

**NO. 19-8011**

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

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**JAMES DELLINGER,  
Petitioner,**

**v.**

**STATE OF TENNESSEE,  
Respondent.**

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

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## CAPITAL CASE

### RESTATEMENT OF THE QUESTION PRESENTED

The petitioner sought to adjudicate an *Atkins* intellectual-disability claim on state collateral review by means of a petition for state writ of error *coram nobis* and a motion to correct illegal sentence pursuant to Tenn. R. Crim. P. 36.1. The Tennessee Court of Criminal Appeals held that the *coram nobis* claim was time-barred by more than a decade with essentially no showing by the petitioner as to why the statute of limitations should be tolled and that an *Atkins* intellectual-disability claim is not cognizable under the narrow purview of Rule 36.1.

In declining to shoehorn an *Atkins* claim into the petitioner's chosen, but inapt, procedural vehicles did the Tennessee Court of Criminal Appeals thwart the constitutional prohibition against the execution of the intellectually disabled?

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## **JURISDICTIONAL STATEMENT**

The Tennessee Supreme Court denied the petitioner's application for permission to appeal on August 14, 2019. (Pet's App'x, 12a.) Justice Sotomayor extended the time for filing a petition for writ of certiorari until January 30, 2020. *Dellinger v. Tennessee*, No. 19A497 (U.S. Aug. 18, 2019). On January 15, 2020, the Clerk of the Supreme Court requested that the petitioner file a corrected petition by March 15, 2020, and the petitioner filed his petition on March 12, 2020. He invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). (Pet. 1.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Article III, § 2 of the United States Constitution 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. § 40-26-105(b) establishes:

Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 27-7-103 subjects *coram nobis* claims to a one-year statute of limitations.

Tennessee Rule of Criminal Procedure 36.1(a)(1) sets out, “Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered.” “[A]n illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.” Tenn. R. Crim. P. 36.1(a)(2).

### **STATEMENT OF THE CASE**

A jury convicted the petitioner of first-degree premeditated murder for the 1992 shooting of Tommy Griffin and sentenced him to death on the strength of the aggravating circumstance that he had previously been convicted of a violent felony. *State v. Dellinger*, 79 S.W.3d 458, 462-65 (Tenn. 2002). The Tennessee Court of Criminal Appeals affirmed the petitioner’s conviction and sentence. *State v. Dellinger*, No. E1997-00196-CCA-R3-DD, 2001 WL 220186, at \*46 (Tenn. Crim. App. Mar. 7, 2001). The petitioner’s conviction and sentence were likewise affirmed by the



Tennessee Supreme Court. *Dellinger*, 79 S.W.3d at 477. This Court denied certiorari. *Dellinger v. Tennessee*, 537 U.S. 1090 (2002).

In 2003, the petitioner filed a petition for post-conviction relief in which he contended, among other things, that he was ineligible for the death penalty due to his alleged intellectual disability and that his trial attorneys were ineffective in failing to develop evidence of his intellectual disability. *See Dellinger v. State*, 279 S.W.3d 282, 285 (Tenn. 2009). To support his claim, the petitioner presented the testimony of Dr. Peggy Joyce Cantrell, an expert in clinical psychology, who testified that the petitioner had deficits in the cognitive, emotional, and interpersonal areas. *See Dellinger v. State*, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576, at \*2 (Tenn. Crim App. Aug. 18, 2015), *perm. app. denied* (Tenn. May 6, 2016). However, she noted that the petitioner had taken two or three IQ tests and that, while he had cognitive limitations, “the limitations were not ‘to the degree where he’s [intellectually disabled], by any means.’” *Id.* The post-conviction court denied relief and, in relation to the petitioner’s claim of intellectual disability, the court highlighted Dr. Cantrell’s expert conclusion that the petitioner was not intellectually disabled. *Id.*

On appeal, the petitioner abandoned his claim of intellectual disability and instead relied in part on his claim of actual innocence of the offense—a claim completely unrelated to his intellectual-disability claim. *Id.* The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court. *Dellinger v. State*, No. E2005-01485-CCA-R3-PD, 2007 WL 2428049 at \*1 (Tenn. Crim. App. Aug. 28, 2007). After granting the petitioner’s application for permission to appeal, the Tennessee Supreme Court concluded that a freestanding claim of actual innocence is cognizable in an initial petition for post-conviction relief, but that Dellinger had failed

to meet his burden of proof. *Dellinger*, 279 S.W.3d at 285, 290-92, 295-96. The Tennessee Supreme Court affirmed in all other respects. *Id.* at 286, 296.

In 2011, the Tennessee Supreme Court clarified that a raw intellectual quotient (“IQ”) score above 70 is not dispositive on the question 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 v. State*, 398 S.W.3d 594, 605-06, 608 (Tenn. 2012).

The following year, the petitioner filed a motion to reopen post-conviction proceedings in which he again alleged that he is intellectually disabled and thus ineligible for the death penalty. *Dellinger*, 2015 WL 4931576, at \*3. In the motion, the petitioner argued that *Coleman* established a new constitutional right that was not recognized at the time of his trial. *Id.* On December 20, 2012, the Tennessee Supreme Court released its opinion in *Keen*, rejecting the bases on which the petitioner sought to reopen post-conviction, namely the claims that *Coleman* established a new constitutional right with retroactive applicability and that a newly-obtained IQ test score constituted newly-discovered scientific evidence of actual innocence necessary to reopen post-conviction proceedings. *Id.* The petitioner then amended his motion to include a petition for writ of *error coram nobis*; a common law writ of *audita querela*; a motion for a declaratory judgment; claims under the law of the land, due process, and open courts clauses of the Tennessee and the United States Constitutions; and “*Bivens*-like” claims. *Id.* The trial court denied relief in August 2013, finding that the petitioner’s *coram nobis* claim was barred by the one-year statute of limitations. *Id.* After the petitioner unsuccessfully sought permission to appeal the denial of his motion to reopen, he appealed the denial of his *coram nobis* petition. *Id.*

On May 27, 2014, while the petitioner's *coram nobis* appeal was pending, this Court decided *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), holding 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." In affirming the trial court's denial of the *coram nobis* petition, the Tennessee Court of Criminal Appeals held that, unlike Hall, the petitioner had not been precluded during trial or post-conviction proceedings from presenting evidence, other than raw I.Q. scores, to prove that his functional intelligence quotient was 70 or below when he committed the crime. *Dellinger*, 2015 WL 4931576, at \*11-\*12. The court concluded that the trial court properly found that the petition was time-barred, and the Tennessee Supreme Court denied the petitioner's application for permission to appeal on May 6, 2016. *Id.* at \*12.

On May 26, 2015, while his previous appeal was still pending, the petitioner filed a second petition for the writ of error *coram nobis*, and the trial court agreed to stay the proceeding until the Tennessee Supreme Court decided *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016). *Dellinger*, 2019 WL 1754701, at \*1. The Tennessee Supreme Court issued its opinion in *Payne* on April 7, 2016, and the petitioner subsequently filed an amendment to his *coram nobis* petition as well as motion to re-open post-conviction proceedings. *Id.* The post-conviction court denied the motion to re-open. (Resp's App'x, 1.) The Court of Criminal Appeals then denied the ensuing application for permission to appeal, holding that, under *Payne*, *Hall*'s holding was not retroactive in application and thus could not serve as the basis for reopening post-conviction proceedings. (Resp's App'x, 2.) The Tennessee Supreme Court denied the petitioner's application for permission to appeal. (Resp's App'x, 3.) This Court denied certiorari on March 18, 2019. *Dellinger v. Tennessee*, 139 S.Ct. 1333 (2019).

On November 30, 2017, the trial court denied the petition for the writ of error *coram nobis*, the motion to correct an illegal sentence pursuant to Tenn. R. Crim. P. 36.1, and other remaining requests for relief. (Pet’s App’x, 1a-3a.) In affirming the denials, the Court of Criminal Appeals held that the petitioner, having abandoned his claim of intellectual disability on appeal from post-conviction proceedings, had no remaining state proceedings available through which he could pursue his claim of alleged intellectual disability. (Pet’s App’x, 8a-10a.) The Tennessee Supreme Court denied further review. (Pet’s App’x, 12a.)

Petitioner now seeks a writ of certiorari.

### **REASONS FOR DENYING THE WRIT**

#### **I. This Court Does Not Have Jurisdiction to Review the Decision of the Tennessee Court of Criminal Appeals Because that Decision Rests on Independent and Adequate State-Law Grounds.**

The Court lacks jurisdiction to review the state-law determination. It is well established that “[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). “In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional.” *Id.* Moreover, principles of comity require federal courts to defer to a state’s judgment on issues of state law. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“[A] state court’s interpretation of state law . . . binds a federal court . . .”).

The Tennessee Court of Criminal Appeals did not reach the merits of the petitioner’s Eighth Amendment claim because it determined that the claim was time barred under state law. This Court, therefore, lacks jurisdiction to review what is plainly and purely the state court’s ruling based on state law grounds about the availability of state-court procedural vehicles. The Tennessee

Court of Criminal Appeals' application of the state *coram nobis* statute of limitations is an independent and adequate state-law ground. *See Coleman*, 501 U.S. at 749-50 (holding that a claim barred by statute of limitations in state court is an independent and adequate state-law ground that results in the procedural default of a federal habeas claim unless the petitioner can show cause and prejudice to excuse the default). The same is true for the state court's decision on whether an *Atkins* claim is cognizable under the very limited purview of Rule 36.1. *See Burket v. Angelone*, 208 F.3d 172, 191 (4<sup>th</sup> Cir. 2000) (a claim found not to be cognizable by a state court under state collateral review was an independent and adequate state-law ground), *cert denied* 120 S. Ct. 2761 (2000).

In sum, because the Tennessee courts' decisions rest on independent and adequate state-law grounds, those decisions are not reviewable by this Court. The Court should thus decline petitioner's invitation to second-guess the decisions of the Tennessee courts regarding a state statute of limitations or the cognizability of the claim under a state rule of criminal procedure.

## **II. Tennessee Is Not Constitutionally Compelled to Adjudicate an *Atkins* Claim Improperly Presented in Time-Barred, Non-Existent, or Otherwise Inapt Procedural Vehicle.**

The petitioner argues that under *Montgomery v. Louisiana* and *Moore v. Texas* the States are constitutionally compelled to provide some vehicle for collateral review to adjudicate an *Atkins* intellectual-disability claim. (Pet. at 3-5).<sup>1</sup> He implicitly concludes from this premise that the Tennessee courts violated the U.S. Constitution by rejecting his proposed vehicles for adjudication. (Pet. at 6-7). Neither assertion is correct; therefore, the Court should deny his petition for certiorari.

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<sup>1</sup> *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 shoehorn a petitioner’s purported Eighth Amendment claim into inapplicable vehicles 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 the relief that federal law requires.’” *Montgomery*, 136 S. Ct. 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 must adjudicate claims that are time-barred, that are presented in non-existent procedural vehicles, or that are facially inapplicable.

Likewise, *Moore* contained no such mandate. *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 psychological practice. *Id.* at 1049-53. Nowhere did the decision hold that a State must force an intellectual-disability claim into an improper procedural vehicle for substantive adjudication.

Indeed, such a holding would conflict with this 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. Giarratano*, 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 state collateral proceeding; he already had a full and fulsome post-conviction review at which he had the opportunity to present evidence of his alleged intellectual disability and in fact presented testimony from a clinical psychologist regarding his cognitive abilities.

And the petitioner’s chosen procedural vehicles were indeed improper, which compelled the state courts to reject his claims. The *coram nobis* vehicle was inappropriate and time-barred—both times the petitioner pursued it—because the evidence was not new. Tennessee’s writ of error *coram nobis* is limited, as relevant here, by statute:

Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for *subsequently or newly discovered evidence* relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 40-26-105(b) (emphasis added). The purpose of this procedure is to correct substantial factual errors that would have prevented criminal liability from attaching at the time of trial had the error been known. *Payne*, 493 S.W.3d at 485. “Thus, the goal of relief afforded pursuant to a writ of error coram nobis is a reliable determination of the petitioner’s criminal liability for the offense with which he was charged . . . .” *Id.* “The goal is *not* a redetermination

of the petitioner's criminal liability in the face of changes in the law occurring many years after his trial." *Id.*

*Coram nobis* claims are also subject to a one-year statute of limitations. Tenn. Code Ann. § 27-7-103; *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). The limitations period begins to run from the date the judgment of the trial court becomes final. *Harris*, 301 S.W.3d at 144. That finality, in turn, occurs thirty days after the entry of judgment in the trial court if the defendant does not file any post-trial motions or upon entry of an order disposing of a timely filed post-trial motion. *Id.* (citing *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999)). Tennessee courts may toll the statute of limitations, but only if the petitioner establishes that the factual ground for relief arose after the limitations period normally commenced and, if the ground was later arising, that a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. *Id.* at 145. More specifically, the petitioner must establish that he has been pursuing his rights diligently and that some extraordinary circumstance prevented timely filing of the petition. *Whitehead v. State*, 402 S.W.3d 615, 627-28 (Tenn. 2013) (citing *Holland v. Florida*, 560 U.S. 631 (2010)).

The writ of error *coram nobis* was patently inapplicable—and the state petition time-barred—because the petitioner never alleged, much less proved, that the facts were newly discovered or that he was prevented from making the claim earlier. Nor could the petitioner plausibly claim that the evidence was newly discovered. The information upon which Drs. Watson and Steinberg relied was available to the petitioner at the time of his trial and post-conviction proceedings. *Dellinger*, 2015 WL 4931576, at \*12. The new IQ testing by Dr. Watson was cumulative to the evidence that was previously available to the petitioner. *Id.* Therefore, the state



courts reasonably concluded that the evidence was not newly discovered for *coram nobis* purposes and that the petitioner did not establish any basis for tolling of the statute of limitations.

Nor is the petitioner's *Atkins* claim cognizable under Tenn. R. Crim. P. 36.1 because his capital sentence is facially valid. The scope of Rule 36.1 is narrow: "Either the defendant or the state may, at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered." Tenn. R. Crim. P. 36.1(a). But "few sentencing errors render sentences illegal" under Rule 36.1. *State v. Wooden*, 478 S.W.3d 585, 595 (Tenn. 2015). "For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." *Id.* at 591.

More particularly, an illegal sentence under Rule 36.1 or the state writ of habeas corpus is one infected by "fatal error." *Id.* at 592. Fatal error determinations assess the facial invalidity of a sentence by comparing the judgment to the applicable statutes, such as a sentence not authorized by the applicable statutory scheme. *Summers v. State*, 212 S.W.3d 251, 255-56 (Tenn. 2007). "Unlike a post-conviction petition, a habeas corpus petition is used to challenge void and not merely voidable judgments. A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish its invalidity." *Id.* These voidable judgments constitute "appealable errors," which are not cognizable under Rule 36.1, and include errors for which a right to direct appeal exists or rest on issues of fact to be established through proof where the trial court is, in essence, making findings of fact. *Payne*, 493 S.W.3d at 595; *Cantrell v. Easterling*, 346 S.W.3d 445, 451 (Tenn. 2011).

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<sup>2</sup> The term "illegal sentence" is construed identically in the context of a petition for state writ of habeas corpus and a Rule 36.1 motion. *Wooden*, 478 S.W.3d at 494-95.

No court had adjudicated the petitioner intellectually disabled by the time of sentencing (or even by the present date); therefore, he was eligible to receive the death penalty for his conviction of first-degree murder under Tennessee law. *See* Tenn. Code Ann. § 39-13-204. To find the petitioner intellectually disabled, the courts would have to weigh evidence beyond the face of the record, thereby rendering the *Atkins* claim merely an alleged appealable error for which Tenn. R. Crim. P. 36.1 does not lie. *Payne*, 493 S.W.3d at 595. The U.S. constitution does not mandate that Rule 36.1 be twisted and reshaped beyond all recognition to provide a vehicle for an *Atkins* claim. The petition for writ of certiorari should be denied.

**III. The Petitioner Has Not Identified a Circuit or State Split Nor Any Authority to Support His Petition.**

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 1-7). In fact, he has not cited a single federal court of appeals decision or a single state-court decision holding that state courts are constitutionally required to shoehorn an *Atkins* intellectual-disability claim into a procedurally improper vehicle.

**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: Amy D. Harwell, at 810 Broadway, Suite 200, Nashville, Tennessee 37203, on the 14<sup>th</sup> day of April 2020. I further certify that all parties required to be served have been served.

s/Benjamin A. Ball  
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