

CAPITAL CASE

No. _____

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

PERVIS TYRONE PAYNE,

Petitioner

vs.

STATE OF TENNESSEE

Respondent

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

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

***Paul R. Bottei
Christopher M. Minton**

Assistant Federal Public Defenders
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

***Counsel of Record**

APPENDIX CONTENTS

- 1a *Payne v. State of Tennessee*, No. W2016-02326-SC-R11-PD (Tenn. Nov. 21, 2017)
- 2a-7a *Payne v. State of Tennessee*, No. W2016-02326-CCA-R28-PD (Tenn. Crim. App. Aug. 1, 2017)
- 8a-23a *Payne v. State of Tennessee*, No. P-09594, In The Criminal Court of Shelby County, Tennessee, Thirtieth Judicial District, Order Denying Motion To Reopen Post-Conviction Petition (Oct. 26, 2016)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

11/21/2017

Clerk of the
Appellate Courts

PERVIS PAYNE v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. P-09594**

No. W2016-02326-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Pervis Tyrone Payne and the record before us, the application is denied.

PER CURIAM

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

FILED

08/01/2017

Clerk of the
Appellate Courts**PERVIS PAYNE v. STATE OF TENNESSEE**

Criminal Court for Shelby County
No. P-09594

No. W2016-02326-CCA-R28-PD

ORDER

This matter is before the Court upon the Petitioner Pervis Tyrone Payne's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. The State has filed a response in opposition thereto.

In 1988, the Petitioner was convicted by a Shelby County jury of two counts of first degree murder and one count of assault with intent to commit first degree murder. He was sentenced to death for the first degree murder convictions and thirty years for the non-capital conviction. The Petitioner's convictions and sentences were affirmed by the Tennessee Supreme Court on direct appeal. *See State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff'd by*, 501 U.S. 808 (1991).

The Petitioner then filed a petition for post-conviction relief which was ultimately consolidated with a petition for a writ of error coram nobis. The post-conviction court denied relief and this Court affirmed the post-conviction court's judgment on appeal. *See Pervis Tyrone Payne v. State*, No. 02C01-9703-CR-00131, 1998 Tenn. Crim. App. LEXIS 68 (Tenn. Crim. App., at Jackson, Jan. 15, 1998), *perm. app. denied* (Tenn. Jun. 8, 1998). In September 2006, the Petitioner filed a motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001. The post-conviction court denied the motion and this Court affirmed the denial on appeal. *See Pervis Payne v. State*, No. W2007-01096-CCA-R3-PD, 2007 Tenn. Crim. App. LEXIS 927 (Tenn. Crim. App., at Jackson, Dec. 5, 2007), *perm. app. denied* (Tenn. Apr. 14, 2008).

In April 2012, the Petitioner filed a petition to reopen post-conviction proceedings in which he alleged that he is intellectually disabled and, therefore, ineligible for the death penalty. He argued that the Tennessee Supreme Court's decision in *Coleman v. State*, 341

S.W.3d 221 (Tenn. 2001), established a new retroactive constitutional right not recognized at the time of his trial. He also argued that he has new scientific evidence that he is actually innocent of capital murder.

In December 2012, the Petitioner amended his petition to include a claim seeking a writ of error coram nobis. On May 7, 2013, the post-conviction court entered an order denying the Petitioner's petition. The court found that the Petitioner's motion to reopen post-conviction proceedings was precluded under the Tennessee Supreme Court's decision in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012). The court also denied the Petitioner coram nobis relief. The court found that the one-year statute of limitations for filing a petition for writ of error coram nobis had expired and that the Petitioner failed to present facts justifying the tolling of the statute of limitations. The court also found that the "mental status of Petitioner has been available for testing since the inception of the case" and that the "mere fact that Petitioner and his attorneys did not proceed with this avenue does not make it newly discovered."

On July 29, 2013, this Court entered an order denying the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen. *See Pervis Tyrone Payne v. State*, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App. July 29, 2013) (Order), *perm. app. denied* (Tenn. Nov. 14, 2013). On November 14, 2013, the Tennessee Supreme Court entered an order denying the Petitioner's application for permission to appeal.

The Petitioner also appealed the court's order denying his petition for writ of error coram nobis. On October 30, 2014, this Court filed its opinion affirming the denial of coram nobis relief. *See Pervis Tyrone Payne v. State*, No. W2013-01248-CCA-R3-PD, 2014 WL 5502365 (Tenn. Crim. App. Oct. 30, 2104), *aff'd by*, 493 S.W.3d 478 (Tenn. 2016). On February 13, 2015, the Tennessee Supreme Court granted the Petitioner's application for permission to appeal.

On April 7, 2016 (while the present motion to reopen post-conviction proceedings was pending), the Tennessee Supreme Court released its opinion in *Payne v. State*, 493 S.W.3d 478 (Tenn. 2016), affirming the denial of coram nobis relief. Our supreme court addressed the petitioner's claim that, pursuant to *Hall*, he was entitled to a hearing on the issue of intellectual disability. *Payne*, 493 S.W.3d at 489. Our Supreme Court noted that

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, 493 S.W.3d at 490 (quoting *Hall*, 134 S.Ct. at 2001).

While the Petitioner’s appeal from the denial of coram nobis relief was pending in the Tennessee Supreme Court, the Petitioner filed the present motion to reopen post-conviction proceedings in the post-conviction court on May 21, 2015. After the issuance and withdrawal of a prior order, the trial court issued a final order on October 26, 2016 denying the motion to re-open post-conviction proceedings, and he has sought permission to appeal this denial to this Court.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

- (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. The 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 asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the 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.

T.C.A. § 40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. *Id.* at (c).

The Petitioner seeks to appeal the post-conviction court's denial of his motion to reopen post-conviction proceedings based upon the rulings of the United States Supreme Court in *Hall v. Florida*, 134 S.Ct. 1986 (2014), *Hurst v. Florida*, 136 S.Ct. 616 (2016), Justice Breyer's dissenting opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015) and the United States Supreme Court ruling in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

The Petitioner argues that his post-conviction petition should be reopened due to the ruling of the United States Supreme court in *Hall v. Florida*, 134 S.Ct. 1986 (2014). The Petitioner admits in his application that the Tennessee Supreme Court has previously addressed the retroactive application of *Hall* and has rejected the claim that *Hall* would allow for a retroactive review of Tennessee cases. *Payne v. State of Tennessee*, 493 S.W.3d 478 (Tenn. 2016). However, the Petitioner asks this Court to declare that the *Payne* decision was wrongly decided in light of the ruling of the United States Supreme Court in the cases of *Montgomery v. State of Louisiana*, 136 S.Ct. 718 (2016), and *Welch v. United States*, 136 S.Ct. 1257 (2016). The Petitioner argues in his application for permission to appeal that the Tennessee Supreme Court did not apply decisions in *Montgomery v. Louisiana* and *Welch v. United States*. This Court will note that *Montgomery v. Louisiana* was decided on January 27, 2016 and *Payne v. State of Tennessee* was decided on April 7, 2016. The argument that our Supreme Court failed to apply the reasoning and guidance of *Montgomery* is without merit in that at the time of the ruling in *Payne* the decision in *Montgomery* had been decided and published.

Notwithstanding the timing of the decisions in the *Montgomery* case by the United States Supreme Court and the *Payne* case by the Tennessee Supreme Court, the ruling espoused by the United States Supreme Court in *Montgomery* made no mention of the findings of *Hall* nor did it mention any effect of the retroactive application of *Hall* as the Petitioner asks this court to determine. The *Montgomery* decision applied to application of a sentence of life without parole to juvenile offenders and did not affect the application of the death penalty to adults. Therefore even with the presented argument in relation to the timing of the two opinions, the reliance upon *Montgomery* to overrule the *Payne* decision is without merit. The holdings of the *Montgomery* opinion would not, and did not, affect the retroactive application of *Hall* by Tennessee courts.

Unlike *Montgomery v. Louisiana*, *Welch v. United States* was decided after our

Supreme Court issued its decision in *Payne*. As stated earlier, *Payne v. State of Tennessee* was decided on April 7, 2016, while *Welch v. United States* was decided on April 18, 2016. However, the issues decided in the *Welch* opinion have no bearing on the retroactive application of *Hall*. As with *Montgomery*, the *Welch* opinion made no mention of the findings of *Hall* nor did it mention any effect of the retroactive application of *Hall* as the Petitioner asks this court to determine. The *Welch* decision applied to the retroactive application of the Supreme Court's ruling in *Johnson v. United States*, 135 S.Ct. 2551 (2015), which involved the interpretation of a residual clause of the federal Armed Career Criminal Act of 1984 as unconstitutionally vague. *Welch*, 136 S.Ct. at 1259. With the narrow scope of the *Welch* ruling, the argument of the Petitioner that *Welch* would direct the retroactive application of *Hall* fails. The opinion in *Welch* would have no effect upon the retroactive application of *Hall* by Tennessee Courts.

The Petitioner asks that if this Court grants him relief under *Hall* that it would further order the additional relief of jury determination of intellectual disability issues under the decision of the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016). The Petitioner did not raise this issue in his motion with the trial court and raises it now for the first time on appeal. Ordinarily, issues raised for the first time on appeal are waived. *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). In light of the lack of relief granted under *Hall* and despite the waiver of this issue, *Hurst* would offer the Petitioner no relief. The Supreme Court's opinion in *Hurst* related to the state of Florida's unique capital sentencing procedure. *Hurst* 136 S.Ct. at 617. The *Hurst* court based its ruling upon the application of the prior United States Supreme Court decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), which has been specifically found by the United States Supreme Court to not apply retroactively to death penalty cases already final on direct review. *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004). As such, there is no basis for relief on the argument that *Hurst* would require retroactive application to the Petitioner when his conviction became final on direct review some eleven years prior to the Supreme Court Ruling in *Ring*.

The Petitioner further argues that the court should find that his sentence of death is unconstitutional after the decision of the United States Supreme Court in *Obergefell v. Hodges*. The *Obergefell* case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty." *Obergefell*, 135 S.Ct. at 2604-05. The Petitioner argues that the death penalty, which has been imposed against him, denies him his fundamental right to life which is prohibited by *Obergefell*. However, the application of the death penalty has not been ruled unconstitutional by either the United States Supreme Court or the Tennessee Supreme Court. Therefore, the trial court did not abuse its discretion in holding that *Obergefell* did not entitle the Petitioner to relief and denying his petition as to that issue.

Relying upon a dissent by Justice Breyer in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), the Petitioner argues that his sentence of death is unconstitutional. The Petitioner's reliance upon a dissenting opinion to reopen his petition for post-conviction relief offers him no relief. To succeed in reopening a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." T.C.A. § 40-30-117(a)(1). The majority opinion in *Glossip* concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eight Amendment. 135 S.Ct. at 2731. Accordingly, the trial court did not abuse its discretion in denying relief to the Petitioner finding that Justice Breyer's dissent relied upon by the Petitioner did not create a new substantive rule of constitutional law as required by statute.

The Petitioner argues that the claimed relief he alleges as a result of the rulings in *Obergefell* and *Glossip* should be retroactively applied due to the United States Supreme Court's decision in *Montgomery v. Louisiana* that 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." 136 S.Ct. 718, 729 (2016). As set out above, the rulings in *Obergefell* and *Glossip* provide no relief to the Petitioner so there is no retroactive application to take in to account.

In addition to the initial application for permission to appeal, the Petitioner filed two separate supplements to his application for permission to appeal. In his supplements, the Petitioner seeks to rely upon the United States Supreme Court Case of *Moore v. Texas*, 137 S.Ct. 1039 (2017), which he alleges was supported by the summary dispositions in the matters of *Henderson v. Davis*, 137 S.Ct. 1450 (2017) and *Martinez v. Davis*, 137 S.Ct. 816 (2017). All of these cases were decided after the ruling of the post-conviction court and therefore none were cited or presented to the post-conviction court for consideration of the petition to reopen post-conviction proceedings. This Court cannot find that the lower court abused its discretion in denying the petition to reopen post-conviction proceedings using these cases as its guide.

For these reasons, the trial court did not abuse its discretion in denying the motion to reopen. 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

JOHN EVERETT WILLIAMS, JUDGE

ALAN E. GLENN, JUDGE

J. ROSS DYER, JUDGE

**IN THE CRIMINAL COURTS OF SHELBY COUNTY, TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION I**

PERVIS TYRONE PAYNE)

Petitioner,)

v.)

STATE OF TENNESSEE,)

Respondent.)

Case No. P-09594

Filed 10-26-14
Richard DeSaussure, Clerk
BY [Signature] **D.C.**

ORDER DENYING MOTION TO REOPEN POST-CONVICTION PETITION

Procedural History

On June 27, 1987, Petitioner killed Charisse Christopher and her two year-old daughter. He also stabbed Ms. Christopher's three year-old son. On February 16, 1987, after a jury trial, Petitioner was convicted of two counts of first degree murder and one count of assault with intent to commit first degree murder. The jury sentenced Petitioner to death for the two murders, and on March 11, 1988, the trial court sentenced Petitioner to 30 years of incarceration for the assault conviction. The Tennessee Supreme Court and United States Supreme Court subsequently affirmed the convictions and death sentence. See State v. Payne, 791 S.W.2d 10 (Tenn. 1990) and Payne v. Tennessee, 501 U.S. 808 (1991).

On January 14, 1992, Petitioner timely filed a petition for post-conviction relief in this Court. As a result of an interlocutory appeal to our supreme court, the appellant's post-conviction hearing was conducted in August, 1996. See Payne v. State, No. 02C01-9703-CR-00131, 1998 WL 12670, at *1 (Tenn. Crim. App. Jan. 15, 1998). This Court denied the petition on October 10, 1996.

On June 26, 1992, during the pendency of the post-conviction hearing, Petitioner filed a petition for writ of error *coram nobis*. This Court denied the petition on February 10, 1997.

Our Court of Criminal Appeals and Supreme Court affirmed the denials of post-conviction relief and writ of error *coram nobis*. Payne v. State, No. 02C01-9703-CR-00131, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998), perm. app. denied (Tenn. June 8, 1998).

On November 3, 1998, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee. The District Court denied habeas relief on March 29, 2002. The Sixth Circuit affirmed the denial of habeas relief on July 22, 2005, and the United States Supreme Court denied certiorari on June 26, 2006. Payne v. Bell, 418 F.3d 644 (6th Cir. 2005), cert denied, 548 U.S. 908 (2006).

On April 4, 2012, the Petitioner filed a motion to reopen post-conviction proceedings, arguing that the Tennessee Supreme Court's decision in Coleman v. State, 341 S.W.3d 221, (Tenn. 2011), established a new constitutional right that was not recognized at the time of his trial. On December 27, 2012, Petitioner amended the motion to include a petition for writ of error *coram nobis*.

This Court dismissed the motion and petition on May 7, 2013. Our Court of Criminal Appeals and Supreme Court affirmed the denial of the motion to reopen in Payne v. State, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App., at Jackson, July 29, 2013) and No. W2013-01215-SC-R11-PD (Tenn. Nov. 14, 2013). Both courts also affirmed the denial of writ of error *coram nobis* in Payne v. State, No. W2013-01248-CCA-R3-PD, 2014 WL 5502365 (Tenn. Crim. App., at Jackson, Oct. 30, 2014) and No. W2013-01248-SC-R11-PD, 2016 WL 1394199 (Tenn. Apr. 7, 2016).

On November 1, 2013, Petitioner filed an action for declaratory judgment in Chancery Court of Davidson County seeking a declaration that he met the criteria for intellectual disability and a permanent injunction against the execution. The trial court dismissed the action on March 25, 2014, and Petitioner appealed. Payne v. Carpenter, et. al., No. 13-1536-III (Davidson Co. Chanc. Ct. filed Nov. 1, 2013). On April 21, 2015, the appeal was stayed during the pendency of the appeal of the denial of error *coram nobis* in the Court of Criminal Appeals. Order *per curiam*, Payne v. Carpenter, et. al., No. M2014-00688-COA-R3-CV (Tenn. App., at Nashville, Apr. 21, 2015). The stay was lifted on May 5, 2016, subsequent to our Supreme Court's April 7, 2016 affirmation of the denial of error *coram nobis*.¹ Order *per curiam*, Payne v. Carpenter, et. al., No. M2014-00688-COA-R3-CV (Tenn. App., at Nashville, May 10, 2016). On August 8, 2016, the Court of Appeals affirmed the Davidson County Chancery Court's dismissal of the action. Pervis Tyrone Payne v. Wayne Carpenter, et al., No. M2014-006880-COA-R3-CV, 2016 WL 4142485 (Tenn. App. Aug. 8, 2016).

On October 13, 2014, Petitioner intervened in a collateral matter challenging the constitutionality of our state's death protocol. See West, et. al. v. Schofield, et. al., No. 13-1627-I, (Davidson Co. Chanc. Ct. Sept. 2, 2015). This proceeding is still pending review by the Tennessee Supreme Court. See West, et. al. v. Schofield, et. al., No. M2015-01952-SC-RDM-CV (Tenn., filed Feb. 24, 2016).

On May 21, 2015, Petitioner filed the instant Motion to Reopen Post-Conviction Petition. Petitioner, through counsel, filed supplements to the motion on April 14, 2016, and June 23, 2016. On September 7, 2016, this Court entered its initial order on the petition.

During the pendency of Petitioner's motions before this Court, this Court has also been handling motions from two other long-time death-row inmates, Michael Sample and Larry

¹ Payne v. State, __ S.W.3d __, 2016 WL 1394199 (Tenn. April 7, 2016).

McKay. Sample and McKay were co-defendants at trial, Attorney Paul Bottei represents both Sample and Payne, and all three cases are at similar procedural postures. Consequently, this Court has endeavored whenever possible to ensure that these cases are disposed of at the same time in order to simplify the administration of justice in the likely event of appeal.

On September 30, 2016, Attorney Bottei noted several areas in which he claimed that this Court failed to address all of the arguments raised in his motion, amendments and supplements in both the instant matter and in Michael Sample v. State. Out of an abundance of caution and in the interests of justice, this Court vacated its rulings in Pervis Tyrone Payne v. State, Michael Sample v. State, and Larry McKay v. State. Today, this Court issues a new ruling which addresses the additional matters which Attorney Bottei raised before this Court on September 30, particularly Petitioner's arguments for relief based on Hall v. Florida as applied in Montgomery v. Louisiana.

After reviewing Petitioner's motion, supplements, amendments, arguments of counsel, and the entire record, including Attorney Bottei's arguments on September 30, 2016, this Court finds that Petitioner's Motion to Reopen is **HEREBY DENIED**.

Standards of Law for Motions to Reopen

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." ID. § 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 TENN. CODE ANN. § 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.

Harris, at 590-91 (citing TENN. CODE ANN. § 40-30-217(a)(1)-(4)) (renumbered as § 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. Furthermore, as Petitioner asserts, the United Supreme Court's opinion in Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718, 729 (2016) provides that "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."

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).

Analysis

Petitioner's Claims under Glossip v. Gross Dissent

In Glossip v. Gross, 135 S. Ct. 2726 (2015), the Supreme Court concluded Oklahoma's three-drug lethal injection protocol did not violate the Eighth Amendment's protection against cruel and unusual punishment. Four justices wrote a dissent addressing the particular controversy at issue in Glossip (namely, the constitutionality of Oklahoma's lethal injection protocol), but in a separate dissent, joined by Justice Ginsburg, Justice Breyer argued for a reexamination of whether the death penalty itself should be held to be unconstitutional. Id. at 2755–80 (Breyer, J., dissenting). This dissent forms the basis for one of Petitioner's issues in the current motion to reopen.

Specifically, Petitioner argues on page 4 and 5 of his motion to reopen,

In Glossip v. Gross, 576 U.S. ___, 135 S. Ct. 2726 (2015) (Breyer, J., dissenting), Justices Breyer and Ginsburg have concluded that the death penalty likely constitutes a prohibited cruel and unusual punishment, which violates the Eighth and Fourteenth Amendments (and in turn violates Article I §§ 8 & 16 of the Tennessee Constitution). Pervis Payne relies on all of the arguments and evidence contained and discussed in Justice Breyer's dissent in support of his discussion that the death sentence in this case is unconstitutional. Pervis Payne attaches Justice Breyer's

Glossip opinion as factual, legal, and evidentiary support for his request for an evidentiary hearing and for post-conviction relief given the unconstitutionality of the death penalty in this case. See Glossip, 576 U.S. at ___, 135 S. Ct. at 2755–80 (incorporated by reference, and attached as Exhibit 1).

As Justice Breyer has explained, the death sentence is unconstitutional here because it is: unreliable (Glossip, 135 S. Ct. at 2756–59 (Breyer, J., dissenting)); arbitrary (Id., 135 S. Ct. at 2759–64); cruel, given excessive delays and its failure to serve any legitimate penological objective (Id., 135 S. Ct. at 2764–72); and highly unusual or rare. (Id., 135 S. Ct. at 2772–76). Pervis Payne need not repeat every specific point made by Justice Breyer on these particular matters, though he specifically relies upon those here. They are, in and of themselves, sufficient to entitle him to an evidentiary hearing and to vacation of his death sentence.

Initially, it is this Court’s determination the Glossip dissent is not a “final ruling of an appellate court” that would entitle Petitioner to relief. The final ruling of the Supreme Court in Glossip affirmed Oklahoma’s lethal injection protocol. Justice Breyer’s separate dissenting opinion has no precedential value and cannot be considered “a new substantive rule of constitutional law [which] controls the outcome of a case[.]” Montgomery, 136 S. Ct. at 729 (describing a new substantive rule of constitutional law as one that controls the outcome of a case). In short, Petitioner’s Glossip claim must be denied because “the facts underlying the claim, if true, would [not] establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.” TENN. CODE ANN. § 40-30-117(a)(4); see also Edmund Zagorski v. State, No. M2016-00557-CCA-R28-PD, slip op. at 2 (Tenn. Crim. App., at Nashville, May 4, 2016) (order denying relief in appeal of motion to reopen decision based upon Obergefell opinion and Glossip dissent), perm. app. filed (Tenn. June 28, 2016).

This Court also notes Petitioner makes several arguments regarding what he views as the unreliability of the death penalty generally and as applied in his case in particular. Petitioner’s claims regarding the unreliability of his convictions and sentences are, in large part, related to

issues which either were or could have been litigated on direct appeal or post-conviction. A motion to reopen is not the proper means of raising such claims. The case-specific “unreliability” claims are, therefore, denied as not cognizable for relief in a motion to reopen.

Petitioner’s general assertions concerning the death penalty in Tennessee being unreliable, arbitrary, cruel, and highly unusual or rare are hardly new. Mindful of evolving standards of decency, the United States Supreme Court has concluded that executing certain classes of persons—such as the intellectually disabled² and persons committing capital offenses as juveniles³—are unconstitutional. However, both the federal and state supreme courts have repeatedly concluded the death penalty itself does not violate the United States and Tennessee constitutions. *See, e.g. Glossip v. Gross*, 135 S. Ct. 2726 (2015) (majority opinion) and *Keen v. State*, 398 S.W.3d 594, 600 n.7 (Tenn. 2012). Whatever arguable merit the concerns set forth in the dissent in *Glossip* may or may not have, binding precedent, which is clearly contained in the majority opinion of the same case, requires this Court to find Petitioner’s claims here do not rely upon a new substantive rule of constitutional law as required by the statute.

Petitioner’s Claims Under Obergefell v. Hodges

Petitioner also asserts he is entitled to relief under the United States Supreme Court’s opinion in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), which concluded the right to marry is a fundamental right under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and, therefore, is guaranteed to all couples regardless of sex. Specifically, Petitioner argues “[j]ust as no state can deny the fundamental right to marry, *a fortiori*, no state can deny the fundamental right to life, which is *the* fundamental human right

² *See Atkins v. Virginia*, 536 U.S. 304 (2002).

³ *See Roper v. Simmons*, 543 U.S. 551 (2005).

and provides the predicate for the exercise of all other rights.” (Motion to Reopen, at 11) (emphasis in original). He further states “Under *Obergefell* and the Fourteenth Amendment, the death sentence must be struck down here.” *Id.* This Court disagrees.

The government’s inability to deny any person his fundamental rights under the state or federal constitution is hardly a novel concept. Petitioner’s assertion the death penalty denies him his fundamental right to life is also not a new claim, as numerous death row inmates have raised the claim in Tennessee’s courts, and both the Tennessee Supreme Court⁴ and the Court of Criminal Appeals⁵ have denied these claims. Petitioner argues *Obergefell*’s conclusions regarding fundamental rights, human dignity, and the prohibition against the diminishment of one’s personhood apply in all circumstances, not just the right to marry. However, this Court is

⁴ See *Cauthern v. State*, 145 S.W.3d 571, 629 (Tenn. 2004); *State v. Mann*, 959 S.W.2d 503, 536 (Tenn. 1997) (appendix); and *State v. Bush*, 942 S.W.2d 489, 524 (Tenn. 1997) (appendix). See also *State v. Freeland*, 451 S.W.3d 791, 825 (Tenn. 2014) (appendix); *State v. Sexton*, 368 S.W.3d 371, 427 (Tenn. 2012) (appendix); *State v. Hester*, 324 S.W.3d 1, 80 (Tenn. 2010); *State v. Holton*, 126 S.W.3d 845, 871–72 (Tenn. 2004) (appendix); and *Nichols v. State*, 90 S.W.3d 576, 604 (Tenn. 2002).

⁵ See also *Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, (Tenn. Crim. App., at Jackson, Aug. 29, 2014); *Akil Jahi a.k.a. Preston Carter v. State*, No. W2011-02669-CCA-R3-PD, 2014 WL 1004502 (Tenn. Crim. App., at Jackson, Mar. 13, 2014); *David Ivy v. State*, No. W2010-01844-CCA-R3-PD, 2012 WL 6681905 (Tenn. Crim. App., at Jackson, Dec. 21, 2012); *Steven Ray Thacker v. State*, No. W2010-01637-CCA-R3-PD, 2012 WL 1020227 (Tenn. Crim. App., at Jackson, Mar. 23, 2012); *Gerald Lee Powers v. State*, No. W2009-01068-CCA-R3-PD (Tenn. Crim. App., at Jackson, Feb. 22, 2012); *John Michael Bane v. State*, No. W2009-01653-CCA-R3-PD, 2011 WL 601173 (Tenn. Crim. App., at Jackson, July 21, 2011); *Christa Gail Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App., at Knoxville, Apr. 25, 2011); *Vincent Sims v. State*, No. W2008-02823-CCA-R3-PD, 2011 WL 334285 (Tenn. Crim. App., at Jackson, Jan. 28, 2011); *Detrick Cole v. State*, No. W2008-02681-CCA-R3-PD, 2011 WL 1090152 (Tenn. Crim. App., at Jackson, Mar. 8, 2011); *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454 (Tenn. Crim. App., at Jackson, July 1, 2009); *Tyrone Chalmers v. State*, No. W2006-00424-CCA-R3-PD, 2008 WL 2521224 (Tenn. Crim. App., at Jackson, June 25, 2008); *Anthony Darrell Hines v. State*, No. M2006-02447-CCA-R3-PC, 2008 WL 271941 (Tenn. Crim. App., at Nashville, Jan. 29, 2008); *James A. Dellinger v. State*, No. E2005-01485-CCA-R3-PD 2007 WL 2428049 (Tenn. Crim. App., at Knoxville, Aug. 28, 2007), *aff’d in part, rev’d in part on other grounds*, 279 S.W.3d 282 (Tenn. 2009); *William R. Stevens v. State*, No. M2005-00096-CCA-R3-PD 2006 WL 3831264 (Tenn. Crim. App., at Nashville, Dec. 29, 2006); *Farris Genner Morris, Jr., v. State*, No. W2005-00426-CCA-R3-PD, 2006 WL 2872870 (Tenn. Crim. App., at Jackson, Oct. 10, 2006); *David Keen v. State*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258 (Tenn. Crim. App., at Jackson, June 5, 2006); *Kevin B. Burns v. State*, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990 (Tenn. Crim. App., at Jackson, Dec. 21, 2005); *Kennath Henderson v. State*, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855 (Tenn. Crim. App., at Jackson, June 28, 2005); *Byron Lewis Black v. State*, No. 01C01-9709-CR-00422, 1999 WL 195299 (Tenn. Crim. App., at Nashville, Apr. 8, 1999); *State v. Ricky Thompson*, No. 03C01-9406-CR-00198, 1996 WL 30252 (Tenn. Crim. App., at Knoxville, Jan. 24, 1996).

not aware of any state or federal appellate opinion extending Obergefell to criminal law in general or capital punishment in particular. The Obergefell opinion does not state explicitly that the Supreme Court's holding applies to areas of the law beyond the right to marry.

In addition and as previously referred to above, the Court of Criminal Appeals has already denied relief in a similar case. In October 2015, Edmund Zagorski, convicted in Robertson County of two counts of first degree murder and sentenced to death,⁶ filed a motion to reopen his post-conviction proceedings based upon the Obergefell opinion and the Glossip dissent discussed above. The post-conviction court denied the motion following a hearing, and on appeal the Court of Criminal Appeals affirmed the trial court:

The Appellant argues that his post-conviction petition should be reopened in light of the United States Supreme Court's ruling in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), and Justice Breyer's dissenting opinion in Glossip v. Gross, 135 S. Ct. 2726 (2015). The Obergefell case held that "same-sex couples may exercise the fundamental right to marry" and that "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and liberty." Obergefell, 135 S. Ct. at 2604–05. The Appellant argues that the death penalty, which has been imposed against him, "denies his fundamental right to life, denies him inherent human dignity, and unconstitutionally diminishes his personhood — all of which are prohibited by Obergefell." The death penalty, however, has not been ruled unconstitutional by the United States Supreme Court or the Tennessee Supreme Court. Accordingly, the trial court did not abuse its discretion in holding that Obergefell simply has no bearing on the Appellant's case. Moreover, the Appellant's reliance upon a dissenting opinion in Glossip offers him no avail. In order to succeed in reopening a previously filed petition, the claim asserted must be "based upon a final ruling of an appellate court." § 40-30-117(a)(1). The majority opinion in Glossip concluded that the method of execution utilized by the State of Oklahoma does not constitute cruel and unusual punishment under the Eighth Amendment. 135 S. Ct. at 2731. Accordingly, the trial court did not abuse its discretion in denying relief to the Appellant based upon his reliance on Justice Breyer's dissent. Finally, the Appellant's reliance on Montgomery v. Louisiana, 136 S. Ct. 718 (2016), is misplaced. The Supreme Court held that "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

⁶ See State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985).

possibility of parole. As the trial court correctly noted, however, "the death penalty for the [Appellant] has not been eliminated" in this case. Again, 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 motion to reopen. The Appellant's application for permission to appeal is, therefore, denied.

Edmund Zagorski v. State, No. M2016-00557-CCA-R28-PD, slip. op. at 2 (Tenn. Crim. App., at Nashville, May 4, 2016) (order denying relief in appeal of motion to reopen decision), perm. app. filed, (Tenn. June 28, 2016).

Under existing precedents, this Court must conclude that while Obergefell indeed states a new rule of constitutional law related to same-sex marriage, that new rule does not alter the long-standing precedent under which the death penalty does not deny an inmate his fundamental right to life. Obergefell does not entitle Petitioner to relief, and, therefore, the motion to reopen should be denied as to this issue.

Petitioner's Claims Under Hall v. Florida

Petitioner also claims he is entitled to reopen his post-conviction proceedings pursuant to Hall v. Florida, 572 U.S. ___, 134 S. Ct. 1986 (2014), and Montgomery v. Louisiana, 577 U.S. ___, 136 S. Ct. 718 (2016). Specifically, he argues Hall is a new rule of constitutional law which must be applied retroactively.

In Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257 (2016), the Court discussed the difference between substantive and procedural rules.

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” Schriro⁷, 542 U.S., at 353, 124 S. Ct. 2519. “This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.” Id., at 351–352, 124 S. Ct. 2519 (citation omitted); see Montgomery, *supra*, at ___, 136 S. Ct., at 728. Procedural rules, by contrast, “regulate only the manner of determining the defendant’s culpability.” Schriro, 542 U.S., at 353, 124 S. Ct. 2519. Such rules alter “the range of permissible methods for determining whether a defendant’s conduct is punishable.” Ibid. “They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Id., at 352, 124 S. Ct. 2519.

136 S. Ct. at 1264–65. The Court further indicated a procedural rule of law would be involved when a case regulates the evidence that the court could consider in making its decision or affects the judicial procedures by which a statute is applied. Id. at 1265.

Our own Tennessee Supreme Court in Payne v. State, ___ S.W.3d ___, 2016 WL 1394199 (Tenn. April 7, 2016), specifically addressed the issue of Hall and whether it should be applied retroactively.

[T]he issue before the Court [in Hall] 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.

⁷ Schriro v. Summerlin, 542 U.S. 348, 351, 124 S. Ct. 2519 (2004).

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, 2016 WL 1394199, at *9.

Also, in Vincent Sims v. State, No. W2015-01713-CCA-R28-PD (Tenn. Crim. App.

Order entered Jan. 28, 2016), perm. app. denied, May 6, 2016, the Tennessee Court of Criminal Appeals addressed the issues raised here concerning retroactivity and determined Hall did not establish a basis on which to reopen a post-conviction petition:

The Petitioner contends that the United States Supreme Court's opinion in Hall v. Florida, 134 S.Ct. 1986 (2014), established a "constitutional right that was not recognized as existing at the time of trial" and that "retrospective application of that right is required." *See* TENN. CODE ANN. § 40-30-117(a)(1). The Petitioner maintains that as a result of the Court's decision in *Hall*, he is intellectually disabled and, therefore, ineligible for the death penalty.

...

... [I]t 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 Tague 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), in which 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. 367, 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 in which the United States Supreme Court has identified as qualifying under this exception is Gideon v. Wainwright, 372 U.S. 335 (1963). See Whorton, 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 Whorton, 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 Whorton, 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.

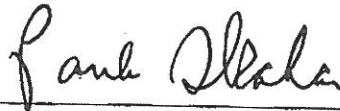
Accordingly, Petitioner's claims related to Hall v. Florida, 572 U.S. ___, 134 S. Ct. 1986 (2014), are found to be without merit and/or previously determined and should be denied.

Conclusion

Petitioner has failed to articulate a basis upon which this Court could grant relief.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Petitioner's Motion to Reopen Petition for Post-Conviction Relief and Supplemental Motions to Reopen are **HEREBY DENIED** as of this date.

IT IS SO ORDERED this the 26 day of October, 2016.



JUDGE PAULA SKAHAN
Criminal Court, Division I