

CAPITAL CASE

No. 19-7369

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

David Keen,
Petitioner,
v.

STATE OF TENNESSEE
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

**REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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“If [Keen] is indeed intellectually disabled, this issue deserves to be heard.”

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

“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)

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), was decided, no post-conviction petitioner has received merits relief from a Tennessee state court. Tennessee’s continued refusal to implement this Court’s decision in *Atkins* must be remedied. 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 nonsensical. The lower court’s decision is a straightforward interpretation of federal constitutional law. App. 035-036. The

availability of a procedural vehicle for Keen’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).

Montgomery is dispositive.

II. Tennessee must enforce the federal constitution.

Tennessee maintains that because it is not constitutionally obliged to provide a post-conviction procedure, it may ignore the mandate of *Atkins* and its progeny for a unique set of death row inmates. This analysis fails, however, because Tennessee has elected to provide post-conviction procedures. “In adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, assuming the claim is properly presented in the case.”

Montgomery, 136 S. Ct. at 732. However, the Tennessee Supreme Court has been inconsistent as to when it exercises its inherent authority. 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, *State v. Mallard*, 40 S.W.3d 473, 481 (Tenn. 2001); to adopt ethics rules for judges, including guidelines for discipline that should be imposed for violations of those rules, *In re Bell*, 344 S.W.3d at 313; to prescribe and administer rules pertaining to the licensing and admission of attorneys, *Belmont*, 511 S.W.2d at 462; to adopt rules regulating the practice of law, including ethics rules for lawyers and rules regarding the disciplinary process and violations of those rules, *Hughes v. Bd. of Prof'l Responsibility*, 259 S.W.3d 631, 640 (Tenn. 2008); and to prevent the unauthorized practice of law, *Petition of Burson*, 909 S.W.2d 768, 773 (Tenn. 1995). 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. Keen's *Atkins* claim. It chooses not to. This choice cannot be squared with *Moore*.

Moore holds that the states are forbidden from executing the intellectually disabled. Period. There is no wiggle room. *Montgomery* holds that States are obliged to enforce the Eighth Amendment principles defined by this Court.

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

This Court in *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. Keen’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. Keen’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.

IV. Tennessee is out of step with the rest of the country where no post-conviction capital petitioner has received a favorable merits adjudication of their 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);

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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 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.

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).

V. 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, Courtney Nicole Orr, Office of the Attorney General and Reporter, P.O. Box 20207, Nashville, Tennessee, 37202-0207, via United States Mail, this 3rd day of March, 2020.

/s/ Kelley J. Henry

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