Appendix

Attachment 1

IN THE CIRCUIT COURT FOR BLOUNT COUNTY, TENNESSEE
AT MARYVILLE

JAMES DELLINGER,	)	
Petitioner	)	
	)	**No. C-23514**
v.	)	**(CAPITAL CASE)**
	)	**(POST-CONVICTION)**
STATE OF TENNESSEE,	)	**(MOTION TO REOPEN)**
Respondent.	)	**(Original PC #14432)**

AMENDED[1] ORDER DENYING
"MOTION TO REOPEN POST-CONVICTION PETITION"

I. INTRODUCTION

Petitioner, with the assistance of counsel, filed a pleading on May 26, 2015, entitled "Petition for Writ of Error Coram Nobis and/or Other Relief"[2] and on June 24, 2016, he filed an "Amended Petition For Writ of Error Coram Nobis, Motion to Reopen Pursuant to T.C.A. § 40-30-117 And/Or Other Relief."[3] The June 2016 motion to reopen was filed pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming Petitioner is entitled to relief based upon a new rule of law as announced in *Montgomery v. Louisiana*, 136

[1] This amended order has been filed due to the fact the parties did not receive proper service of the November 30, 2017, order from the Blount County Circuit Court Clerk's Office.

[2] The petition for writ of error coram nobis and any other relief sought other than the motion to reopen is filed under case no. 24583. The motion to reopen was separated from the other causes of action and is the instant case no. 23514.

[3] The initial pleading was filed citing to the then pending case of *Payne v. State* and sought a stay pending resolution of that case. The parties agreed to stay proceedings until the completion of *Payne* and Petitioner's separate appeal on other collateral claims. On April 17, 2016, the Tennessee Supreme Court issued its opinion in *Payne* and the amended pleadings were filed accordingly.

S. Ct. 718 (2016), and based upon his submitted evidence which he claims supports his intellectual disability. The State filed a response on September 29, 2016, seeking dismissal of the Motion to Reopen and all other relief requested,[4] and Petitioner filed a reply on December 1, 2016, asserting Petitioner never had a "meaningful determination" of his intellectual disability.

On August 28, 2017, Petitioner filed a Supplemental Motion To Reopen pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he is also entitled to relief based upon a new rule of law as announced in *Moore v. Texas*, 581 U.S. _____, 137 S. Ct. 1039 (2017). The State filed its response to the supplemental motion on September 29, 2017, again seeking summary dismissal, and Petitioner filed a reply on November 13, 2017.

This Court entered an order in August 2017 which set a briefing schedule and scheduled argument by the parties on the issue of summary dismissal for December 21, 2017, if necessary. However, after reviewing the pleadings, the record, and the relevant authorities, and for the reasons stated within this order, this Court has determined that oral argument is not necessary. Accordingly and for the reasons set forth below, the State's Motions to Dismiss are **GRANTED**, and Petitioner's Motions To Reopen are hereby **DENIED** and **DISMISSED**.[5]

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[4] The Petition for Writ of Error Coram Nobis and other relief sought is addressed by separate order.

[5] In his June 24, 2016, pleading, Petitioner cites to his pleadings filed in 2012 and 2013 and states "each is incorporated by reference as if plead in full." However, these pleadings were previously denied and that denial was affirmed on appeal. *James Dellinger v. State*, Order E2013-02079-CCA-R28-PD (Tenn. Crim. App. at Knoxville, Jan. 16, 2014), *perm. app. denied*, (Tenn. May 15, 2014), and *James Dellinger v. State*, 2015 WL 4931576 (Tenn. Crim. App. August 18, 2015), *perm. app. denied*, (Tenn. May 18, 2015). While this Court has taken judicial notice of those proceedings, this Court will not readdress those pleadings.

II. PROCEDURAL HISTORY

On September 5, 1996, Petitioner, James Dellinger, was convicted in Blount County of the February 1992 premeditated first degree murder of Tommy Griffin.[6] At the capital sentencing hearing for the murder, clinical psychologist Dr. Peter Young testified that Dellinger had an I.Q. between 72 and 83 and had borderline personality disorder. The jury determined the sentence of death was appropriate based upon finding Petitioner was previously convicted of a felony involving the use of violence. *See* Tenn. Code Ann. § 39-2-204 (i)(2).[7] Subsequently, our state supreme court reviewed the defendant's case on appeal and affirmed both the conviction and the sentence. *State v. Dellinger*, 79 S.W.2d 458 (Tenn. 2002), *cert. denied*, 123 U.S. 1090 (2002).

On March 3, 2003, Petitioner filed a *pro se* petition for post-conviction relief, and subsequently amended the petition with the assistance of counsel on August 11, 2003, which included a claim of intellectual disability and ineffective assistance of trial counsel for failure to raise the issue of intellectual disability. Additional amendments were filed to the petition and evidentiary hearings were held in October 2004, and January 2005. The following is a summary of the evidence presented related to intellectual disability at the 2004-2005 post-conviction hearings:

> During the hearing, the Petitioner presented the testimony of Dr. Peggy Joyce Cantrell, an expert in clinical psychology and the psychology of rural Appalachia. In evaluating the Petitioner, Dr. Cantrell reviewed Dr. Young's report and raw

[6] Petitioner's codefendant, Gary Sutton, was also convicted and sentenced to death.

[7] Petitioner and codefendant Sutton were also convicted and received life sentences in Sevier County of the first degree murder of Connie Branam, Tommy Griffin's sister. *See State v. Gary Wayne Sutton and James Anderson Dellinger*, 1995 WL 406953 (Tenn. Crim. App. July 11, 1995), *perm. app. denied*, (Tenn. Jan. 22, 1996). Although the Branam murder occurred second in time, it went to trial first and the conviction was used to support the aggravating circumstance in support of the death penalty in the Blount County case. *See Dellinger*, 79 S.W.3d at 465.

> data from 1995, the psychological evaluation by Middle Tennessee Mental Health Institute in 1993, and Dr. Diana McCoy's report from a 1992 evaluation. Dr. Cantrell interviewed the Petitioner, his wife, and one of his sisters. Dr. Cantrell reviewed the transcript of the penalty phase of the trial and eleven interview summaries of the Petitioner's family members and friends conducted in 2003.
>
> Dr. Cantrell testified regarding the Petitioner's family history of extreme poverty, his lack of education, his history of alcohol abuse that began at a young age, his employment history, his marriage and relationship with his wife, and the deaths of two of his children. Dr. Cantrell stated that the Petitioner had deficits in the cognitive, emotional, and interpersonal areas. Dr. Cantrell noted that the Petitioner previously had taken two or three IQ tests. She described the Petitioner's scores on the tests as "very consistent in the borderline to lower end of the low average range of intelligence, with his verbal skills being less well developed." Dr. Cantrell noted the Petitioner had significant verbal reasoning deficits. She said that the Petitioner was essentially illiterate and that his scores on academic testing fell within the first or second grade level. Dr. Cantrell also said that the Petitioner lacked full personality development and that he would find forming and sustaining close relationships difficult. Dr. Cantrell testified that while the Petitioner had cognitive limitations, the limitations were not "to the degree where he's [intellectually disabled], by any means."

James Dellinger v. State, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576 (Tenn. Crim. App. August 18, 2015), *perm. app. denied*, (Tenn. May 6, 2016). Dr. Cantrell also described Dr. Peter Young's pretrial evaluation of Petitioner as having been a very thorough evaluation. Following the evidentiary hearings, the trial court denied his petition on June 2, 2005, and found Petitioner was not intellectually disabled. Specifically, the trial court held "Dr. Cantrell testified at the evidentiary hearing that the petitioner is not mentally retarded. This issue is without merit." The trial court's denial of post-conviction relief was upheld on appeal. *Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009).

Petitioner, with the assistance of counsel, filed both a Motion to Reopen and an Amended Motion to Reopen his post-conviction proceedings on April 10, 2012, and then a "Second Amended Motion To Reopen And Additional Claims For Relief" on February

6, 2013. The April 2012 pleading raised claims of double jeopardy and of actual innocence of the death penalty; he claimed alleged new scientific evidence establishing his intellectual disability based upon what he also claimed was a new rule of constitutional law in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). After claims similar to Petitioner's claims related to *Coleman* were rejected in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), Petitioner filed the February 2013 "Second Amended Motion to Reopen and Additional Claims for Relief." In the 2013 amendment, Petitioner requested relief related to his claimed intellectual disability pursuant to (1) a Writ of Error Coram Nobis, (2) a Writ of Audita Querela, (3) a request for Declaratory Judgment, (4) the Law of the Land Clause, the Due Process Clause, or the Open Courts Clause, and (5) a "Bivens" claim. On August 14, 2013, this Court denied Petitioner's various requests for relief.[8]

Petitioner then filed a Rule 28 application for appeal with the Tennessee Court of Criminal Appeals on the motion to reopen and an appeal from the remainder of the claims; the appellate court also denied relief. *James Dellinger v. State*, Order E2013-02079-CCA-R28-PD (Tenn. Crim. App. at Knoxville, Jan. 16, 2014), *perm. app. denied*, (Tenn. May 15, 2014), and *James Dellinger v. State*, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576 (Tenn. Crim. App. August 18, 2015), *perm. app. denied*, (Tenn. May 6, 2016).

[8] In support of his claims, Petitioner had relied upon (1) the 2012 affidavit and 2010 report of Dr. Dale G. Watson, a clinical psychologist who specialized in neuropsychology and neuropsychological assessments, and (2) the 2012 affidavit and 2010 report of psychologist Dr. Stephen Greenspan who had evaluated Petitioner in 2010 but not for intellectual disability.

Petitioner currently has a pending petition for federal habeas corpus relief in the United States District Court for the Eastern Division of Tennessee. *James Dellinger v. Colson*, No. 3:09-ev-104 (E.D. Tenn. Knoxville Div).

III. MOTION TO REOPEN: APPLICABLE LAW

The statutes governing motions to reopen were summarized in *Harris v. State*, 102 S.W.3d 587, 590-91 (Tenn. 2003).

> 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; 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 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).

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. 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. ***MONTGOMERY V. LOUISIANA*** CLAIMS

Petitioner argues *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), announced a new constitutional right not recognized at the time of trial and asserts retroactive application of the right is required.

Does Montgomery v. Louisiana Require Retroactive Application?

Initially, this Court must consider whether *Montgomery v. Louisiana* announced a new rule of constitutional law which should be applied retroactively. "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.'" *William Steve Greenup v. State*, No. W2001–01764–CCA–R3–PC, 2002 WL 31246136 (Tenn. Crim. App., at Jackson, Oct. 2, 2002) (quoting *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

In *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016), the Supreme Court held:

> (1) The Supreme Court has jurisdiction to review a state collateral review court's failure to give retroactive effect to a new rule which the Constitution requires to be applied retroactively;
>
> (2) The U.S. Constitution requires state collateral review courts to give retroactive effect to new substantive rules of federal constitutional law under the *Teague* framework; and
>
> (3) The Supreme Court's decision in *Miller v. Alabama*,[9] finding the 8th Amendment prohibits mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review.

This Court finds the holding in *Montgomery* discussed only the new rule addressed in the *Miller* holding, and did not constitute an independent new rule of constitutional law to be applied retroactively and *Montgomery* does not combine with the intellectual disability cases discussed in Petitioner's pleadings to establish a new rule or provide Petitioner any relief here.

V. ***MOORE V. TEXAS* CLAIMS**

Relevant Case Law

Intellectual Disability and the Death Penalty: Pre-*Moore* Jurisprudence

In 1990, the Tennessee General Assembly first enacted Tenn. Code Ann. § 39-13-203, which in section (b) prohibits the execution of defendants who are

[9] Miller v. Alabama, 132 S. Ct. 2455 (2012).

intellectually disabled at the time they commit first degree murder. The statute sets forth the following three criteria for establishing intellectual disability:

> (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 manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a). Several years later, the Tennessee Supreme Court in *Van Tran v. State,* 66 S.W.3d 790, 800 (Tenn. 2001), held the Tennessee Constitution also prohibited the execution of an intellectually disabled person. Subsequent to the holding in *Van Tran*, the United States Supreme Court held the Eighth and Fourteenth Amendments of the United States Constitution also prohibited the execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002).

"'[T]he task of developing appropriate ways to enforce the constitutional restriction'" was left to the states. *Atkins*, at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This discretion left to the states, however, was not "unfettered." *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014).

Subsequently, in *Coleman v. State*, 341 S.W.3d 221, 244 (Tenn. 2011), our state supreme court noted that "while the definition of 'intellectual disability' has changed over time, the three essential criteria for ascertaining whether a person is intellectually disabled continue to remain relatively constant." *See also Moore*, 137 S. Ct. at 1045 (The United States Supreme Court referred to a definition of [intellectual disability] substantially similar to the Tennessee statutory

definition as the "generally accepted, uncontroversial intellectual-disability diagnostic definition."). The *Coleman* court clarified the type of evidence that Tennessee trial courts should consider in assessing this prong of the test.

> The criterion in Tenn. Code Ann. § 39-13-203(a)(1) requires a "functional intelligence quotient of seventy (70) or below." The statute does not require a "functional intelligence quotient test score of seventy (70) or below." Because the statute does not specify how a criminal defendant's functional I.Q. should be determined, we have concluded 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.
>
> Ascertaining a person's I.Q. is not a matter within the common knowledge of lay persons. Expert testimony in some form will generally be required to assist the trial court in determining whether a criminal defendant is a person with intellectual disability for the purpose of Tenn. Code Ann. § 39-13-203(a). ... Expert testimony that meets the requirements of Tenn. R. Evid. 702 and 703, unless otherwise barred, is admissible and may be considered by the trial court for the purpose of determining a defendant's functional I.Q. However, consistent with the plain language to Tenn. Code Ann. § 39-13-203(a)(1), as interpreted in *Howell v. State*, an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is "seventy (70) or below" or is above 70).
>
> In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields. ... Of course, the soundness of any particular expert's opinion regarding a defendant's I.Q. may be tested by vigorous cross-examination. ... In the final analysis, the trial court is not required to follow the opinion of any particular expert, ... but must give full and fair consideration to all the evidence presented, including the results of all the I.Q. tests administered to the defendant. *See Howell v. State*, 151 S.W.3d at 459.

341 S.W.3d at 241-42 (citations and footnote omitted).

In *Coleman*, the court also stated that trial courts should permit experts to consider such factors as the Flynn Effect in assessing a defendant's functional I.Q.

> The AAIDD currently recognizes ten potential "challenges" to the reliability and validity of I.Q. test scores. AAIDD Manual, at 36-41. Among these challenges are the standard error of measurement, the Flynn Effect, and the practice effect. The Flynn Effect refers to the observed phenomenon that I.Q. test scores tend to increase over time. Thus, the most current versions of a test should be used at all times and, when older versions of the test are used, the scores must be correspondingly adjusted downward. AAIDD Manual, at 37; *see also Coleman v. State*, 2010 WL 118696, at *16-

> 18. The practice effect refers to increases in I.Q. test scores that result from a person's being retested using the same or a similar instrument. AAIDD Manual, at 38.

341 S.W.3d at 242, n.55; *see also State v. Pruitt*, 415 S.W.3d 180 (Tenn. 2013).

Later, in *Keen v. State*, 398 S.W.3d 594, 603 (Tenn. 2012), the court stated that

> 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. *See, e.g., Smith v. State*, No. E2007-00719-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 793, 2010 WL 3638033, at *40 (Tenn. Crim. App. Sept. 21, 2010) (reluctantly refusing to consider the Flynn effect); *Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 36, 2010 WL 118696, at *14, 16-18, 23 (Tenn. Crim. App. Jan. 13, 2010) (upholding, under *Howell*, a trial court's refusal to consider the standard error of measurement and the Flynn effect in determining the petitioner's I.Q. score); *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 Tenn. Crim. App. LEXIS 1129, 2005 WL 2662577, at *14, 17-18 (Tenn. Crim. App. Oct. 19, 2005) (rejecting the Flynn effect under the "bright-line cutoff" rule of *Howell*). 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.

Accordingly, if 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.

Subsequent to the decisions in *Coleman* and *Keen*, the United States Supreme Court in *Hall v. Florida*, 134 S. Ct. 1986 (2014), addressed the issue of how intellectual disability must be defined in order to implement the holding in *Atkins* and the various principles requiring the prohibition of executing the intellectually disabled. *Hall*, 134 S.

Ct. at 1992-93. After discussing various approaches taken by the different states to define intellectual disability post-*Atkins*, the *Hall* Court stated as follows:

> ... 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. But *Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.
>
> The *Atkins* Court twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70. *Atkins* first cited the definition provided in the DSM-IV: "'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70." 536 U.S., at 308, n. 3, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (citing Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000)). The Court later noted that "'an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'" 536 U.S., at 309, n. 5, 122 S. Ct. 2242. Furthermore, immediately after the Court declared that it left "'to the States the task of developing appropriate ways to enforce the constitutional restriction,'" *id.*, at 317, 122 S. Ct. 2242, the Court stated in an accompanying footnote that "[t]he [state] statutory definitions of mental retardation are not identical, but generally conform to the clinical definitions," *ibid.*
>
> Thus *Atkins* itself not only cited clinical definitions for intellectual disability but also noted that the States' standards, on which the Court based its own conclusion, conformed to those definitions. In the words of *Atkins*, those persons who meet the "clinical definitions" of intellectual disability "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.*, at 318, 122 S. Ct. 2242. Thus, they bear "diminish[ed] . . . personal culpability." *Ibid.* 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*. And those clinical definitions have long included the SEM. See Diagnostic and Statistical Manual of Mental Disorders 28 (rev. 3d ed. 1987) ("Since any measurement is fallible, an IQ score is generally thought to involve an error of measurement of approximately five points; hence, an IQ of 70 is considered to represent a band or zone of 65 to 75. Treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior")....
>
> ...
>
> ... If 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. This Court thus reads Atkins to provide substantial guidance on the definition of intellectual disability....
>
> ...
>
> Intellectual disability is a condition, not a number. See DSM-5, at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number. A State that ignores the inherent imprecision of these tests risks executing a person who suffers from intellectual disability. See APA Brief 17 ("Under the universally accepted clinical standards for diagnosing intellectual disability, the court's determination that Mr. Hall is not intellectually disabled cannot be considered valid").
>
> This Court agrees with the 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.
>
> It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM-5, at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score"). ...

Hall, 134 S. Ct. at 1998-2000.

In *State v. Bell*, 512 S.W.3d 167 (Tenn. 2015), the Tennessee Supreme Court specifically addressed the issue of whether our intellectual disability statute, as interpreted by the Tennessee Supreme Court, was facially unconstitutional in light of the decision in *Hall*. In *Bell*, the Tennessee Supreme Court held

> unlike the Florida Supreme Court [in *Hall*], 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. Accordingly, we deem our statute, as currently interpreted, to be constitutionally sound under the Eighth Amendment.

512 S.W.3d at 186. *See also Vincent Sims v. State*, 2014 WL 7334202 (Tenn. Crim. App. December 23, 2014), *perm. app. denied* (Tenn. 2015); and *Tyrone Chalmers v. State*, 2014 WL 2993863 (Tenn. Crim. App. June 30, 2014)), *perm. app. denied* (Tenn. 2014).

Moore

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:

> 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")[10]] 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 "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

[10] 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.

"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 (footnotes omitted).

Mr. Moore appealed to the United States Supreme Court, which reversed. In concluding 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,

> 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

In determining whether Mr. Dellinger is entitled to relief, this Court must consider whether *Moore* announced a new rule of constitutional law which should be applied retroactively. In *Vincent Sims v. State*, W2015-01713-CCA-R28-PD (Tenn. Crim. App. January 28, 2016), the Tennessee Court of Criminal Appeals' order addressing Mr.

Sims's *Hall v. Florida*-based motion to reopen set forth the standard for determining whether a case 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").

Sims, 2016 Order, at 11.

Tennessee's appellate courts have not addressed the issue raised in Petitioner Dellinger's motion. However, this Court finds the Tennessee Court of Criminal Appeals' order addressing Mr. Sims's *Hall* claim to be particularly instructive. In concluding *Hall*—upon which the Supreme Court relied heavily in crafting its *Moore* decision—did not entitle Mr. Sims to relief, the Court of Criminal Appeals stated,

> 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), [. . .] 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 [. . .] 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 (alterations added).

In 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 *Moore* does not create a new rule of law, nor does *Moore* require retroactive application. As in *Hall*, the *Moore* opinion does not expand the class of persons to be considered intellectually disabled and, therefore, ineligible to be executed. To any extent *Moore* can be seen as creating a requirement to assess

persons for intellectual disability using modern medical standards, the *Hall* holding reflects such a requirement would be procedural only and would not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Tenn. Code Ann. § 40-30-122. Just as in *Hall*, *Moore* does not provide a death row inmate is entitled to a hearing to establish his intellectual disability.

Nor can the *Moore* opinion be seen as a "watershed rule of criminal procedure" which would implicate 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*, which created protections for intellectually disabled individuals against the death penalty, are such cases. However, *Moore*, like *Hall* before it, "did not expand the class already protected [against the death penalty as] intellectually disabled;" rather, the opinion "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. The Tennessee Supreme Court has suggested 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*. As such, the applicability of *Moore* to Mr. Dellinger's case is minimal at best.

Accordingly, this Court concludes *Moore* did not create a new constitutional rule to be applied retroactively. *See also Williams v. Kelley*, 858 F.3d 464 (8th Cir. 2017) (holding *Moore v. Texas* did not apply retroactively). Petitioner is not entitled to reopen his post-conviction proceedings.

VI. CONCLUSION

For the reasons stated above, the State's Motions to Dismiss Mr. Dellinger's motions to reopen his petition for post-conviction relief are **GRANTED** and Mr. Dellinger's motions to reopen his post-conviction petition are **DISMISSED**. Mr. Dellinger is indigent, so any costs associated with these proceedings are taxed to the State.

IT IS SO ORDERED this the 20 day of December, 2017.

David Duggan
Circuit Court Judge

Attachment 2

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

JAMES DELLINGER v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-23514

No. E2018-00130-CCA-R28-PD

ORDER

The Petitioner, James Dellinger, has filed an application for permission to appeal the trial court's denial of his motion to reopen his petition for post-conviction relief. Tennessee Code Annotated Section 40-30-117 provides that a motion to reopen a prior post-conviction petition may be filed in the trial court if certain limited circumstances warrant relief. "If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal." Tenn. Code. Ann. § 40-30-217(c). The application must contain copies of all documents filed by both parties in the trial court, as well as the order denying the motion. *Id.* The instant application is timely, and based upon the information included, this Court is able to consider the merits thereof.

The Post Conviction Procedure Act imposes limits on the nature, number, and timing of petitions for post-conviction relief. *See* Tenn. Code Ann. §§ 40-30-102, -103. Although the Act also provides a means for reopening previously filed petitions, the types of claims which may be raised in a motion to reopen are limited. *See* Tenn. Code. Ann. § 40-30-117. Relief will only be granted in a motion to reopen if the claim presented is based upon a final ruling of an appellate court establishing a constitutional right not previously recognized at the time of trial and retrospective application is required, if the claim is based upon new scientific evidence establishing that the appellant is actually innocent of the crime, or if the claim presented seeks relief from a sentence that was enhanced because of a previous conviction which has subsequently been invalidated. § 40-30-117(a). Furthermore, the facts underlying the claim, if true, must establish by clear and convincing evidence that a petitioner is entitled to have his or her conviction set aside or his or her sentence reduced. *Id.* This Court will grant an application for permission to appeal only if we conclude that the trial court abused its discretion in denying the motion to reopen. § 40-30-117(c).

The Petitioner received the death penalty for his conviction of the first degree murder of Tommy Mayford Griffin in 1992. *State v. Dellinger*, 79 S.W.3d 458 (Tenn. 2002). A history of the Petitioner's post-conviction attacks on his death sentence can be found in this Court's opinion affirming the trial court's denial of error coram nobis relief. *James Dellinger v. State*, No. E2013-02094-CCA-R3-ECN, 2015 WL 4931576 (Tenn. Crim. App. Aug. 18, 2015), *perm. to app. denied* (Tenn. May 6, 2016). The Petitioner filed the instant motion to reopen and amended motion claiming the United States Supreme Court's decisions in *Moore v. Texas*, 137 S.Ct. 1039 (2017) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) created new constitutional rights providing him an avenue of relief under the terms of the motion to reopen statute. Concluding otherwise, the trial court denied relief to the Petitioner relief.

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.

Tenn. Code Ann. § 40-30-122. 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 (hereinafter "TCCA") of the intellectual disability of the defendant was unconstitutional. *Moore* at 1044. The TCCA utilized factors it created in *Ex Parte Jose Garcia Briseno*, 135 S.W.3d 1 (Texas Crim. App. 2004), to determine whether Moore was intellectually disabled. In its ruling, the Supreme Court did not establish a new constitutional right to be retroactively applied but rather based its decision upon an application of its prior rulings in *Atkins v. Virginia,* 536 U.S. 304 (2002), and *Hall v. Florida,* 134 S.Ct. 1986 (2014). *Atkins* held the States may not execute intellectually disabled individuals and *Hall* held a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70. The Supreme Court found error in the TCCA's use of its own self-created factors in *Briseno* to determine the intellectual disability of Moore rather than the generally accepted, uncontroversial intellectual-disability diagnostic definition. *Moore* at 1053. "[T]he several factors *Briseno* set out as indicators of intellectual disability are an invention of the [T]CCA untied to any acknowledged source. Not aligned with the medical community's

information, and drawing no strength *from our precedent*, the *Briseno* factors 'creat[e] an unacceptable risk that persons with intellectual disability will be executed.'" *Id.* at 1044 (emphasis added).

Moore is clearly derivative of *Atkins* and *Hall* as it merely applied the standards created in those prior cases to the specific proceedings of the TCCA. *Moore* only abrogated the TCCA ruling in *Briseno*. As with the prior Supreme Court ruling in *Hall*, the *Moore* decision did not enlarge the class of individuals affected by the Court's ruling in *Atkins* but instead directed the application of the principles established in *Atkins*. In overturning the state court decision in *Briseno*, the Court ruled: "States have some flexibility, but not 'unfettered discretion,' in enforcing *Atkins* ' holding. *Hall*, 572 U.S., at ---, 134 S.Ct. at 1998. 'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.' *Id.*, at —— – ——, 134 S.Ct., at 1999." *Moore*, 137 S.Ct. at 1052-53. Therefore, it follows that the Supreme Court's decision in *Moore*, which applied existing case law to nullify *Briseno*, did not announce a new constitutional rule requiring retrospective application. *See Williams v. Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (holding *Moore* did not announce new rule of constitutional law requiring retroactive application).

Moreover, the Petitioner's reliance on *Montgomery* is misplaced. In that case, the Supreme Court held "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.* at 729. The issue in *Montgomery* dealt with juvenile offenders sentenced to life without the possibility of parole. As the trial court correctly noted, "*Montgomery* does not combine with the intellectual disability cases discussed in Petitioner's pleadings to establish a new rule or provide Petitioner any relief here." To the contrary, the death penalty is currently a constitutionally acceptable form of punishment in this state and country.

For these reasons, the trial court did not abuse its discretion in denying the Petitioner's request to reopen his post-conviction petition. The Petitioner's application for permission to appeal is, therefore, denied. Because it appears the petitioner is indigent, costs are taxed to the State.

PER CURIAM

(Montgomery, J., Woodall, P.J., Wedemeyer, J.)

Attachment 3

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JAMES DELLINGER v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-23514

No. E2018-00130-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of James Dellinger and the record before us, the application is denied.

PER CURIAM