabled, but that under this standard, “it is our view that some mentally retarded defendants are likely to be executed in Tennessee”); *Van Tran v. State*, 2006 WL 3327828 (Tenn.Crim.App. Nov. 9, 2006); *Keen v. State*, 2006 WL 1540258 (Tenn.Crim.App. Jun. 5, 2006); *Black v. State*, 2005 WL 2662577 (Tenn.Crim.App. Oct. 19, 2005).

In light of the absence of any present process for raising post-conviction *Atkins* claims, the Tennessee Supreme court has twice invited the legislature to create a procedural remedy – to no avail. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012) (noting the ruling “does not foreclose the ability of the [Tennessee] General Assembly to create a procedure that accommodates prisoners on death row whose

intellectual disability claims cannot be raised under Tenn. Code Ann. § 40-30-117(a)(1) or (2).”); *Payne v. State*, 493 S.W. 3d 478, 492 (Tenn. 2016) (encouraging the General Assembly “to consider whether another appropriate procedure should be enacted”).

In Mr. Dellinger’s case, the Court of Criminal Appeals highlighted the legislature’s inaction:

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

Apx. 9a.

Mr. Dellinger is ineligible for execution because he is intellectually disabled. The submissions to the courts below show that Mr. Dellinger has a raw, unadjusted I.Q. score of 69. The disability indicated by this score is supported by the fact that in the free world Mr. Dellinger had obvious adaptive deficits: he did not know the value of currency or coins, and would just hold out handfuls of money to clerks, trusting they would take what was fair; he could not distinguish between the three letters of “men” and the five letters of “women,” or understand the two standard symbols for male (in pants) and female (in skirt), such that he often entered the wrong bathroom; he could not read a calendar; he did not know his birthday; he would often forget what he had been sent to the store to purchase; and while a low level construction worker, he could not remember instructions, he could not do dangerous or complex work, and he had to be redirected and instructed every day:

“he could cut, but he couldn’t measure.” Mr. Dellinger’s proof of his colorable claim is overwhelming; no one has claimed otherwise. Despite the un rebutted proof that Mr. Dellinger is intellectually disabled and exempt from execution, he has been completely shut out of the Tennessee courts for want of a procedural remedy. Tennessee should not be permitted to execute him. States may not execute anyone in “the entire category of [intellectually disabled] offenders.” *See Roper v. Simmons*, 543 U.S. 551, 563–564 (2005).

Where there is a constitutional right there must be a remedy. Such is a bedrock principle of our judicial system. *Marbury v. Madison*, 1 Cranch 137, 162 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.”). When there is a constitutional limitation on the state’s power to act, the courts are constitutionally obligated to provide a substantive opportunity to determine whether that limitation applies. *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). *Moore, Brumfield, Hall* and *Atkins* place a constitutional obligation on the State of Tennessee to provide a forum for the adjudication of Mr. Dellinger’s intellectual disability exemption claim.

Tennessee must not be allowed to subvert the constitutional protections recognized by this Court in *Atkins*; the courtroom doors should be opened to Mr. Dellinger.

CONCLUSION

The writ should be granted.

Respectfully Submitted,

/s/ Amy D. Harwell

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CERTIFICATE OF SERVICE

I certify that a copy of this application was served upon counsel for Respondent, Benjamin Ball, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 12th day of March, 2020.

/s/ Amy D. Harwell

Amy D. Harwell

Counsel for James Dellinger