

**CAPITAL CASE**

No.19-8011

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IN THE  
SUPREME COURT OF THE UNITED STATES

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**JAMES DELLINGER,**

*Petitioner,*

vs.

**STATE OF TENNESSEE**

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE TENNESSEE SUPREME COURT

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PETITION FOR REHEARING

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AMY D. HARWELL\*  
Assistant Chief, Capital Habeas Unit

RICHARD L. TENNENT  
Assistant Federal Public Defender

FEDERAL PUBLIC DEFENDER  
Middle District of Tennessee  
Capital Habeas Unit  
810 Broadway, Suite 200  
Nashville, TN 37203  
(615) 736-5047  
[Amy\\_Harwell@fd.org](mailto:Amy_Harwell@fd.org)

\*Counsel of Record for Petitioner

In this capital case, James Dellinger requested that this Court grant certiorari to review the Tennessee Supreme Court's refusal to provide a procedural mechanism for the vindication of his *Atkins* claim. *See* Pet. For Cert. at i. The Tennessee Court has repeatedly disposed of *Atkins* claims by endorsing conflicting truths. First, in compliance with *Atkins*, the Tennessee Court has repeatedly affirmed that Tennessee has no business executing the intellectually disabled. Fair enough. But, secondly, they have repeatedly refused to identify or create a procedural remedy for those who have never had a merits adjudication of their *Atkins* claims. Thus, despite paying lip service to the significance of *Atkins* the Tennessee Supreme Court and Court of Criminal Appeals have failed to provide relief for a single intellectually disabled inmate on death row. *See* Reply to BIO at 7-8 (listing each of the times the Tennessee Courts have failed to provide a procedural remedy for an *Atkins* claim). Mr. Dellinger seeks rehearing pursuant to Rule 44 of the Supreme Court Rules due to the intervening circumstance described below.

After the denial of Mr. Dellinger's petition, the Court set several cases related to the question presented by Mr. Dellinger on the June 11 conference. *Smith v. Alabama* asks whether *Hall v. Florida* and *Moore v. Texas* announced new substantive rules that apply retroactively to cases on collateral review. *See* Pet. for Cert. in *Willie B. Smith v. Jefferson S. Dunn, Commissioner, Alabama Department of Corrections*, No. 19-7745, p. i. Noting the circuit split on the retroactivity of *Hall v. Florida*, 134 S. Ct. 1986 (2014) and *Moore v. Texas*, 137 S. Ct. 1039 (2017), Smith argues that *Montgomery v. Louisiana*, 136 S.Ct.718 (2016), controls and requires retroactive

application of *Hall* and *Moore*. *Id.* at 22. That is the precise argument Mr. Dellinger presents. *See* Pet. For Cert. at 6. The inter-relation of the issues in *Smith* with those presented by Mr. Dellinger is underlined by Mr. Smith's citation of the Tennessee Supreme Court's concession that *Montgomery* "may well entitle [Mr. Dellinger] to relief" on his claims under *Atkins*, *Hall*, and *Moore*. *Id.* at p. 23 (quoting, *Dellinger v. State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701, at \*5 (Tenn. Crim. App. Apr. 17, 2019)). *David Keen v. State*, U.S. No. 19-7369, also set on June 11, asks virtually the same question as that posed by Mr. Dellinger: whether the constitution permits Tennessee to evade this Court's mandate in *Atkins* by failure to create a procedural remedy. *Keen* was originally set for conference on March 20, 2020 but was rescheduled to June 11 be considered with *Smith*.

In addition, this Court has before it a related petition for writ of certiorari in *Ohio v. Shawn Ford*, U.S. No. 19-1191, in which Ohio claims to require clarification of the definition of intellectual disability for purposes of an *Atkins* exemption. *Ford* is also on the Court's June 11, 2020 docket and will be considered at the same time as *Smith* and *Keen*.

Given the pendency of *Smith* and *Keen*, this Court should hold James Dellinger's petition for rehearing pending review of those cases. Should this Court grant certiorari in *Smith* and/or *Keen*, this Court should then grant James Dellinger's petition for writ of certiorari, vacate the judgment below, and remand for further proceedings.

Respectfully Submitted,

/s/ Amy D. Harwell

Amy D. Harwell  
Assistant Chief, Capital Habeas Unit

Richard L. Tennent  
Assistant Federal Defender, Capital Habeas Unit  
Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, Tennessee 37203  
(615) 736-5047

#### CERTIFICATE

I certify that the foregoing petition for rehearing is restricted to grounds set forth in Rule 12.2 and is presented in good faith and not for delay.

/s/ Amy D. Harwell

Amy D. Harwell  
Counsel for James Dellinger

#### CERTIFICATE OF SERVICE

I certify that a copy of this application was served upon counsel for Respondent, Benjamin Ball, 425 Fifth Avenue North, Nashville, Tennessee 37243 this the 1st day of June, 2020.

/s/ Amy D. Harwell

Amy D. Harwell  
Counsel for James Dellinger