CAPITAL CASE

No.19-8011

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DELLINGER,

Petitioner,
vs.

STATE OF TENNESSEE

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

RELY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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"States may not execute anyone in the entire category of intellectually disabled offenders."

Moore v. Texas, 581 U.S. __, 137 S. Ct. 1039, 1051 (2017) (cleaned up)

"If [the petitioner] is indeed intellectually disabled, this issue deserves to be heard."

Keen v. State. 398 S.W.3d 594, 613 (Tenn. 2012) (Majority Opinion)

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

Dellinger v. State, No. E2018-00135-CCA-R3-ECN (Tenn. Crim. App. Nov. 28, 2018)

Tennessee alleges that this Court lacks jurisdiction to enforce the Eighth Amendment's prohibition against the execution of the intellectually disabled. Tennessee further contends that it is not constitutionally obligated to give full force and effect to this Court's interpretation of the United States Constitution. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), settled this issue long ago. *See also Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (this Court has jurisdiction to consider whether state court erred by failing to give effect to this Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012)).

In the years since *Atkins v. Virginia*, 536 U.S. 304 (2002), no post-conviction petitioner has received merits relief from a Tennessee state court on an intellectual disability exemption claim. Tennessee's continued refusal to implement this Court's decision in *Atkins* must be remedied. Further a circuit split has developed with regard to the application of this Court's decisions in *Moore v. Texas, 137 S.Ct. 1039 (2017)* and *Hall v. Florida,* 134 S.Ct. 1986 (2014).

Certiorari should be granted.

I. This Court has jurisdiction to adjudicate an Eighth Amendment claim.

Tennessee's suggestion that the Tennessee Court of Criminal Appeals decision did not decide a federal question is incorrect. The lower court's decision necessarily involves interpretation of federal constitutional law. App. 4a-7a (citing *Atkins v. Virginia,* 536 U.S. 304 (2002); *Moore v. Texas*, 581 U.S. ___ (2017); *Hall v. Florida,* 572 U.S. ___ (2014); *Montgomery v. Louisiana*, 577 U.S.___ (2016); *Ford v. Wainwright*, 477 U.S. 399 (1986)). The availability of a procedural vehicle for Dellinger's *Atkins* claim is inextricably intertwined with the lower court's interpretation of this Court's precedent. This Court has jurisdiction. *Asarco v. Kadish*, 490 U.S. 605 (1989) (this Court has jurisdiction over state court decision that rests on interpretation of federal law); *Harris v. Reed,* 489 U.S. 255 (1989) (same).

II. Tennessee's decision is not based on an adequate and independent state law ground.

Respondent is wrong that the Tennessee courts' resolution of Mr. Dellinger's claim is merely a straightforward application of the statute of limitations. A violation of a procedural rule is only effective as a procedural bar if it is adequate and independent of federal law and the procedural rule is consistently and regularly applied. See *Lee v. Kemna*, 534 U.S. 362 (2002); *Coleman v. Thompson*, 501 U.S. 722, 752–753 (1991). The procedural rule allegedly violated here does not meet either criteria: the statute of limitations is not consistently applied and the decision of whether to toll the statute turns on application of federal constitutional principles.

Tennessee does not consistently apply the statute of limitations to bar coram nobis petitions. On multiple occasions, the Tennessee courts have granted equitable tolling of the statute of limitations. *See, e.g., Workman v. State*, 41 S.W.3d 100, 102 (Tenn. 2001) (Due process required tolling the coram nobis statute of limitations.); *Nunley v. State*, 552 S.W.3d 800 (Tenn. 2018) (Entitlement to equitable tolling must be shown on the face of the coram nobis pleading.); *Wilson v. State*, 367 S.W.3d 229 (Tenn. 2012) (Due process required tolling of coram nobis statute of limitations.). Because Tennessee does not bar coram nobis petitions on the basis of the statute of limitations consistently, the state law ground is not "adequate" to bar federal review. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (A state rule is only adequate if it is consistently and regularly applied.). Further, the Tennessee Court's decision whether to toll the statute of limitations is necessarily dependent on federal constitutional principles of due process. App. 2a. Because the state court analysis of the procedural rule is inextricably intertwined with an analysis of federal law and the principles of due process and Eighth amendment protections, it is not "independent" of federal law. *Lee*, 534 U.S. at 387.

III. Tennessee must enforce the federal constitution.

Respondent maintains that serial, piecemeal dismissals of Mr. Dellinger's invoked procedural remedies satisfies the constitution, but that cannot be right. Mr. Dellinger has repeatedly invoked every procedural remedy available in Tennessee—and in the alternative requested that the Tennessee Supreme Court fashion a new remedy for the presentation of his constitutional claim. App. 9a ("The door to a

proceeding to now present Petitioner's claim of intellectual disability has been closed in post-conviction (initial proceedings and motion to reopen); error coram nobis; writ of audita querala (sic); declaratory judgment; pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U,S, 388 (1971); due process; law of the land; open courts provision of the United States and Tennessee Constitutions . . ."). Despite Mr. Dellinger's repeated request, the Tennessee courts have failed to recognize or create a remedy. *Id.* ("As far as we are able to discern, Petitioner has no state court remedy in order to present his claim that the sentence of death is void due to his intellectual disability."). Tennessee's denial of any procedural vehicle to present Mr. Dellinger's claim vitiates the constitutional protection set out in *Atkins*.

Despite its inherent power to create new procedural remedies, the Tennessee Supreme Court has been inconsistent as to when it exercises its inherent authority. The Tennessee Court has failed to use its authority even in the face of its recognition of a need for a new procedure for *Atkins* claims. *Keen v. State*, 398 S.W. 3d 594, 613 (Tenn. 2012) (noting the power of the General Assembly to create a procedure to "accommodate prisoners on death row whose intellectual disability claims cannot be raised" by existing procedural vehicles); *Payne v. State*, 493 S.W.3d 478, 492 (Tenn. 2016) ("encourag[ing] the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of the eligibility to be executed."). The Tennessee Supreme

Court recently acknowledged that it "has previously created procedures to fill otherwise procedural voids." *State v. Hall*, No. E1997-00344-SC-DDT-DD, slip op. at 10 (Tenn. Dec. 3, 2019). *See also Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (creating procedure to adjudicate competency to be executed claim where existing statutory vehicles inadequate). The *Hall* opinion suggests that the Tennessee Supreme Court will exercise its inherent supervisory powers to create post-conviction procedural vehicles when due process requires. The Court explored its authority in a recent decision:

> This Court has broad authority over the Tennessee Judicial Department. *In re Bell*, 344 S.W.3d at 313; *Belmont v. Bd. of Law Exam'rs*, 511 S.W.2d 461, 463 (Tenn. 1974). The General Assembly has acknowledged this Court's "broad conference of full, plenary and discretionary power," Tenn. Code Ann. § 16-3-504 (2009), and its "general supervisory control over all the inferior courts of the [S]tate," id. § 16-3-501. And the General Assembly has expressly recognized that these powers are not a matter of legislative largess but derive from "the common law as it existed at the time of the adoption of the constitution of Tennessee and of the power inherent in a court of last resort." *Id.* § 16-3-503; *see also In re Bell*, 344 S.W.3d at 313. This Court has exercised its supervisory and inherent power to promulgate rules governing the practice and procedure before the courts of this State . . . And, as the constitutionally designated repository of judicial power that exercises supervisory authority over the Judicial Department, this Court, and only this Court, has the authority to prescribe rules, policies, and procedures relating to matters essential to the judicial function.

Moore-Pennoyer v. State, 515 S.W.3d 271, 276-77 (Tenn. 2017). In other words, the Tennessee Supreme Court could create a procedural vehicle for Mr. Dellinger's *Atkins* claim. *Keen* and *Payne* demonstrate that the Court recognizes the need for such a procedure. The Tennessee courts' choice not to create such a remedy cannot be squared with *Moore*.

Moore holds that the states are forbidden from executing the intellectually disabled. *Montgomery* holds that States are obliged to enforce the Eighth Amendment principles defined by this Court. Accordingly, Tennessee must recognize or create a procedure for the vindication of Mr. Dellinger's Eighth Amendment claim.

IV. *Moore* and *Montgomery* command the states to provide a procedural vehicle for the adjudication of an *Atkins* claim.

Montgomery defined the obligations of the states in this context:

> If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings. Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. 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. So it is here. The Tennessee Supreme Court has unequivocally stated that it has no interest in Mr. Dellinger's execution if he is intellectually disabled: "We remain committed to the principle that Tennessee has no business executing persons who are intellectually disabled." *Keen*, 398 S.W.3d at 613. Dellinger's unassailable proof establishes his intellectual disability. Where the Tennessee Supreme Court has demonstrated a willingness to create procedure for the adjudication of Eighth Amendment claims to fill a procedural void, failing to do so now is arbitrary and capricious.

V. Tennessee is out of step with the rest of the country where no post-conviction capital petitioner has received a favorable merits adjudication of his *Atkins* claim. There is a circuit split.

No death-sentenced prisoner has received *Atkins* relief in state post-conviction in the years since *Atkins* was decided. Instead, procedural barrier after barrier has been erected to prevent the adjudication of these claims. *See, e.g., Dellinger v. State*, No. E201800135CCAR3ECN, 2019 WL 1754701 (Tenn. Crim. App. Apr. 17, 2019); *Ivy v. State*, No. W201602454CCAR3ECN, 2018 WL 625127 (Tenn. Crim. App. Jan. 30, 2018), *appeal denied* (May 18, 2018), *cert. denied*, 139 S. Ct. 804, 202 L. Ed. 2d 591 (2019); *Sample v. State*, No. W201602479CCAR3ECN, 2017 WL 3475439 (Tenn. Crim. App. Aug. 11, 2017); *Chalmers v. Carpenter*, No. M201401126COAR3CV, 2016 WL 4186896 (Tenn. Ct. App. Aug. 4, 2016); *Sims v. Carpenter*, No. M201400687COAR3CV, 2016 WL 4186958 (Tenn. Ct. App. Aug. 4, 2016); *Payne v. Carpenter*, No. M201400688COAR3CV, 2016 WL 4142485 (Tenn. Ct. App. Aug. 2, 2016); *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016); *Dellinger v. State*, No. E201302094CCAR3ECN, 2015 WL 4931576 (Tenn. Crim. App. Aug. 18, 2015); *Sims v. State*, No. W2014-00166-CCA-R3PD, 2014 WL 7334202 (Tenn. Crim. App. Dec. 23, 2014); *Payne v. State*, No. W2013-01248-CCA-R3PD, 2014 WL 5502365 (Tenn. Crim. App. Oct. 30, 2014); *Chalmers v. State*, No. W2013-02317-CCA-R3PD, 2014 WL 2993863 (Tenn. Crim. App. June 30, 2014); *Suttles v. State*, No. E2013-01016-CCA-R3PD, 2014 WL 2902271 (Tenn. Crim. App. June 25, 2014); *Jahi v. State*, No. W2011-02669-CCA-R3PD, 2014 WL 1004502 (Tenn. Crim. App. Mar. 13, 2014); *Porterfield v. State*, No. W2012-00753-CCA-R3PD, 2013 WL 3193420 (Tenn. Crim. App. June 20, 2013); *Rice v. State*, No. W2011-01069-CCA-R3PD, 2013 WL 1229527 (Tenn. Crim. App. Mar. 27, 2013); *Ivy v. State*, No.

W2010-01844-CCA-R3PD, 2012 WL 6681905 (Tenn. Crim. App. Dec. 21, 2012); *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012); *Smith v. State*, 357 S.W.3d 322 (Tenn. 2011); *Howell v. State*, No. W2009-02426-CCA-R3PD, 2011 WL 2420378 (Tenn. Crim. App. June 14, 2011), *abrogated by Moore v. Texas*, 137 S. Ct. 1039 (2017); *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011); *State v. Irick*, 320 S.W.3d 284 (Tenn. 2010); *Smith v. State*, No. E2007-00719-CCA-R3PD, 2010 WL 3638033 (Tenn. Crim. App. Sept. 21, 2010), *aff'd in part, vacated in part*, 357 S.W.3d 322 (Tenn. 2011); *Coleman v. State*, No. W200702767CCAR3PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010), *aff'd in part, vacated in part*, 341 S.W.3d 221 (Tenn. 2011); *Cribbs v. State*, No. W200601381CCAR3PD, 2009 WL 1905454 (Tenn. Crim. App. July 1, 2009); *Van Tran v. State*, No. W200501334CCAR3PD, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006); *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).[1]

A recently filed petition for writ of certiorari highlights the split among the lower courts. In *Willie B. Smith v. Alabama*, No. 19- 7745 (U.S. Feb. 19, 2020), the Petitioner notes:

> Federal courts of appeals and state courts of last resort are intractably divided on the question whether *Hall* and *Moore* apply retroactively on collateral review of state-court judgments. In the Tenth Circuit and the Supreme Courts of Kentucky and Florida, intellectually disabled individuals like Smith are entitled to relief from their death sentences under *Hall* or *Moore*, regardless of when their convictions became final following direct review. But the Sixth, Eighth, and Eleventh Circuits, joined by the Tennessee Supreme Court, do not give *Hall* or *Moore* retroactive effect. In those courts, an intellectually disabled individual

[1] Michael Angelo Coleman's case was settled on remand with no agreement or judicial finding that he is intellectually disabled. Agreed Order Allowing Amended Judgment, *Coleman v. State*, No. P-11326/B68633 (Shelby Cty. Crim. Ct. Sept. 2, 2011).

> is entitled to relief under *Hall* or *Moore* only if those opinions issued before his or her conviction became final following direct review. This split urgently requires this Court's intervention.

Pet. at 3.

VI. Conclusion.

The petition should be granted. Alternatively, the Court should hold this case and consider it along with the petition in *Smith v. Alabama.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply were served upon counsel for Respondent, Benjamin Ball, Office of the Attorney General and Reporter, 301 6th Avenue North, P.O. Box 20207, Nashville, Tennessee, 37202-0207, via United States Mail, this 24th day of April, 2020.

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