CAPITAL CASE
NO EXECUTION DATE SET

No. 16-____

IN THE

Supreme Court of the United States

PERVIS TYRONE PAYNE,

Petitioner,

v.

TENNESSEE

Respondent.

On Petition for a Writ of Certiorari
to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Paul R. Bottei
OFFICE OF THE FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway
Suite 200
Nashville, TN 37203
(615) 736-5047

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), this Court held that the Constitution forbids the execution of the intellectually disabled, but largely permitted the States to determine the standards for finding such disability. In response, some States focused on one measure *Atkins* had mentioned—an IQ score of 70 or below—and treated a score above 70 as essentially a bright-line cutoff against intellectual-disability claims. Capital offenders who sought collateral relief or were initially sentenced during this period and had IQ scores just over 70 would thus frequently be denied any further hearing on their intellectual-disability claims, preventing them from developing highly relevant evidence of such disability.

Over a decade later, in *Hall v. Florida*, 134 S. Ct. 1986 (2014), this Court held that the Constitution imposes a minimum floor on how the States may define and determine intellectual disability, and in particular, requires more careful consideration than these States had provided for scores just above the 70-point threshold. That paradigm-shifting decision was rendered in a case on collateral review, and the Florida Supreme Court has since granted Hall himself complete, retroactive relief from the death penalty. Nonetheless, certain courts of final review—including the Tennessee Supreme Court below—have held that *Hall* is not retroactive, and need not be applied on collateral review. The explicit disagreement is at least 3-3 on this question, but the actual split is far deeper, because a host of additional courts have in fact applied *Hall* retroactively without controversy—this Court included. Moreover, the federal Court of Appeals decisions on point have fully developed the

arguments on both sides of this issue via vigorous dissents. The Question Presented is:

Must this Court's decision in *Hall v. Florida* be applied on collateral review?

PARTIES TO THE PROCEEDINGS BELOW

All the parties to the proceedings below are named in the caption.

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INTRODUCTION

This is one of three closely related cases in which the Tennessee courts held that this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), is not retroactive as a matter of federal law. That question is critically important: *Hall* revolutionized this Court's Eighth Amendment jurisprudence by imposing a federal constitutional floor on how the States define and determine intellectual disability, and in so doing, required further sentencing consideration for a set of capital offenders most at risk of being unconstitutionally executed. For most of those offenders, collateral review represents their only opportunity to avoid an unconstitutional execution, making *Hall*'s retroactivity a nationwide issue of life or death. This question has also expressly divided courts of final review and is leading to intolerably different outcomes in capital cases across an even wider set of courts because many of them—including this one—are simply applying *Hall* retroactively without controversy. Moreover, there should be little question that the decision below is incorrect after this Court's decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which, under precisely analogous circumstances, required retroactive application of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), on state collateral review. Accordingly, the decision below represents: (1) an incorrect decision on (2) a question of the greatest importance that (3) has divided the lower courts. It is thus an archetypical certiorari candidate.

Candidly, however, this is the weakest candidate for plenary review of the three Tennessee cases simultaneously presenting this question. When the Tennessee Supreme Court decided in this case not to apply

Hall retroactively, it also denied two other petitions for review from capital offenders—Vincent Sims and Michael Sample—whom the Tennessee Court of Criminal Appeals had denied relief on the very same grounds. As explained below, *infra* p.31-34, this case presents a potential vehicle concern that those cases do not.[1] Accordingly, petitioner believes that the co-pending petition presenting those cases should be granted, and this case held for their disposition. He presents a complete argument below only because the Tennessee Supreme Court announced the relevant rule in his own case.

In fact, the nature of the decision below suggests that a hold for a possible grant, vacatur, and remand in this case would be appropriate for three separate reasons: (1) in light of a potential decision in *Sims* and *Sample*; (2) in light of the decision already rendered in *Montgomery* alone, *see* 136 S. Ct. at 729-32 (clarifying retroactivity of cases proscribing punishments for certain offenders); or (3), in light of the potential decision in *Moore v. Texas*, No. 15-797 (raising, in *retroactive posture*, effect of *Hall* on Texas's scheme for intellectual-disability claims). For multiple reasons explained below, a grant in *Sims* and *Sample* is the most appropriate course. But if this Court is not inclined to grant *Sims* and *Sample*, it plainly should GVR both petitions in light of *Montgomery* and/or *Moore*, especially be-

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[1] Sims and Sample could not join this petition under Rule 12.4 of this Court because the Tennessee Supreme Court denied them discretionary review. All three petitioners are represented by the same counsel, however, and all agree that it would be most efficient for the Court to consider their petitions together at this stage.

cause *Montgomery* is precisely on point, and the Tennessee Supreme Court failed to address it at all.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Pervis Payne respectfully seeks a writ of certiorari to review a judgment of the Tennessee Supreme Court.

OPINIONS BELOW

The Tennessee Supreme Court's decision (Pet. App. 1a) is slated for publication and presently available at 2016 WL 1394199. The decisions of the trial court denying relief (Pet. App. 81a) and of the Tennessee Court of Criminal Appeals denying review (Pet. App. 32a) are unreported, but the latter is available at 2014 WL 5502365. The order denying rehearing (Pet. App. 88a) is unreported.

JURISDICTION

The judgment below was entered on April 7, 2016. Pet App. 1a, and a timely request for rehearing was denied on April 29, 2016. Pet App. 88a. Justice Kagan extended the time for this petition to September 26, 2016, *see* No. 16A100. The decision below affirms the complete denial of relief to petitioner and so is a final judgment of the state's highest court. Petitioner sought retroactive application of *Hall* to his federal intellectual-disability claim immediately after *Hall* was decided, and the Tennessee Supreme Court accordingly decided the question of *Hall*'s retroactivity on the merits, vesting this Court with jurisdiction under 28 U.S.C. §1257.

STATEMENT OF THE CASE

1. Petitioner Pervis Payne was initially convicted and sentenced to death in 1988, and his sentence was

finalized on direct appeal in 1991. Notably, he presented evidence of a mental handicap even in his original trial, long before this Court held in *Atkins v. Virginia,* 536 U.S. 304 (2002), that the Constitution prohibits the execution of inmates who are intellectually disabled. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 814 (1991) (noting "Payne's low score on an IQ test" and that he "was mentally handicapped"); *see also id.* at 827-29 (affirming Payne's initial death sentence by overruling two controlling precedents on another question).

2. Just before petitioner's death sentence became final, Tennessee statutorily prohibited execution of the intellectually disabled. *See* Tenn. Code Ann. §39-13-203. In so doing, it adopted the same three criteria this Court would point to in *Atkins*—including, especially, the requirement of "significantly sub-average general intellectual functioning." *Id.* But, importantly, it required that low functioning to be "evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." *Id.* As the statutory text suggested—and the Tennessee Supreme Court would confirm—an IQ score of 70 thus functioned in this scheme as a "bright-line" cutoff, so that offenders with an IQ score of 71 or higher were categorically ineligible for relief from a capital sentence on the ground of intellectual disability. *See Howell v. State*, 151 S.W.3d 450, 459 (Tenn. 2004).

Howell confirmed that bright-line rule with regard to claims under the Tennessee statute (enacted in 1990), and the Tennessee constitution (which was held to prohibit execution of the intellectually disabled in *Van Tran v. State*, 66 S.W.2d 790 (Tenn. 2001)). But the same rule was also applied in federal habeas

courts in Tennessee for purposes of federal constitutional claims under *Atkins* because (like other courts) the Sixth Circuit interpreted *Atkins* as having left the State essentially free to define intellectual disability as it saw fit. *See, e.g.*, *Howell*, 151 S.W.3d at 457 (noting that *Atkins* left definition of intellectual impairment to States); *Black v. Bell*, 664 F.3d 81, 91-96 (6th Cir. 2011) (applying state-law standards regarding determination of intellectual disability to federal intellectual-disability claims); *Smith v. Ryan*, 813 F.3d 1175, 1197-98 (9th Cir. 2016) (same).

In establishing this bright-line rule, *Howell* specifically rejected a plea to interpret the 70-or-below requirement "as representing a range of scores between sixty-five and seventy-five" to account for the standard error of measurement (SEM) on IQ tests. *Howell*, 151 S.W.3d at 457-58. Accordingly, IQ test scores over 70 prevented disabled petitioners in Tennessee from obtaining relief under state or federal law, even if psychologists would have found them to be intellectually impaired based on other considerations." *See, e.g.*, *Coleman v. State*, 2010 WL 118696, at *16-18, *23 (Tenn. Crim. App. Jan. 13, 2010) (denying claim where numerous IQ scores were not 70 or less); *Black v. State*, 2005 WL 2662577, at *17 (Tenn. Crim. App. Oct. 19, 2005) (same). And those other, off-limits considerations included not only more subjective measurements of intellectual disability, but also verified, objective issues surrounding the analysis of IQ scores, such as statistical laws about measurement error (like a test's SEM), the well-established upward drift in IQ scores over time ("Flynn Effect"), and the recognized "practice" effect of repeatedly assessing a particular

person with the same IQ test. *Coleman v. State*, 341 S.W.3d 221, 242 n.55 (Tenn. 2011).

In 2011, after state and federal courts had repeatedly denied relief to capital offenders under *Howell*'s bright-line rule, the Tennessee Supreme Court reversed course. In *Coleman*, it held that the state courts now *could* consider the impact of scientifically recognized influences on IQ scores like the SEM and the Flynn Effect—although it did not require their consideration. *See* 341 S.W.3d at 252 & n.55. The court avoided squarely overruling *Howell*, however, by reinterpreting it to merely forbid experts from expressing a capital offender's IQ as a range of possible scores around a median (although that is *exactly* what the concept of SEM entails). Instead, in what the court itself recognized as a direct break "with clinical practice," psychological experts would still be required to "testify to a specific score or at least that the criminal defendant's 'function intelligence quotient' is either 'seventy (70) or below' or above seventy." *Id.* at 247 (quoting Tenn. Code Ann. §39-13-203(a)(1)). Nonetheless, the change in Tennessee law was clear. After *Coleman*, the Tennessee courts could no longer use *Howell*'s bright-line rule to prevent experts from considering statistical laws and other effects in assessing intellectual disability for an offender with borderline IQ scores—even if those experts had to render their clinical judgment in "corrected" IQ scores rather than a range of possible results.

Coleman thus resulted in multiple requests for fresh collateral review by offenders with IQ scores slightly above *Howell*'s antiquated, 70-point line. In Tennessee, such claims are usually brought as a motion to reopen a previous challenge to one's sentence

under Tenn. Code Ann. §40-30-117. *See Keen v. State*, 398 S.W.3d 594, 607 (Tenn. 2012) (holding that "a motion to reopen is the proper vehicle for a claim that arises after the petitioner's original post-conviction avenues have been exhausted and that asserts a newly recognized constitutional right, even when the issue was arguably waived.") (citing *Van Tran*, 66 S.W.3d at 799). But the Tennessee Supreme Court eventually held in *Keen v. State* that this avenue was closed to these post-*Coleman* petitioners because *Coleman* had not adopted a new *constitutional* rule. *See Keen*, 398 S.W.3d at 609 (declining to decide whether *Coleman* was a "new rule" because it was only an interpretation of Tenn. Code Ann. §39-13-203).

At least temporarily, this holding resulted in some very peculiar circularity, because the federal courts in Tennessee were—as in many other circuits—looking to the state courts to establish the disability standard for *Atkins*, while the state courts were denying that their articulation of standards for state avenues of relief in any way determined federal intellectual-disability claims. *See Black*, 664 F.3d at 101 (noting rare and confounding situation of the Supreme Court making a new retroactive rule while leaving articulation of its content to state courts); *Keen*, 398 S.W.3d at 609 n.13 (denying that *Coleman* affected federal habeas claims). But the bottom line was quite clear: Notwithstanding *Coleman*, the interaction of *Howell* and *Keen* denied Tennessee capital offenders with IQ scores very slightly above 70 *any* way to assert their potentially valid intellectual-disability claims in *any* court—initially, because *Howell*'s bright-line rule had prevented it, and thereafter, because *Keen* declined to apply *Coleman*'s abrogation of *Howell* retroactively. *See, e.g.*, *Dellinger*

v. State, 2015 WL 4931576 (Tenn. Crim. App. Aug. 18, 2015); *Sims v. State*, 2014 WL 7334202 (Tenn. Crim. App. Dec. 23, 2014).

3. Meanwhile, in the wake of *Coleman*, petitioner's low intellectual function (which had long been a feature of his case, *see supra* p.4) was reassessed by a leading expert at Vanderbilt University. Dr. Reschly individually administered the leading IQ inventory, the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), and petitioner scored a 74, to go along with two previous scores of 78 in 1987 and 1996. Correcting for the Flynn Effect on these three tests, Dr. Reschly calculated actual full-scale IQ scores of 75.4 on the 1978 test, 72.4 on the 1996 test, and 73.7 on the 2010 test.[2] Consistent with how *Coleman* required him to state his findings, Dr. Reschly concluded that, correcting for all factors, "Mr. Payne's functional intelligence clearly is at or below 70 and otherwise in the range of MR-ID [intellectual disability], a conclusion that is further supported by … significant limitations in adaptive behavior." *See* Pet. App. 95a-96a. He also concluded that petitioner's lifetime IQ testing had shown stable and consistent results within the "widely

[2] The Flynn Effect varies according to the time between the release of the test (which is normalized at that point to a population-wide average of 100) and the administration date. *See Keen*, 398 S.W.3d at 605 n.11. Petitioner's two scores of 78 on the WAIS-R, released in 1979, thus resulted in different corrected scores. His lowest absolute score of 74—and first score falling within the SEM band for an absolute score of 70 on an individually administered test—occurred in 2010. But accounting for the Flynn effect yielded two scores below 75, and one barely above.

accepted standard for the identification of mental retardation." *Id.* at 94a-95a.

4. Having obtained a first absolute score below 75 on an individually administered IQ test, and an assessment that confirmed his intellectual disability in light of the more complete picture *Coleman* newly permitted, petitioner filed a motion to reopen his previous challenge to his death sentence under Tenn. Code Ann. §40-30-117. He filed this motion, as required, within one year of *Coleman*, and then amended it to add a request for coram nobis relief just over one year later, after *Keen* held that *Coleman* would not be applied retroactively on a motion to reopen like his. Relying on *Keen*, however, the trial court denied both claims. Pet. App. 86a-87a.

As state law required, Payne then bifurcated the appeal of his two claims. As to his motion to reopen, he sought permission to appeal from the Tennessee Court of Criminal Appeals, which denied relief in reliance on *Keen*. *See Payne v. State,* No. W2013-01215-CCA-R28-PD (Tenn. Crim. App. July 29, 2013). The Tennessee Supreme Court denied permission to appeal. *Payne v. State*, No. W2013-01215-SC-R11-PD (Tenn. Nov. 14, 2013). As to his request for coram nobis relief, petitioner took an appeal as of right to the Tennessee Court of Criminal Appeals. That separate appeal gives rise to this petition.

The Tennessee Court of Criminal Appeals ultimately affirmed the denial of coram nobis relief in that proceeding, but only after a critical intervening development. After petitioner's appeal of the denial of his motion to reopen was finalized, and after his appeal on coram nobis relief was submitted, this Court decided

Hall. That decision imposed the first federal constitutional floor on how the States defined and determined intellectual disability for Eighth Amendment purposes, and specifically held that capital offenders with IQ scores between 70 and 75 (*i.e.*, within SEM for a score of 70 or below) must at least be allowed to present additional evidence that they are in fact intellectually disabled. *Hall*, 134 S. Ct. at 2000-01. This holding dramatically simplified petitioner's case, and others like it, in two respects. First, it created a uniform, federal constitutional rule for such cases, essentially superseding approaches like *Coleman*'s with respect to federal constitutional claims, and resolving the circularity mentioned above, *supra* p.7. Second, it turned the question of whether the new standard applied retroactively into a federal question: If *Hall* was itself retroactive on collateral review, it would alleviate the possibility of capital offenders—like Payne and others—slipping between the cracks of *Howell* of *Keen* in both state and federal habeas courts.[3]

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[3] *Hall*'s retroactivity on post-conviction review in Tennessee is now clearly a federal question because of *Montgomery*'s holding that the Constitution requires state courts to apply retroactive federal law in state post-conviction proceedings. 136 S. Ct. at 729-32. But even before *Montgomery*, Tennessee made this a federal question by choosing on its own to both follow federal retroactivity standards and apply new federal law retroactively on motions to reopen. *See* Tenn. Code Ann. §40-30-122; *Bush v.* State, 428 S.W.3d 1, 19-20 (Tenn. 2014) (standards codified in §40-30-122 are "similar to the federal standard of *Teague*"); *Michigan v. Long*, 463 U.S. 1032, 1038-43 (1983) (decision to incorporate federal standards into interpretation of state law creates a federal question) *see also* Pet. App. 26a-27a (looking to U.S. Supreme

Notably, *Hall* itself was presented in a collateral-review posture when this Court provided relief and announced its new federal minimum rule. And while this Court was considering *Hall*, it was simultaneously holding *Howell*—the very case that had articulated Tennessee's 70-or-below cutoff, which was likewise presented on collateral review. *See Howell v. Tennessee*, No. 13-5086. This Court ultimately took no action on Howell's petition because he died (naturally) while the case was pending. But the grant of relief to Hall in a retroactive posture, and the simultaneous holding of Howell's post-conviction case, strongly suggests that Tennessee offenders in that same posture must likewise get the benefit of *Hall*.

A divided panel of the Tennessee Court of Criminal Appeals nonetheless affirmed. Among other things, the majority concluded that coram nobis relief—which is available in Tennessee to challenge a conviction or sentencing based on newly available evidence—had not been sought in a timely fashion. Despite the fact that the evidence of petitioner's low intellectual function had seemed irrelevant as a matter of Tennessee law until *Coleman* was decided, the court held that such evidence was technically "available" for coram nobis purposes ten years earlier, when execution of the intellectually disabled was held to violate the state constitution. Because petitioner did not seek coram nobis relief within one year of that decision, his request was untimely. *See* Pet. App. 65a.

Court or federal appellate court decisions to determine if *Hall* applies retroactively).

Judge McMullen dissented, emphasizing that petitioner was in the exact same procedural posture as Hall himself. She also stressed that it, in light of *Howell* and the countless other cases from her court applying it as a bright line, it was unfair to "fault the Petitioner for failing to seek relief when based on our law the request would not have been successful." Pet. App. 75a-76a. Given *Hall*'s requirement that offenders with IQ scores in petitioner's range receive further process to prevent the execution of a constitutionally ineligible person, and given that petitioner had no previous opportunity to present evidence of this intellectual disability because of then-existing state-law rules, she would have reversed and remanded for a trial-court presentation of further evidence on petitioner's intellectual-disability claim. Pet. App. 76a-80a.

The Tennessee Supreme Court granted discretionary review. "In conjunction … [it] requested the parties address whether the United Sates Supreme Court's recent decision in *Hall* … is to be afforded retroactive application to cases on collateral review," and "asked the parties to address the issue of the appropriate procedural avenue for the Petitioner to pursue, if any, should [it] conclude that he is not entitled to an evidentiary hearing via his claim of error coram nobis." Pet. App. 23a; *see also* Pet. App. 90a (briefing order). Moreover, while the court was considering petitioner's case, it held one case from another capital inmate (Michael Sample) who presented his *Atkins*/*Hall* claim exclusively through a motion to reopen, and received another petition for discretionary review from yet another inmate in the same posture (Vincent Sims). *See* Pet. App. 89a.

The Tennessee Supreme Court affirmed. As to Payne's request for coram nobis relief, it held that such relief was unavailable because petitioner's claim essentially sounded in a change in law, rather than a change in the facts. Pet. App. 11a-19a. Accordingly, the court held, Payne should have sought relief via a motion to reopen in light of intervening legal precedent. Pet. App. 16a. But the court then held that this door was closed anyway to petitioner and others like him because *Hall* does not apply "retroactively within the meaning of Tennessee Code Annotated section 40-30-117(a)(1)." Pet. App. 27a. In so holding, the Tennessee Supreme Court aligned itself with the Eighth and Eleventh Circuits, which (over vigorous dissents) had likewise "concluded that *Hall* does *not* apply retroactively to cases on collateral review." Pet. App. 27a (citing *Goodwin v. Steele*, 814 F.3d 901 (8th Cir. 2014) and *In re Henry*, 757 F.3d 1151 (11th Cir. 2014)). Having foreclosed coram nobis relief under state law by determining that a motion to reopen was the appropriate vehicle, and having foreclosed motion-to-reopen relief by holding that *Hall* is not retroactive as a matter of federal law, the court denied all relief, denied petitioner's request for rehearing, Pet. App. 88a, and denied review in *Sims* and *Sample* as a result.

Critically, there can be no dispute that the Tennessee Supreme Court's decision regarding the retroactivity of *Hall* was a decision of federal law. *See supra* p.10 n.3. Moreover, there should have been no dispute that it was incorrect. After petitioner's case was submitted, but before it was decided, this Court held in *Montgomery* that the Constitution required state and federal courts to apply retroactively *Miller*'s requirement that juveniles receive further considera-

tion before being sentenced to life without parole. *Montgomery*, 134 S. Ct. at 733-36. As explained below, the analogy between *Montgomery* and this case is remarkably tight: *Montgomery* is to *Miller* exactly as this case is to *Hall*. Petitioner thus sought rehearing on the ground that the Tennessee Supreme Court had failed to take account of *Montgomery*—a case that was also briefed for the court in *Sample* via a supplemental submission, and in *Sims* in the petition for discretionary review itself. Nonetheless, the Tennessee Supreme Court denied relief in all three cases without discussing *Montgomery* at all. Pet. App. 1a-30a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The decision below, holding *Hall* inapplicable on collateral review, easily meets all of the criteria for certiorari.

First, it squarely presents a direct conflict among the courts of multiple states and federal Courts of Appeals: Kentucky, Florida, and Alabama have all expressly held that *Hall* is retroactive, and a host of other courts have implicitly treated it as retroactive without any dispute—this Court included. Moreover, while two federal circuits have sided with Tennessee's view, both of those decisions engendered vigorous dissents, further developing the arguments on both sides of the disagreement for this Court's review. *Hall*'s specific holding about how to analyze borderline IQ scores necessarily affects only the minority of jurisdictions that followed a contrary rule, *see Hall*, 134 S. Ct. at 1996-98, which are in turn concentrated in a handful of circuits. Accordingly, the split is unlikely to meaningful-

ly deepen, and is fully developed for this Court's review.

Second, there are special concerns here that counsel against further delay. AEDPA's many overlapping limitations may prevent last-resort federal habeas courts from considering a capital petitioner's *Atkins*/*Hall* claim at all, and even if they do, their decision may be unreviewable on certiorari in this Court. Indeed, the two federal courts that have considered this issue did so in a posture that does not permit a certiorari petition, *see* 28 U.S.C. §2244(b)(3)(E), and the Eleventh Circuit has made clear that its doors are closed to further cases in that posture until this Court establishes that *Hall* is "a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*." *Id.* §2244(b)(2)(A) (emphasis added); *Henry*, 757 F.3d at 1159-61. When Congress has designed a system that requires the lower courts to wait for this Court's pronouncements, this Court should not unduly withhold its review. And even more importantly, until this Court resolves the disagreement and holds that *Hall* is retroactive—which it *clearly* is—there is a palpable danger in certain jurisdictions that intellectually-disabled persons will be executed without redress.

Third, this issue is vitally important, for the obvious reason that it implicates the life-or-death possibility of executing intellectually-disabled offenders after this Court has held that practice unconscionable. As multiple judges have emphasized and even the decision below admits, the immediate consequence of denying retroactive effect to *Hall* is to make it reasonably likely that inmates constitutionally ineligible for the death penalty will be executed anyway.

Fourth and finally, the decision below is obviously incorrect. Certainly after *Montgomery*, there can be no dispute that *Hall* fits within the category of necessarily retroactive rules that prohibit "a certain category of punishment for a class of defendants because of their status or offense," *Montgomery*, 136 S. Ct. at 732 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)), even if it "mandates only that a sentencer follow a certain process … before imposing a particular penalty" on an offender in light of that status. *Montgomery*, 136 S. Ct. at 734. Accordingly, few issues will be better suited for this Court's review than Tennessee's decision on the question presented below.

That said, petitioner recognizes that the petition in *Sims* and *Sample* is the superior vehicle for plenary review, and so seeks more limited intervention. In this case, the State may argue that there is an independent state ground for the decision below because this proceeding concerned only petitioner's (previously bifurcated) request for coram nobis relief, and the Tennessee courts held that coram nobis was an inappropriate vehicle for petitioner's claim. The Tennessee Supreme Court's decision to affirmatively seek briefing on the *Hall* question and decide it, however, raises a reasonable possibility that it would provide relief to petitioner notwithstanding any state-law issues if its premise about *Hall*'s retroactivity were rejected. At a minimum, because the Tennessee Supreme Court does not render advisory opinions, *see State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961), it must have believed a decision on *Hall*'s retroactivity was a meaningful premise of its decision about how to handle petitioner's case. That premise could be outright rejected if this court grants review in *Sims* and *Sample*; is al-

most certainly wrong in light of *Montgomery* (which Tennessee Supreme Court refused the opportunity to consider); and could be further affected by a decision in *Moore*, which again presents a *Hall*-related question in a retroactive posture. Accordingly, the right course here is either to hold this petition pending plenary review in *Sims* and *Sample*, or to GVR both petitions in light of *Montgomery* and/or *Moore*.

I. The Question Presented Is Certworthy

The question presented is a perfect candidate for certiorari review for four reasons: (1) there is a clear split that is unlikely to benefit from further percolation; (2) special concerns caution against delaying this Court's review; (3) the question is of vital importance; and (4), at least after *Montgomery*, the decision below is plainly incorrect.

A. The question has created disparate decisions and outcomes in capital cases.

In contrast to the decision below, three states courts have expressly held that *Hall* is retroactive, and a host of others have treated it as retroactive without controversy. Indeed, the only reason the split is not deeper is the extent to which *Hall*'s retroactivity is treated as a non-issue, even in courts that are traditionally unfriendly to capital petitioners. The set of courts that will directly confront this issue is necessarily limited because—as *Hall* itself points out, 136 S. Ct. at 1996-97—only some States have the death penalty, and a minority of those States applied a bright-line IQ cutoff at 70 for intellectual-disability claims. The overwhelming consensus in the state courts is thus against Tennessee's approach, and it is unlikely that other States will meaningfully weigh in.

Hall identified four States that retained an explicit IQ cutoff at 70 when it was decided. *See id.* at 1996. In all three of the four to have considered the question since, the state courts have applied *Hall* retroactively. In *Oats v. State*, 181 So.3d 457, 459 n.1 (Fla. 2015), the Florida Supreme Court reversed the denial of "post-conviction relief from a sentence of death" on the ground that the lower court's decision was inconsistent with *Hall*. In fact, the Florida Supreme Court has since granted complete relief from the death penalty to Hall himself in a post-conviction review posture. *See Hall v. State*, 2016 WL 4697766, at *1 (Fla. Sept. 8, 2016). Following that lead, Kentucky joined "the company of our sister state Florida" and held that *Hall* must be applied retroactively because it is "'a substantive restriction on the State's power to take the life of individuals suffering from intellectual disabilities." *White v. Commonwealth*, 2016 WL 2604759, at *5 (Ky. May 5, 2016) (citing *Oats*, 181 So. 3d at 457, and quoting *Atkins*, 536 U.S. at 321). And the Alabama Court of Criminal Appeals has likewise recently held that *Hall* applies to cases on collateral review as an extension of *Atkins*. *See Reeves v. State*, 2016 WL 3247447, at *9 n.7 (Ala. Ct. Crim. App. June 10, 2016).

The sole remaining State from *Hall* is Virginia, which has not considered the issue. This may be attributable to the slowing pace of executions in that State, *Glossip v. Gross*, 135 S. Ct. 2726, 2775 (2015) (Breyer, J., dissenting)—which likewise indicates that Virginia, unlike Tennessee, is unlikely to execute an inmate with a borderline IQ without affording the extra process that *Hall* requires. In any event, in the sole case that seems to have presented this issue from Virginia, the Fourth Circuit simply "assume[d]" that

Hall would apply retroactively on collateral review. *Prieto v. Zook*, 791 F.3d 465, 470 (4th Cir. 2015).

Hall identified five additional States in which it was unclear whether an impermissible, 70-point cutoff existed, and then further noted that many of those States had not even considered the *Hall* issue itself (let alone the question of *Hall*'s retroactivity), in part because of declining use of capital punishment. *See* 134 S. Ct. at 1997. Perhaps unsurprisingly, neither these States nor any others appear to have expressly encountered the question of *Hall*'s retroactivity since. Accordingly, in nearly all the States most likely to consider this issue, Tennessee's rule has been rejected and *Hall* has been held retroactive on collateral review.

In addition, numerous state and federal courts have operated since *Hall* on the assumption that it applies retroactively. Accordingly, they have applied its more general holding—which imposes a minimum federal-law floor on intellectual-disability determinations rooted in prevailing clinical standards—without qualification on collateral review. Some have even relied on *Hall* in granting relief in that posture. On the federal side, that list includes the Sixth Circuit, *see Williams v. Mitchell*, 792 F.3d 606, 620 (6th Cir. 2015) (applying *Hall* in granting habeas relief to state prisoner); the Seventh Circuit, *see Webster v. Daniels*, 784 F.3d 1123, 1139 n.7, 1141 (7th Cir. 2015) (en banc) (applying *Hall* in granting partial habeas relief to federal prisoner, and avoiding "intolerable result of condoning an execution that violates the Eighth Amendment"); and the Ninth Circuit, *see Smith*, 813 F.3d at 1202 (applying *Hall* in invalidating state prisoner's death sentence); *id.* at 1203-17 (Reinhardt, J. specially concurring) (concluding that Arizona's intellectual-disability ap-

proach as a whole is unconstitutional after *Hall*).[4] On the state side, it includes at least Mississippi, *see Carr v. State*, 196 So.3d 926, 942 (2016) (applying *Hall* in granting post-conviction relief).

These cases represent instances where lives were spared on the uncontroversial assumption that collateral-review courts must apply *Hall* retroactively, just as they apply *Atkins* itself. Particularly in the realm of capital punishment, the conflict between courts granting relief on that assumption and others sanctioning executions on the opposite view is intolerable, and should be resolved.

That's particularly so because one of the courts to have operated on the clear assumption that *Hall* applies on collateral review is this Court itself. *Hall* was *announced* in a collateral-review posture, and this Court was holding *Howell*—the very post-conviction case that created Tennessee's impermissible cutoff—when *Hall* was under review. *See supra* p.11. Moreover, after *Hall*, this Court "granted a writ of certiorari to a successive capital habeas petitioner, vacated the Florida Supreme Court's judgment, and remanded for further consideration in light of *Hall*." *In re Hill*, 777 F.3d 1214, 1229 (11th Cir. 2015) (Martin, J. dissenting) (citing *Haliburton v. Florida,* 135 S. Ct. 178 (2014)). Just like *Hall*'s relief and *Howell*'s hold, *Hali-*

[4] Arizona has 124 prisoners on death row and is one of the States *Hall* identified as having had a potentially unconstitutional 70-point cutoff. *Hall*, 134 S. Ct. at 1996-97; *Smith*, 813 F.3d at 1202 (Reinhardt, J., specially concurring). If *Hall* does not apply retroactively, as the Court below concluded, several of these prisoners could be subject to execution notwithstanding valid intellectual-disability claims.

burton's GVR can only be consistent with the assumption that *Hall* applies retroactively.

In fact, under *Teague* itself, it is impossible to use a post-conviction case to create a rule like *Hall*'s unless it will likewise be applied retroactively to other habeas petitioners. *See Teague v. Lane*, 489 U.S. 288, 316 (1989) ("[I]mplicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.") (plurality).[5] Put otherwise, *Hall* and *Haliburton* must constitute at least implicit endorsement of *Hall*'s retroactivity, or this Court is in open revolt against its own rules.

The actual practice in this Court and others since *Hall* further demonstrates the depth and importance of Tennessee's break with the majority approach. This Term, the Court will review yet another case presented in a retroactive posture where the petitioner argues that a State's approach to intellectual disability is inconsistent with *Hall*. Indeed, the question presented in *Moore* (No. 15-797) explicitly relies on *Hall* in challenging the Texas Court of Criminal Appeals' decision on his request for collateral review. In that case, the Texas court—which is not particularly solicitous to-

[5] While the other opinions in *Teague* disputed whether the Court must always decide retroactivity first, *see* 489 U.S. at 318-23 (Stevens, J., concurring); *id.* at 330-40, 345 (Brennan, J., dissenting), none denied that, the Court having first announced a rule in a habeas case (as in *Hall*), that rule would necessarily apply to other habeas cases as well.

wards such challenges—applied *Hall* without qualification, *see Ex Parte Moore*, 470 S.W.3d 481, 487 (Tex. Crim. App. 2015), and Texas did not dispute *Hall*'s applicability in either the Brief in Opposition or on the merits. In fact, Texas's BIO explicitly urged that Moore's claim would be *better* expounded through federal habeas—an admission that *Hall* simply must be a new, retroactive constitutional rule. Brief in Opposition at 7-9, *Moore v. Texas* (No. 15-797). It is not tenable for this Court and others to repeatedly grant retroactive relief to petitioners from Florida and Texas on the basis of principles that *Hall* expounded, while capital petitioners from Tennessee alone have no way to benefit from the four corners of *Hall* itself.

In the face of all of these courts explicitly and implicitly applying *Hall* on collateral review, Tennessee sided with two federal Courts of Appeals that have reached the opposite conclusion. *See Goodwin*, 814 F.3d at 904; *Henry*, 757 F.3d at 1161. Both of those decisions were reached under the strain of imminent execution dates—preventing ordinary briefing, argument, and consideration—and both engendered passionate dissents. *See Goodwin*, 814 F.3d at 905-06 (Murphy, J. dissenting); *Henry*, 757 F.3d at 1163-69 (Martin, J. dissenting). The majority and dissenting opinions in those cases fully develop the arguments regarding *Hall*'s retroactivity, and Judge Martin has further developed these arguments in subsequent dissents from cases applying the Eleventh Circuit's rule. *See, e.g.*, *Hill*, 777 F.3d at 1226-33 (Martin, J. dissenting). These split decisions further demonstrate that the issue is unlikely to benefit from percolation. Indeed, these federal decisions have been explicitly rejected by other courts, which leaves the existence of a

meaningful split beyond any doubt. *See, e.g.*, *Reeves*, 2016 WL 3247447, at *9 (explicitly rejecting Eleventh Circuit's decision in *Henry*); *Lynch v. Hudson*, 2016 WL 4035186, at *2-3 (S.D. Ohio July 28, 2016) (magistrate) (noting tension in cases and siding with retroactive application of *Hall*).

Moreover, the fact that Tennessee is the first *state* court to explicitly follow these Court of Appeals decisions is particularly consequential. The Eleventh Circuit encompasses two of the four States most likely to present problems of *Hall* retroactivity—Florida and Alabama. *See Hall*, 134 S. Ct. at 1996-97. But both of those States have decided on their own that *Hall* must be applied retroactively in state court, which may limit the consequence of the Eleventh Circuit's error: After all, the States are the primary avenues for post-conviction relief, and federal habeas is bogged down by AEDPA's limitations. Once States like Tennessee have joined in denying *Hall* retroactive application, however, there is no question that capital offenders like the petitioner here are under a severe risk of being unconstitutionally executed.

In sum, this case presents a mature split that is ready for this Court's resolution. There are multiple courts and reasoned opinions on each side, and there is an overwhelming course of post-*Hall* practice in the States from which Tennessee has departed. Given the somewhat limited set of States in which *Hall* problems are most likely to be presented, *see Hall*, 134 S. Ct. at 1996-97, and their concentration in only a handful of the circuits, the issue is quite unlikely to benefit from further percolation, and requires this Court's intervention to bring consistency to outcomes in capital cases.

B. AEDPA's limitations provide a special reason for immediate review.

As explained above, there is reason to doubt that many additional state supreme courts will weigh in on the question presented. And still other state decisions that do implicate the question will—like this one—potentially embed problematic issues about whether and when the petitioner pursued the correct form of state relief (assuming such relief is available at all). This will leave last-gasp, federal habeas review as the primary route for this question to come before the Court. But it would be unwise for this Court to deny certiorari on the ground that this issue might percolate further through federal habeas, for two related reasons.

First, additional circuits may not weigh in because of AEDPA's strict standard of review. Even on a first federal petition—which most capital offenders will have long ago expended—relief is available only if a state court's decision is contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). As explained above, most of the States that would present a problem under *Hall*'s most precise holding have already resolved the issue. Accordingly, most of the remaining cases will involve the question whether *Hall*'s new, clinical-practice-based floor on intellectual-disability claims fatally undermines a State's regime—say, Texas's *Briseno* factors (*see Moore*, No. 15-797), or Georgia's requirement that a petitioner prove disability beyond a reasonable doubt (*see Hill*, 777 F.3d at 1224). If those cases can only be presented in federal habeas, AEDPA's incredibly strict standard may de-

cide the case without regard to *Hall*'s retroactivity because, even applying *Hall*, the state court's holding may not be objectively unreasonable. *See, e.g.*, *Prieto*, 791 F.3d at 470 (not deciding *Hall* retroactivity because petitioner would still lose under AEDPA standard); *Hill*, 777 F.3d at 1226 n.6 (noting question would be better presented to this Court on certiorari from state court, precisely because of AEDPA).

Second, even if other circuits do reach the issue, they will likely do so in a way that this Court cannot review on certiorari. As with the Eleventh Circuit decisions in *Henry* and *Hill*, many capital petitioners are likely to be on their second federal habeas petitions, and so need permission from a Court of Appeals before they can even seek habeas relief in district court. *See* 28 U.S.C. §2244(b)(3)(A). The Court of Appeals cannot grant that permission unless *this Court* has already made an intervening decision retroactive on collateral review. *Id.* §2244(b)(2)(A). And AEDPA specifically provides that a decision denying such an order "shall not be appealable and shall not be the subject of a petition … for a writ of certiorari." *Id.* §2244(b)(3)(E). In *Hill*, Judge Martin unsuccessfully urged the Eleventh Circuit to certify to this Court the question of *Hall*'s retroactivity for just this reason. *See Hill*, 777 F.3d at 1227-29 (Martin, J., dissenting). In short, because of AEDPA, the circuits must wait for this Court to make *Hall* retroactive before they can even entertain the cases that would present the question of *Hall*'s retroactivity in the first place. And even if they do make pronouncements on *Hall*'s retroactivity in that posture, AEDPA will cause those holdings to essentially evade this Court's review.

Ultimately, Congress's decision to condition federal habeas relief on a decision "by the Supreme Court" to make its own rules retroactive creates a special reason not to delay questions like the one presented here. That is because, until *this Court* intervenes, it leaves in place an unacceptable risk that an inmate with a valid *Hall* claim will have no way to bring it—even to this Court—before he is executed.

C. This question is vitally important.

There is little need to dwell on the importance of the question presented. The simple reality is that *Hall*'s retroactivity affects numerous death-sentenced petitioners who are relatively likely to be constitutionally ineligible for capital punishment. Indeed, the subsequent history of Hall's own case demonstrates that retroactive application of *Hall* means the difference between life and death for actually disabled offenders. *Supra* p.9-14. As mentioned above, Tennessee is one of only a few States in which *Hall*'s most direct holding is implicated, but we believe there are approximately 10 petitioners in Tennessee alone with potentially valid intellectual-disability claims that were previously scuttled by *Howell*'s unconstitutional, bright-line rule. The Ninth Circuit's decision in *Smith*, 813 F.3d at 1202-03 (Reinhardt, J., specially concurring), suggests that Arizona may add many more.

In addition, as this Court's grant of plenary review in *Moore* demonstrates, *Hall*'s broader holding regarding the clinical-standard-based, federal minimum floor for intellectual-disability claims will be implicated in many other cases. Even if a State did not have an impermissible, bright-line cutoff at 70, many adopted

procedures that are arguably inadequate to ensure that intellectually-disabled petitioners are not unconstitutionally executed—as Texas arguably did in *Briseno* and *Moore*. As further explained below, *Hall* must be held retroactive in part because it was a critical sea-change in the courts' understanding of *Atkins*: Many had previously held the States free to adopt any rules they deemed appropriate for avoiding executions of the intellectually disabled. Retroactive application of *Hall* is thus critical if minimum federal standards are to be applied *at all* to the host of petitioners already on death row who must proceed via collateral review; otherwise, they will be stuck with their circuits' previous, state-law-based approach to intellectual-disability standards, even after they have been held contrary to controlling federal law.

To be sure, a case involving a state rule that unambiguously violates *Hall*—like *Howell*'s 70-point, bright-line cutoff—remains the ideal vehicle for considering *Hall*'s retroactivity. The point is only that, in resolving that question, the Court would not only affect numerous capital sentences rendered under that unconstitutional cutoff, but also resolve a much broader, critical question about whether *Hall*'s decision to apply *any* federal minimum standard to intellectual-disability claims applies retroactively as well.

D. The decision below is incorrect.

On the merits, the decision below is almost certainly incorrect. The plurality decision in *Teague*, which this Court has followed since, establishes the "framework for retroactivity in cases on federal collateral review." *Montgomery*, 136 S. Ct. at 728; *see also id.* at 729-31 (applying framework to state post-

conviction review under Supremacy Clause). Although new constitutional rules of criminal procedure generally do not apply retroactively, *Teague* recognized two exceptions. 489 U.S. at 307. Of particular relevance, habeas courts must give retroactive effect to new substantive rules of constitutional law, *id.*, and this includes both "rules forbidding criminal punishment of certain primary conduct" *and* "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. *Hall* clearly falls in this group.

As Judge Martin has persuasively argued, the combination of *Atkins* and *Hall* plainly requires retroactive application in light of *Penry*'s approach to the *Teague* rule. *See Henry*, 757 F.3d at 1167-69 (Martin, J., dissenting). In fact, *Penry* itself recognized that, if the Court at some point held that "the Eighth Amendment prohibits the execution of mentally retarded persons," that holding would be covered by *Teague*'s substantive-rule exception. 492 U.S. at 391. When the Court finally did take that step in *Atkins*, *Penry* thus placed it "beyond any debate" that "*Atkins* is retroactively applicable to cases on collateral review." *Henry*, 757 F.3d at 1165 (Martin, J., dissenting).

By expanding the class of people *Atkins* protects, *Hall* necessarily shares *Atkins*'s retroactive character. In *Hall*, the Court explained that a rigid formula for measuring intellectual disability, particularly one that requires an IQ score of 70 or lower, violates the Eighth Amendment because it breaks with clinical practices that identify a wider band of potentially disabled persons. *Hall*, 134 S. Ct. at 2000-01. That is a substantive change: Before *Hall*, those with IQ scores of 71

were necessarily eligible for the death penalty even if they were actually disabled, just like actually disabled offenders lacked any Eighth Amendment claim before *Atkins* itself. Thus, in Judge Martin's words, "*Hall* is substantive because it grew the class of people who are not eligible for the death penalty." *Henry*, 757 F.3d at 1167 (Martin, J., dissenting). Notably, *Hall* reached its conclusion by reasoning that a bright-line, 70-point cutoff "creates an unacceptable risk that persons with intellectual disabilities will be executed, and thus is unconstitutional." 134 S. Ct. at 1990. This language is almost identical to the Court's explanation for why substantive rules must apply retroactively in collateral proceedings—"because they necessarily carry a significant risk that a defendant … faces a punishment that the law cannot impose upon him." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (internal quotation marks omitted). That same "significant" and "unacceptable" risk equally exists for petitioners like Payne (and Sims and Sample), demonstrating that *Hall* necessarily created a new substantive rule of constitutional law that must be applied retroactively on collateral review.

That conclusion is further strengthened by focusing on *Hall*'s broader holding. Simply put, any inmate who meets the new federal floor for intellectual-disability claims, but not the previous and more onerous standard in their State, is newly protected from the death penalty according to their mental status. Their claim thus falls squarely within *Penry*'s approach to the first *Teague* exception.

Moreover, if there was ever any doubt on this question, *Montgomery* resolved it. That is because *Montgomery* is to *Miller* almost exactly as this case is to *Hall* and *Atkins*. *Miller* established an Eighth

Amendment prohibition on mandatory life sentences without parole (LWOP) for juvenile offenders, instead requiring sentencing courts to consider individualized factors before sentencing such offenders to life. 132 S. Ct. at 2469, 2475. In *Montgomery*, this Court held that "*Miller* announced a substantive rule that is retroactive in cases on collateral review." *Montgomery*, 136 S. Ct. at 732. Clearly, that holding covers *Hall* as well. For *Penry/Teague* purposes, *Miller* and *Hall* are identical twins: Both hold that sentencing courts must apply individualized analysis before a certain kind of penalty (LWOP or death) may be imposed on a certain kind of offender (juveniles or those with borderline IQs).

Accordingly, *Montgomery* expressly rejects the only meaningful argument that has been raised against applying *Hall* retroactively. Previously, one might have argued that, rather than prohibiting the death penalty for a class of intellectually-disabled offenders, *Hall* merely requires that certain offenders receive additional process, making it a procedural rule. *See, e.g.*, *Goodwin*, 814 F.3d at 904; *Henry*, 757 F.3d at 1161. But Louisiana made just that argument about *Miller* in *Montgomery*—and it was equally apt, because *Miller* only required individualized consideration before juveniles could be sentenced to LWOP—and this Court rejected it in terms. 136 S. Ct. at 734-35. In fact, in so holding, *Montgomery* specifically pointed to intellectual-disability claims as an example of a circumstance where the need to establish a procedure for identifying those who are protected from capital punishment does not "transform" the rule's character as a substantive prohibition against executing those persons. *See id.* at 735.

In the end, *Hall* requires courts to consider a variety of factors in addition to an IQ score because it establishes a new class of persons whom the Eighth Amendment protects. That class consists of offenders with IQ scores just above 70 but who are, in fact, intellectually disabled—people who could previously have been executed under Florida's statute or the Tennessee Supreme Court's *Howell* rule, but are now categorically ineligible for the death penalty. That plainly makes *Hall* a substantive—and therefore retroactive—rule.

II. This Court Should Hold This Case Or GVR In Light Of *Montgomery* And/Or *Moore*.

Montgomery's dispositive holding, combined with the other factors above, leaves this Court with two good choices. First and foremost, it can grant certiorari in *Sims* and *Sample* and hold this case for their resolution. Alternatively, it can GVR both petitions in light of *Montgomery* and/or the pending decision in *Moore*, which could likewise impact consideration of *Hall*'s retroactivity on remand.

The petition in *Sims* and *Sample* explains why those cases are excellent vehicles for the question presented here. The only shortcoming of this case relative to those is that the bifurcation of Payne's appeal may technically leave only the question of coram nobis relief in this case, which was rejected below on (arguably independent) state-law grounds. In truth, the question whether such a problem exists here is very diffi-

cult and quirky.[6] But this vehicle issue has no effect whatsoever on the other petition, and does nothing to diminish the obvious certworthiness of the question presented. The best course is accordingly to grant *Sims* and *Sample* and hold this case for their determination.

That is particularly true because concerns about a possible independent state ground of decision do not prevent this Court from issuing a GVR. That power is broad, *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) and appropriately exercised whenever "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome." *Id.* Based on the Tennessee Supreme Court's decision to affirmatively

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[6] For example, the underlying judgment in this case is actually the trial court decision denying coram nobis *and* motion-to-reopen relief. The bifurcation of petitioner's appeal does not necessarily deprive the Tennessee Supreme Court of the power to review all aspects of that judgment, which perhaps explains why it affirmatively sought briefing on *Hall*'s retroactivity. Certainly, because the Tennessee Supreme Court lacks the power to render advisory opinions, *supra* p.16, its decision on *Hall*'s retroactivity very strongly suggests that *it* believed petitioner's motion to reopen *was* at issue in this appeal. In fact, Payne requested that if the court were to find *Hall* retroactive, the court should grant his earlier-denied motion to reopen and rule in his favor at these very proceedings. Such state-law imponderables are far better decided by the state courts themselves, however, rather than on this Court's plenary review or *sub silentio* in the certiorari process.

seek briefing and decide the question of *Hall*'s retroactivity, Payne surely meets this standard: That decision suggests, at the very least, that the Tennessee Supreme Court "may determine" petitioner's case differently if its premise about *Hall* is rejected by this Court.

Moreover, this Court has recently clarified that such relief is appropriate even if a possible independent and adequate state ground is argued. When *Montgomery* itself was decided, Justice Thomas concurred in a series of GVRs, specifically noting that "[t]he Court's disposition does not … address whether an adequate and independent state ground bars relief." *See, e.g.*, *Adams v. Alabama*, 136 S. Ct. 1796, 1797 (2016) (Thomas, J., concurring). Accordingly, just as in *Montgomery* itself, the final decision about whether an independent state ground exists here can be left to the state courts on remand after *Sims* and *Sample* are decided.

In fact, a GVR is appropriate here even if the Court is not inclined to grant plenary review in those cases. Though it was given the opportunity to account for *Montgomery*, the Tennessee Supreme Court simply chose not to address it. Given how close this case is to *Montgomery* itself, that silence provides a "reason to believe the court below did not fully consider" this Court's recent precedent, which in turn suffices to create a "reasonable probability that the decision below rests upon a premise [about *Hall*'s retroactivity] that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 166. Given the concerns articulated above—including the special problems created by AEDPA—it would be far better for the Court to grant *Sims* and *Sample* now

and resolve the question presented itself. Failing that, however, the Court should clearly GVR both petitions in light of *Montgomery*.

Finally, this Court could also hold these petitions for *Moore*, No. 15-797, whose determination this Term could likewise affect the question presented. *L*ike *Hall* itself, *Moore* represents yet another case in a retroactive posture in which the petitioner asks the state and federal courts to apply *Hall*'s principles to him. It is thus another opportunity for this Court to hold—either implicitly (as it has) or explicitly (as it should)—that *Hall* must be applied retroactively on collateral review. And such a holding would necessarily govern these cases as well, making a hold and possible GVR appropriate as an absolute minimum form of relief.

CONCLUSION

The Court should grant the petition in *Sims* and *Sample* and hold this petition for their resolution. Alternatively, it should GVR both petitions in light of *Montgomery* and/or *Moore*.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ecitron@goldsteinrussell.com

September 26, 2015

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
September 30, 2015 Session Heard at Lebanon[1]

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

Appeal from the Court of Criminal Appeals
Criminal Court for Shelby County
No. P-09594 J. Robert Carter, Jr., Judge

No. W2013-01248-SC-R11-PD – Filed April 7, 2016

We granted permission to appeal in this case to determine whether a capital defendant, via a petition for writ of error coram nobis, may obtain a hearing to determine whether he is ineligible to be executed because he is intellectually disabled. The Petitioner, Pervis Tyrone Payne, was convicted in 1988 of two first degree murders, and the jury imposed the death sentence for each murder. In 2001, this Court held

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[1] We heard oral argument in this case on September 30, 2015, at Cumberland University in Lebanon, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

that the federal and state constitutions prohibit the execution of individuals who are intellectually disabled. *Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001). The Petitioner asserts that he meets the statutory definition of intellectually disabled, but he has not yet been afforded an evidentiary hearing on his claim. In this proceeding, he has sought to establish his right to such a hearing via a claim of error coram nobis. The trial court denied relief without a hearing, and the Court of Criminal Appeals affirmed with one judge dissenting. We hold that the Petitioner is not entitled to relief under a claim of error coram nobis. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

Tenn. R. App. P. 11; Judgment of the Court of Criminal Appeals Affirmed

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which SHARON G. LEE, C.J., and CORNELIA A. CLARK and HOLLY KIRBY, JJ., joined.

Paul R. Bottei and Christopher M. Minton, Nashville, Tennessee, for the appellant, Pervis Tyrone Payne.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Nicholas W. Spangler, Assistant Attorney General; Amy Weirich, District Attorney General; and Thomas D. Henderson, Assistant District Attorney, for the appellee, the State of Tennessee.

OPINION

Factual and Procedural History

This matter began in 1987 when the Petitioner stabbed to death Charisse Christopher and her minor daughter, Lacie. He also stabbed Ms. Christopher's minor son, Nicholas. In 1988, a jury convicted the Petitioner of two counts of first degree murder and one count of assault with intent to commit first degree murder. The jury imposed a death sentence for each of the two murders, and the trial court imposed a sentence of thirty years for the attempted murder. This Court affirmed the Petitioner's convictions and sentences in 1990, *see State v. Payne*, 791 S.W.2d 10, 21 (Tenn. 1990), and the United States Supreme Court affirmed, *see Payne v. Tennessee*, 501 U.S. 808, 830 (1991).

The Petitioner since has pursued collateral review but has been unsuccessful in obtaining the reversal of either his convictions or his sentences. *See Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670, at *21 (Tenn. Crim. App. Jan. 15, 1998) (denying post-conviction and error coram nobis relief), *perm. appeal denied* (Tenn. June 8, 1998); *Payne v. Bell*, 418 F.3d 644, 646 (6th Cir. 2005) (denying habeas corpus relief), *cert. denied* 548 U.S. 908 (2006); *Payne v. State*, No. W2007-01096-CCA-R3-PD, 2007 WL 4258178, at *1 (Tenn. Crim. App. Dec. 5, 2007) (denying motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001), *perm. appeal denied* (Tenn. Apr. 14, 2008).

In 1990, the Tennessee General Assembly passed legislation providing that, "[n]otwithstanding any law to the contrary, no defendant with [an intellectual disability] at the time of committing first degree

murder shall be sentenced to death." 1990 Tenn. Pub. Acts 730, ch. 1038, § 1, codified at Tenn. Code Ann. § 39-13-203(b) (2014).[2] The legislation defined intellectual disability as follows:

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

Tenn. Code Ann. § 39-13-203(a) ("the intellectual disability statute"). Subsequently, in 2001, this Court determined that the federal and state constitutions prohibit the execution of persons who are intellectually disabled. *See Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001). Shortly thereafter, the United States Supreme Court declared that the federal constitution prohibited the execution of the intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

The instant collateral proceeding began on April 4, 2012, when the Petitioner filed a motion to reopen his petition for post-conviction relief ("Motion to Reopen") in an effort to obtain a hearing on his claim

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[2] The legislation, which originally used the term "mental retardation," was revised in 2010 to utilize the term "intellectual disability." *See* 2010 Tenn. Pub. Acts 166, ch 734, §§ 1-3, 7.

that he meets the definition of intellectually disabled as set forth in the intellectual disability statute.[3] The Petitioner attached to the Motion to Reopen the March 20, 2012, affidavit of Dr. Daniel J. Reschly, a professor of education and psychology at Vanderbilt University. According to Dr. Reschly, the Petitioner was administered the Otis-Lenon Test of Mental Ability, a group-administered I.Q. test, in March 1976, when the Petitioner was nine years old, and he received an I.Q. score of 69. In 1987, the Petitioner was administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") and received a full-scale I.Q. score of 78. In 1996, he was administered the WAIS-R and received a full-scale I.Q. score of 78. In 2010, he was administered the fourth edition of the Wechsler Adult Intelligence Scale ("WAIS-IV") and

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[3] In *Van Tran*, this Court held that those defendants who had been sentenced to death prior to the decision could raise a claim of intellectual disability in a motion to reopen a previously filed petition for post-conviction relief. 66 S.W.3d at 811-12; *see also Keen v. State*, 398 S.W.3d 594, 607-08 (Tenn. 2012); *Howell v. State*, 151 S.W.3d 450, 463 (Tenn. 2004). The Petitioner did not file a motion to reopen within one year of the ruling in *Van Tran*, the statutory time limit. *See* Tenn. Code Ann. § 40-30-117(a)(1) (providing that motions to reopen based on new and retroactive constitutional rights must be filed within one year of the highest appellate court's ruling establishing the right).

received a full-scale I.Q. score of 74. Dr. Reschly applied the Flynn Effect[4] to adjust the Petitioner's

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[4] As we have explained previously,

> The "Flynn effect" is the name given to the verified worldwide phenomenon that I.Q. scores, since the beginning of intelligence testing, have tended to rise overall at a rate of 0.3 per year, or three points every decade. . . . To compensate for the Flynn effect, I.Q. tests have to be routinely revised or "renormed" to make them more difficult. Thus, the WAIS gave way to the WAIS-R, which was eventually replaced by the WAIS-III, and now the current WAIS-IV. Under the Flynn effect, a recently-obtained WAIS-IV score will be close to accurate, while a WAIS-III score that was obtained ten years after the test was renormed would need to be reduced by approximately three points to capture the test-taker's actual I.Q. at the time.

Keen v. State, 398 S.W.3d 594, 605 n.11 (Tenn. 2012) (citing Geraldine W. Young, *A More Intelligent and Just Atkins: Adjusting for the Flynn Effect in Capital Determinations of Mental Retardation or Intellectual Disability*, 65 Vand. L. Rev. 615, 616, 621, 624-25 (2012); Am. Ass'n on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 37 (11th ed. 2010) (hereafter AAIDD Manual); James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the*

I.Q. scores and stated that the adjusted scores on his latter three tests were 75.4, 72.4, and 73.7. Dr. Reschly also stated that, based upon his clinical judgment and consideration of the Flynn Effect, estimation of error in the test, the practice effect,[5] and cultural differences, the Petitioner's "functional intelligence clearly is at or below 70." Dr. Reschly further concluded that the Petitioner has significant deficits in adaptive behavior due to substantial limitations in the conceptual skills and practical skills domain. In Dr. Reschly's opinion, the Petitioner's functional intelligence and significant deficits in adaptive behavior were present prior to the age of eighteen. In sum, Dr. Reschly opined that the Petitioner is intellectually disabled within the meaning of the intellectual disability statute.[6]

As grounds for the Motion to Reopen, the Petitioner asserted that this Court's decision in

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Flynn Effect, 12 Psychol. Pub. Pol‟y & L. 170, 173-74, 179-81 (2006)).

[5] "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." *Coleman v. State*, 341 S.W.3d 221, 242 n.55 (Tenn. 2011) (citing AAIID Manual, at 38).

[6] The Petitioner has never had an evidentiary hearing on his claim that he is intellectually disabled as that term is defined in the intellectual disability statute. Therefore, his repeated assertions to this Court that the evidence of his intellectual disability is "uncontroverted" are inaccurate.

Coleman v. State, 341 S.W.3d 221 (Tenn. 2011), established "a new retroactive constitutional right not recognized at the time of trial." *See* Tenn. Code Ann. § 40-30-117(a)(1) (2012) (providing that a post-conviction petitioner may move to reopen his petition if "[t]he 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").[7] The Petitioner

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[7] Prior to our decision in *Coleman*, both trial courts and the Court of Criminal Appeals had construed our earlier decision in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), as establishing

> a mandatory requirement that only raw I.Q. test scores may be used to determine whether a criminal defendant has "significantly impaired general intellectual functioning" and that a raw I.Q. test score above seventy (70) may be sufficient, by itself, to disprove a criminal defendant's claim that he or she is a person with intellectual disability.

Coleman, 341 S.W.3d at 240. In *Coleman*, this Court clarified that a trial court "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," *id*. at 241 (emphasis added), including expert opinions that utilize various recognized factors for adjusting raw

asserted as an additional basis for granting the Motion to Reopen that Dr. Reschly's opinion was new scientific evidence establishing that "he is actually innocent of capital murder and the death penalty." *See id*. § 40-30-117(a)(2) (providing that a post-conviction petitioner may move to reopen his petition if 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").

After the Petitioner filed the Motion to Reopen but before the trial court ruled on it, this Court issued its decision in *Keen v. State*, 398 S.W.3d 594 (2012), in which we concluded that *Coleman* did not provide a basis for reopening a post-conviction proceeding in order to assess a capital defendant's claim of intellectual disability. *Keen*, 398 S.W.3d at 609, 613. We also held in *Keen* that a capital defendant's intellectual disability does not render him actually innocent of the death penalty offense. *Id*. at 612-13.

Realizing the roadblock that *Keen* erected to his Motion to Reopen, the Petitioner filed his "Amended Petition for Relief from Death Sentences" only days after *Keen* was released. In the Amended Petition, the Petitioner asserts that he is seeking relief (1) pursuant to our error coram nobis statute, Tenn. Code Ann. § 40-26-105, and (2) "by directly invoking [the intellectual disability statute] as an additional

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I.Q. scores upwards or downwards, *id*. at 242, 242 n.55.

basis for this Court to adjudicate his mental retardation/intellectual disability claim and vacate his death sentences."

The State filed a written response, requesting that the trial court deny both the Motion to Reopen and the Amended Petition without a hearing.

The trial court denied both the Motion to Reopen and the Amended Petition without a hearing. As to the Motion to Reopen, the trial court noted that *Keen* held that *Coleman* did not establish a new constitutional right. Accordingly, the Petitioner was not entitled to reopen his petition for post-conviction relief on that basis. The trial court also noted that *Keen* held that new proof of intellectual disability does not establish the type of innocence referred to in Tennessee Code Annotated section 40-30-117(a)(2). Accordingly, the Petitioner was not entitled to reopen his petition for post-conviction relief pursuant to that subsection. The trial court further noted that, while the *Van Tran* decision established a new constitutional right that was to be applied retroactively, *see Van Tran*, 66 S.W.3d at 811, the Petitioner's Motion to Reopen was filed more than one year after the *Van Tran* decision was released and therefore was barred by the applicable statute of limitations. *See* Tenn. Code Ann. § 40-30-117(a)(1) (providing that motions to reopen based on new and retroactive constitutional rights must be filed within one year of the highest appellate court's ruling establishing the right). The Court of Criminal Appeals denied the Petitioner's application for permission to appeal the trial court's denial of his Motion to Reopen, and this Court denied the

Petitioner's application for permission to appeal the Court of Criminal Appeals' ruling. Accordingly, the trial court's disposition of the Petitioner's Motion to Reopen is not before us.

As to the Petitioner's claim of error coram nobis, the trial court denied relief on the basis that the claim was barred by the applicable one year statute of limitations. *See* Tenn. Code Ann. §§ 40-26-105(a) (2012); 27-7-103 (2000). The trial court did not address the Petitioner's claim that the intellectual disability statute created a free-standing cause of action.

On appeal, the majority of the Court of Criminal Appeals panel affirmed the trial court's denial of relief on the Petitioner's claim of error coram nobis and also held that the intellectual disability statute did not afford the Petitioner an independent cause of action. *See Payne v. State*, No. W2013-01248-CCA-R3-PD, 2014 WL 5502365, at *17 (Tenn. Crim. App. Oct. 30, 2014). In a separate opinion, Judge McMullen concluded that the Petitioner should be afforded an evidentiary hearing in which to have determined his claim of intellectual disability and concomitant ineligibility for execution. *Id*. (McMullen, J., concurring in part, dissenting in part). We granted the Petitioner's application for permission to appeal.

Analysis

Error Coram Nobis

The Petitioner is seeking a hearing on his claim of intellectual disability through the procedural mechanism of error coram nobis relief. Our statute

setting forth the parameters for seeking a writ of error coram nobis provides as follows:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Tenn. Code Ann. § 40-26-105(b). The decision to grant or deny a petition for writ of error coram nobis on its merits rests within the trial court's sound discretion. *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010).

Claims under the coram nobis statute are subject to a one-year statute of limitations. Tenn. Code Ann. § 27-7-103. "The statute of limitations is computed from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." *Harris*, 301 S.W.3d at 144 (citing *State v. Mixon*, 983 S.W.2d 661, 670 (Tenn. 1999)). The trial court in this proceeding denied the Petitioner relief

under the coram nobis statute on the basis that his claim was barred by this statute of limitations.

We have opined that the writ of error coram nobis "is an *extraordinary* procedural remedy . . . [that] fills only a slight gap into which few cases fall." *Mixon*, 983 S.W.2d at 672. That slight gap is met only under the following circumstances:

> The . . . petition must be in writing and (1) must describe with particularity the nature and substance of the newly discovered evidence and (2) must demonstrate that this evidence qualifies as "newly discovered evidence." In order to be considered "newly discovered evidence," the proffered evidence must be (a) evidence of facts existing, but not yet ascertained, at the time of the original trial, (b) admissible, and (c) credible. In addition to describing the form and substance of the evidence and demonstrating that it qualifies as "newly discovered evidence," the [petitioner] must also demonstrate with particularity (3) why the newly discovered evidence could not have been discovered in a more timely manner with the exercise of reasonable diligence; and (4) how the newly discovered evidence, had it been admitted at trial, may have resulted in a different judgment.

Harris, 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result) (footnotes omitted). These prerequisites make clear that the focus of a proper petition for writ of error coram nobis is on the *facts* that should have been made available to the

factfinder *at the time of the trial*. *See State ex rel. Carlson v. State*, 407 S.W.2d 165, 167 (Tenn. 1966) (stating that the purpose of a coram nobis proceeding "is to bring to the attention of the court some *fact* unknown to the court, which if known would have resulted in a different judgment") (emphasis added).

As this Court explained almost twenty years ago, "the common law writ of error coram nobis allowed a trial court to reopen and correct its judgment upon discovery of a substantial *factual* error not appearing in the record which, if known at the time of judgment, would have prevented the judgment from being pronounced." *Mixon*, 983 S.W.2d at 667 (citing John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure* 11.42, 83 Ky. L. J. 265, 320 (1994-95)) (emphasis added). This concern with factual error was incorporated into the coram nobis statute:

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Id. at 668 (quoting Tenn. Code Ann. § 40-26-105 (1997 Repl.)).

Significantly, the relief being sought via a writ of error coram nobis "is the setting aside of the judgment of conviction and the granting of a new

trial." *Harris*, 301 S.W.3d at 150 n.8 (Koch, J., concurring in part and concurring in result) (citing Tenn. Code Ann. § 40-26-105(c)). As this Court previously has recognized, the writ of error coram nobis may provide a remedy "for those rare instances in which a petitioner may otherwise be wrongfully convicted of a crime." *Wlodarz v. State*, 361 S.W.3d 490, 504 (Tenn. 2012). Thus, the goal of the relief afforded under a writ of error coram nobis is a reliable determination of the petitioner's criminal liability for the offense with which he was charged based on all of the evidence that should have been made available to the factfinder at the initial trial. The goal is *not* a redetermination of the petitioner's criminal liability in the face of changes in the law occurring many years after his trial.

In the realm of coram nobis jurisprudence, "newly discovered evidence" refers to evidence that existed at the time of trial but of which the defendant, through no fault of his own, was unaware. *See* Tenn. Code Ann. § 40-26-105(b); *Harris*, 301 S.W.3d at 152 (Koch, J., concurring in part and concurring in result). As the Court of Criminal Appeals has recognized, however, "a narrow exception exists where 'although not newly discovered evidence, in the usual sense of the term, the *availability* of the evidence is newly discovered.'" *Sims v. State*, No. W2014-00166-CCA-R3-PD, 2014 WL 7334202, at *9 (Tenn. Crim. App. Dec. 23, 2014) (quoting *Harris*, 301 S.W.3d at 160-61 (Koch, J., concurring in part and concurring in result) (internal quotation marks omitted)). This narrow exception may be triggered when previously unavailable

evidence becomes available following a change in *factual* circumstances. *Id*. Thus, where testimony that was not available at the time of trial later becomes available, the testimony may qualify as "newly discovered" even if the defendant knew about the witnesses at the time of trial. *See, e.g.*, *Taylor v. State*, 171 S.W.2d 403, 404-05 (Tenn. 1943) (applying exception in motion for new trial where one witness was hospitalized and one witness was outside the jurisdiction at the time of trial but who later became available to testify); *Brunelle v. State*, No. E2010-00662-CCA-R3-PC, 2011 WL 2436545, at *10 (Tenn. Crim. App. June 16, 2011) (noting that petitioner could have sought coram nobis relief after a Department of Children's Services report, known to the petitioner but sealed at the time of trial, became available), *perm. appeal denied* (Tenn. Oct. 18, 2011). We agree with our Court of Criminal Appeals, however, that this narrow exception is not triggered by post-trial changes in the law. *Sims*, 2014 WL 7334202, at *10. Rather, "[i]ssues regarding whether a change in the law should apply post-trial relate to retroactivity and are more properly addressed in post-conviction proceedings or a motion to reopen post-conviction proceedings." *Id*.

The gravamen of the Petitioner's claim in this proceeding is that he is ineligible to be executed because he is intellectually disabled. We reiterate our commitment "to the principle that Tennessee has no business executing persons who are intellectually disabled." *Keen*, 398 S.W.3d at 613. However, we also are committed to not contorting Tennessee's statutes under the guise of construction.

The evil that the coram nobis statute is aimed at remedying is a conviction based on materially incomplete or inaccurate information. It is not intended to provide convicted felons a second trial due to subsequent changes in the law. Here, the Petitioner is attempting to challenge his sentence of death based on changes in the law that occurred many years after his trial. A petition for writ of error coram nobis pursuant to Tennessee Code Annotated section 40-26-105(b) is not the appropriate procedural mechanism for pursuing the Petitioner's claim of intellectual disability. We hold that the Petitioner has failed to state a claim that is cognizable under the coram nobis statute. Therefore, we need not address the trial court's ruling on the statute of limitations.

The Petitioner also argues that, even if he is not entitled to relief under the coram nobis *statute*, he is entitled to a hearing under a common law claim of error coram nobis. In this regard, the Petitioner relies on this Court's decision in *Wlodarz*, claiming that we stated there that coram nobis "survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available." *Wlodarz*, 361 S.W.3d at 499.

The Petitioner takes our language in *Wlodarz* out of context. The full quote is as follows:

> In *Mixon*, this Court described the writ of error coram nobis, *as codified in Tennessee Code Annotated section 40-26-105(b)*, as an extraordinary procedural remedy which rarely produces results favorable to a petitioner. *See Mixon*, 983 S.W.2d at 673.

> Nevertheless, *its statutory terms* provide an alternative procedural remedy when all other post-judgment remedies fail. "„[K]nown more for its denial than its approval,‟" *Vasques*, 221 S.W.3d at 524 (quoting *Mixon*, 983 S.W.2d at 666), the procedure survives as the lone means by which a court might rectify a recognized wrong when all other possible remedies are no longer available. *Mixon*, 983 S.W.2d at 672; *see also United States v. Morgan*, 346 U.S. 502, 512 . . . (1954).

Wlodarz, 361 S.W.3d at 499 (emphases added). Clearly, we were speaking about the *statutory* writ of error coram nobis, not an undefined common law procedure that guarantees the Petitioner a hearing under any circumstances. We hold that *Wlodarz* does not provide the Petitioner with a common law remedy in coram nobis.

The Petitioner's claim that he is ineligible to be executed because of his intellectual disability is analogous to a claim that he is not competent to be executed. In *Van Tran v. State*, we held that error coram nobis was not an appropriate procedural mechanism for determining a capital prisoner's competency to be executed because "[t]he writ of error coram nobis challenges the judgment itself." 6 S.W.3d 257, 264 (Tenn. 1999), *abrogated in part on other grounds by State v. Irick*, 320 S.W.3d 284, 294- 95 (Tenn. 2010). Similarly, the Petitioner's claim of intellectual disability does not attack the validity of his sentencing proceeding as of the time it took place. Rather, and crucially, his claim of ineligibility is completely independent of the validity of his original

sentencing proceeding because it arises from a change in the law that occurred many years after he was sentenced. Indeed, Justice Wade acknowledged in his dissenting opinion in *Keen* that he had "found no authority from this state recognizing a coram nobis petition as an appropriate procedural vehicle for asserting a claim of intellectual disability." *Keen*, 398 S.W.3d at 618 n.5 (Wade, J., dissenting).

The Petitioner is not entitled to relief on the basis of his proceeding in error coram nobis.

Free-Standing Claim
Under the Intellectual Disability Statute

The Petitioner argues that this Court should construe the intellectual disability statute in such a manner as to provide him with a free-standing cause of action for seeking a ruling on his intellectual disability claim. To address this argument, we recite here the remaining provisions of the intellectual disability statute:

> (b) Notwithstanding any law to the contrary, no defendant with intellectual disability at the time of committing first degree murder shall be sentenced to death.
>
> (c) The burden of production and persuasion to demonstrate intellectual disability by a preponderance of the evidence is upon the defendant. The determination of whether the defendant had intellectual disability at the time of the offense of first degree murder shall be made by the court.
>
> (d) If the court determines that the defendant was a person with intellectual disability at the time of the offense, and if the trier of fact

> finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. The provisions of § 39-13- 207 shall govern the sentencing proceeding.
>
> (e) If the issue of intellectual disability is raised at trial and the court determines that the defendant is not a person with intellectual disability, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).
>
> (f) The determination by the trier of fact that the defendant does not have intellectual disability shall not be appealable by interlocutory appeal, but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

Tenn. Code Ann. § 39-13-203.

While the Petitioner acknowledges that the statute does not contain an explicit provision allowing him to seek an evidentiary hearing, he nevertheless contends that the statute allows this Court to infer such a provision. The State disagrees.

The trial court did not rule on this aspect of the Petitioner's application for relief. The Court of Criminal Appeals rejected the Petitioner's argument, holding that

> [t]he plain language of the statute does not create an independent cause of action allowing a defendant to challenge his or her eligibility for the death penalty. Had the General Assembly intended to create a separate and independent cause of action in which to allege intellectual disability, they would have stated so in the statute.

Payne, 2014 WL 5502365, at *17.

In *Van Tran*, this Court concluded that the intellectual disability statute was to be given prospective application, only. 66 S.W.3d at 797-99. We also recognized that the intellectual disability statute "does not contain a procedure by which [intellectually disabled] persons sentenced to death before July 1, 1990, can raise [their intellectual disability] as a bar to execution." *Id*. at 798. We concluded that a defendant who had been sentenced to death prior to the effective date of the intellectual disability statute could move to reopen a previously filed post-conviction petition on the basis of the new and retroactive *constitutional* ruling that we issued in the *Van Tran* decision. *See id*. at 811-12.

Consistently with our decision in *Van Tran*, we hold that the intellectual disability statute does not create an independent collateral cause of action for raising a claim of intellectual disability and ineligibility to be executed. The plain language of the statute indicates that it is not applicable to those

defendants who were sentenced to death prior to its enactment because it prohibits those defendants who meet the definition of intellectual disability from being "*sentenced* to death," not from being executed. Tenn. Code Ann. § 39-13-203(b). The remaining provisions of the intellectual disability statute also lead to the inescapable conclusion that the legislature intended a claim of intellectual disability to be raised in conjunction with the capital defendant's *trial*, not in a collateral proceeding many years later. For instance, subsection (d) refers to how the sentencing proceeding shall be conducted if, prior thereto, the trial court has determined that the defendant was intellectually disabled at the time he committed the murder and the fact-finder then concludes that the defendant is guilty of first degree murder. Subsection (e) addresses the situation in which the trial court concludes pre-trial that the defendant is not intellectually disabled. In that event, the defendant is permitted to offer proof of his mental capacities "as a mitigating circumstance" during the sentencing hearing. Tenn. Code Ann. § 39-13- 203(e). Additionally, subsection (f) prohibits a defendant from seeking an interlocutory appeal of a trial court's determination that he is not intellectually disabled, providing instead that the issue may be raised on appeal "following the sentencing stage of the trial." *Id*. § 39-13-203(f). These provisions make clear the legislature's intention that a claim of intellectual disability be resolved *before* the defendant is either tried or sentenced. Accordingly, these provisions indicate that our legislature did not intend the intellectual disability statute to provide a private

right of action to a capital defendant who was convicted and sentenced to death prior to the statute's enactment.

The Petitioner has failed to establish that he has a private cause of action to pursue his claim of intellectual disability pursuant to the intellectual disability statute. Accordingly, the Petitioner is not entitled to relief on this basis.

Other Potential Remedies

In conjunction with granting the Petitioner's application for permission to appeal, this Court requested the parties to address whether the United States Supreme Court's recent decision in *Hall v. Florida*, 572 U.S. __, 134 S. Ct. 1986 (2014), is to be afforded retroactive application to cases on collateral review. We also asked the parties to address the issue of the appropriate procedural avenue for the Petitioner to pursue, if any, should we conclude that he is not entitled to an evidentiary hearing via his claim of error coram nobis.

Although the Petitioner acknowledges that the trial court's denial of his Motion to Reopen is not before this Court, he argues that recent changes in the law should allow him to reopen his post-conviction proceeding. Specifically, he asks us to hold that the United States Supreme Court's opinion in *Hall* established a new constitutional right that must be applied retroactively.[8] He also asks us to overrule

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[8] Although the Petitioner argues to this Court that *Hall* established a new constitutional rule that must be afforded retroactive application, the record

our decision in *Keen* and hold that our decision in *Coleman* created a new constitutional right that requires retrospective application. In support of this latter contention, the Petitioner relies on a recent decision by the United States Court of Appeals for the Sixth Circuit, *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014). We will address each of these arguments in turn.[9]

Hall v. Florida

The Petitioner claims in his brief to this Court that *Hall* holds that he is *entitled to a hearing* on his claim of intellectual disability because, after applying the standard error of measurement to his I.Q. test scores, he has at least one score that falls below 71. We disagree that *Hall* holds that the Petitioner is entitled to a hearing.

In *Hall*, the Supreme Court considered the Florida Supreme Court's interpretation of its state statute prohibiting the execution of intellectually disabled defendants. The Florida statute defined

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contains no indication that the Petitioner filed a motion to reopen his post-conviction petition within one year of that decision.

[9] The Petitioner also posits that he should be allowed to seek relief via a declaratory judgment action, a motion to vacate an illegal sentence, and/or a petition for writ of *audita querela*. We decline to address the Petitioner's contentions regarding these actions, none of which, so far as the record before us indicates, the Petitioner has pursued.

intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18." *Hall*, 134 S. Ct. at 1994 (quoting Fla. Stat. Ann. § 921.137(1) (2013)). The statute defined the term "significantly subaverage general intellectual functioning" as "performance that is two or more standard deviations from the mean score on a standardized intelligence test." *Id*. Florida's high court had decided that, unless a defendant could adduce proof that he had a raw score of less than 71 points on an I.Q. test, regardless of the standard error of measurement, the defendant was barred from adducing other proof of his intellectual disability. *Id*. at 1995. It was this line of decisions and statutory interpretation that the United States Supreme Court overruled. *See also Brumfield v. Cain*, __ U.S. __, __, 135 S. Ct. 2269, 2277-78 (2015) (emphasizing that the determination of a capital defendant's functional I.Q. must take into account the standard error of measurement applicable to the defendant's raw I.Q. test scores).

In *Hall*, the United States Supreme Court held as follows:

> [W]hen 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.
>
> . . . .

> The Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability. Florida's rule is invalid under the Constitution's Cruel and Unusual Punishments Clause.

Hall, 134 S. Ct. at 2001.

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.[10] 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.

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[10] *Hall* indicates that the defendant obtained a hearing after filing a motion in 2004 "claiming that he had intellectual disability and could not be executed." *Hall*, 134 S. Ct. at 1991-92. The decision does not describe the procedural mechanism underlying the motion. The defendant originally had been sentenced to death prior to July 1981 and, after that sentence was vacated, he was resentenced to death sometime between 1989 and 1993. See *Hall* v. State, 614 So. 2d 473, 475 (Fla. 1993).

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*, Nos. 14-3739, 14-3743, 2014 WL 11128597, at *2 (8th Cir. Dec. 9, 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).

Coleman v. State and Van Tran v. Colson

As set forth above, the constitutional prohibitions against executing the intellectually disabled did not arise until after the Petitioner was convicted and sentenced. The Petitioner's first opportunity for seeking to avoid the death penalty on this basis arose in 2001 with our decision in *Van Tran v. State*. The Petitioner, however, did not seek relief on this basis at that time.

In 2004, this Court issued its decision in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). As indicated above, some trial courts and Court of Criminal Appeals panels applied *Howell* in such a way as to preclude relief if a defendant alleging intellectual

disability could not produce a raw I.Q. score of less than 71. While the Petitioner contends that a motion to reopen his post-conviction petition would have been futile after *Howell*, he does not offer a satisfactory explanation for his failure to file such a motion within a year after our decision in *Van Tran*, which preceded *Howell* by more than two years. Our review of Dr. Reschly's affidavit, which includes his curriculum vitae, indicates that he was practicing at Vanderbilt in 2001 and 2002 and, presumably, would have been available to provide substantially the same information then that he has provided now. In short, had the Petitioner pursued his claim of intellectual disability at the appropriate time, he would not have faced the potential of the trial (or intermediate appellate) court relying on *Howell* to limit his proof.

The Petitioner contends that the progression of the law in this area presented him with another opportunity to reopen his petition for post-conviction relief when this Court decided *Coleman*. As set forth above, this Court already has concluded that *Coleman* did not create a new constitutional rule that must be applied retroactively. *See Keen*, 398 S.W.3d at 609. However, in *Colson*, the federal court of appeals determined that *Coleman* was to be applied retroactively to the defendant's claim of intellectual disability. 764 F.3d at 617. The Petitioner asks us to reverse our decision in *Keen* on the basis of *Colson*.

In *Colson*, the United States Court of Appeals for the Sixth Circuit considered whether the defendant was entitled to federal habeas corpus relief on his claim that he was intellectually disabled. *Id*. at 597. The defendant had been given a hearing in state

court prior to this Court's decision in *Coleman*, and the trial court concluded that the defendant had not proved his intellectual disability. *Id*. at 600. The state trial court therefore denied relief, and the Court of Criminal Appeals affirmed. *Id*. at 601.

Upon his petition for habeas corpus relief in federal court, the district court denied relief. *Id*. at 602. On appeal, the United States Court of Appeals for the Sixth Circuit remanded "for the entry of a conditional writ of habeas corpus to allow the state courts to consider Van Tran's *Atkins* claim under the proper, now-governing standard" announced in *Coleman*. *Id*. at 597. That is, the federal appeals court concluded that *Coleman* was to be applied retroactively. *Id*. at 617. In so concluding, the *Colson* court relied on its earlier decision in *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011). *Id*. at 617. In *Black*, the federal appellate court explained that "federal courts conducting habeas review routinely look to state law that has been issued after the defendant's state conviction has become final in order to determine how *Atkins* applied to the specific case at hand." *Black*, 664 F.3d at 92 (citing *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002); *Wiley v. Epps*, 625 F.3d 199, 208 (5th Cir. 2010)).

Neither *Colson* nor *Black* is binding on this Court. *See Frye v. Blue Ridge Neuroscience Ctr, P.C.*, 70 S.W.3d 710, 716 (Tenn. 2002) (recognizing that "the decisions of the Sixth Circuit are not binding on" the Tennessee Supreme Court); *Townes v. Sunbeam Oster Co., Inc.*, 50 S.W.3d 446, 452 (Tenn. Ct. App. 2001) (acknowledging that the Sixth Circuit's "interpretation and application of state law is not

binding on" the Tennessee Court of Appeals). The precise issue the Petitioner asks us to consider is whether our decision in *Coleman* provides him with grounds to reopen his state law petition for post-conviction relief. That issue is a matter of state law. Neither *Colson* nor *Black* persuades us that our decision in *Keen*—that *Coleman* "did not establish a new rule of constitutional law that must be applied retroactively" so as to support motions to reopen petitions for post-conviction relief—was incorrect. *Keen*, 398 S.W.3d at 597. Accordingly, we decline to overrule our decision in *Keen*.

Conclusion

Our decision in this case does not foreclose the Petitioner from availing himself of any and all state and federal remedies still available to him. See *Keen*, 398 S.W.3d at 613. We reaffirm the holding in *Van Tran* that such claims may be raised in Tennessee courts by a timely filed motion to reopen. *Van Tran*, 66 S.W.3d at 811-12. We recognize that some death-row inmates, like the Petitioner, may have failed to timely file a motion to reopen on this basis. We encourage 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 their eligibility to be executed. We hold, however, that the procedural avenues by which the Petitioner is seeking relief in this proceeding do not entitle him to the hearing he seeks. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

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JEFFREY S. BIVINS, JUSTICE

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON
February 5, 2014 Session

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. P9594 J. Robert Carter, Jr., Judge

No. W2013-01248-CCA-R3-PD - Filed October 30, 2014

The Petitioner, Pervis Tyrone Payne, appeals from the Shelby County Criminal Court's denial of his petition for writ of error coram nobis in which he challenged his death sentence resulting from his 1988 convictions for first degree murder. On appeal, the Petitioner contends that he is entitled to coram nobis relief because he is intellectually disabled and, therefore, ineligible for the death penalty. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS, J., joined. CAMILLE R. MCMULLEN, J., fil ed an opinion concurring in part and dissenting in part.

Christopher Minton, Memphis, Tennessee, for the appellant, Pervis Tyrone Payne.

Robert E. Cooper, Jr., Attorney General & Reporter; Deshea Dulany Faughn, Assistant Attorney General; and Amy P. Weirich, District Attorney General, for the appellee, State of Tennessee.

OPINION

In 1988, the Petitioner, Pervis Tyrone Payne, was convicted 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 assault 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 subsequently filed a petition for writ of error coram nobis claiming that he is intellectually disabled and, therefore, ineligible for the death penalty. He also sought relief pursuant to the intellectual disability provisions in Tennessee Code Annotated section 39-13-203. The trial court denied the petition, and the Petitioner appealed.

TRIAL PROCEEDINGS

The evidence presented at trial was summarized by the Tennessee Supreme Court on direct appeal as follows:

> Charisse Christopher was 28 years old, divorced, and lived in Hiwassee Apartments, in Millington, Tennessee, with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. The building in which she lived contained four units, two downstairs

and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christophers. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartments were separated by a narrow hallway. Each of the upstairs apartments had back doors in the kitchen that led to an open porch overlooking the back yard. In the center of the porch was a metal stairway leading to the ground. There was also an inside stairway leading to the ground floor hallway and front entrance to the four-unit building.

Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag, containing clothing, etc., for his weekend stay, in the hallway, near the entrance to the Thomas apartment. With the bag were three cans of Colt 45 malt liquor.

Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher apartment above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided

momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 p.m. and immediately dispatched a squad car to the Hiwassee Apartments. Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C. E. Owen, of the Millington Police Department, was the first officer to arrive at the Hiwassee Apartments. He was alone in a squad car when the disturbance call was assigned to Officers Beck and Brawell. Owen was only two minutes away from the Hiwassee Apartments so he decided to back them up. He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the

stairs and out the front door of the building. He was carrying the overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant." Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running west on Biloxi Street. Owen pursued him but Defendant outdistanced him and disappeared into another apartment complex.

Owen called for help on his walkie-talkie and Officer Boyd responded. By that time Owen had decided Defendant was not hurt and the blood was not his own -- he was running too fast. Owen told Boyd that "there's something wrong at that apartment." They returned to 4516 Biloxi. Nancy Wilson had a master key and let them in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor -- everywhere. The three bodies were on the floor of the kitchen. Boyd discovered that the boy was still breathing and called for an ambulance and reported their findings to the chief of police and the detective division. A Medic Ambulance arrived, quickly confirmed that Charisse and Lacie were dead, and departed with Nicholas. He was taken to Le Bonheur Children's Hospital in

Memphis and was on the operating table there from 6:00 p.m. until 1:00 a.m., Sunday, 28 June. In addition to multiple lacerations, several stab wounds had gone completely through his body from front to back. One of those was in the middle of his abdomen. The surgeon, Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfusion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. He was in intensive care for a period and had two other operations before he left the hospital, but he survived.

Charisse sustained forty-two (42) knife wounds and forty-two (42) defensive wounds on her arms and hands. The medical examiner testified that the forty-two (42) knife wounds represented forty-one (41) thrusts of the knife, "because there was one perforated wound to her left side that went through her -- went through her side. In and out wounds produce two." He said no wound penetrated a very large vessel and the cause of death was bleeding from all of the wounds; there were thirteen (13) wounds "that were very serious and may have by themselves caused death. I can't be sure, but certainly the combination of all the wounds caused death." He testified that death probably occurred within, "maybe 30 minutes, that sort of time period," but that she would have been unconscious within a few minutes after the stabbing had finished.

The medical examiner testified that the cause of death of Lacie Christopher was multiple stab wounds to the chest, abdomen, back and head, a total of nine. One of the wounds cut the aorta and would have been rapidly fatal.

Defendant was located and arrested at a townhouse where a former girlfriend, Sharon Nathaniel, lived with her sisters. Defendant had attempted to hide in the Nathaniel attic. When arrested he was wearing nothing but dark pants, no shirt, no shoes. As he descended the stairs from the attic he said to the officers, "Man, I ain't killed no woman." Officer Beck said that at the time of his arrest he had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid." A search of his pockets revealed a "pony pack" with white residue in it. A toxicologist testified that the white residue tested positive for cocaine. They also found on his person a B&D syringe wrapper and an orange cap from a hypodermic syringe. There was blood on his pants and on his body and he had three or four scratches across his chest. He was wearing a gold Helbrose wristwatch that had bloodstains on it. The weekend bag that he struck Officer Owen with was found in a dumpster in the area. It contained the bloody white shirt he was wearing when Owen saw him at the Hiwassee Apartments, a blue shirt and other shirts.

It was stipulated that Charisse and Lacie had Type O blood and that Nicholas and

Defendant had Type A. A forensic serologist testified that Type O blood was found on Defendant's white shirt, blue shirt, tennis shoes and on the bag. Type A blood was found on the black pants Defendant was wearing when seen by Owen and when arrested. Defendant's baseball cap had a size adjustment strap in the back with a U-type opening to accommodate adjustments. That baseball cap was on Lacie's forearm -- her hand and forearm sticking through the opening between the adjustment strap and the cap material. Three Colt 45 beer cans were found on a small table in the living room, two unopened, one opened but not empty, bearing Defendant's fingerprints, and a fourth empty beer can was on the landing outside the apartment door. Defendant was shown to have purchased Colt 45 beer earlier in the day. Defendant's fingerprints were also found on the telephone and counter in the kitchen.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut. And this hand, a dark-colored hand with

a gold watch, kept trying to shut that back door." It was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived. She did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.

The medical examiner testified that Charisse was menstruating and a specimen from her vagina tested positive for acid phosphatase. He said that result was consistent with the presence of semen, but not conclusive, absent sperm, and no sperm was found. A used tampon was found on the floor near her knee. The murder weapon, a bloody butcher knife, was found at the feet of Lacie, whose body was also on the kitchen floor near her mother. A kitchen drawer nearby was partially open.

Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the inside stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer before proceeding to his friend Sharon Nathaniel's to await the arrival of Bobby Thomas. He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt that was longer than his

shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment and after saying he was "coming in" and "eased the door on back," he described what he saw and his first actions as follows:

> I saw the worst thing I ever saw in my life and like my breath just had -- had tooken -- just took out of me. You know, I didn't know what to do. And I put my hand over my mouth and walked up closer to it. And she was looking at me. She had the knife in her throat with her hand on the knife like she had been trying to get it out and her mouth was just moving but words had faded away. And I didn't know what to do. I was about ready to get sick, about ready to vomit. And so I ran closer -- I saw a phone on the wall and I lift and got the phone on the wall. I said don't worry. I said don't worry. I'm going to get help. Don't worry. Don't worry. And I got ready to grab it -- the phone but I didn't know no number to call. I didn't know nothing. I didn't know nothing about no number or – I just start trying to twist numbers. I didn't know nothing. And she was watching my movement in the kitchen, like she -- I had saw her. It had been almost

> a year off and on in the back yard because her kids had played with Bobbie's kids. And I have seen her before. She looked at me like I know you, you know. And I didn't know what to do. I couldn't leave her. I couldn't leave her because she needed -- she needed help. I was raised up to help and I had to help her.

He described how he pulled the knife out of her neck, almost vomited, then kneeled down by the baby girl, had the feeling she was already dead; said the little boy was on his knees crying, he told him not to cry he was going to get help. His explanation of the blood on his shirt, pants, tennis shoes, body, etc., was that when he pulled the knife out of her neck, "she reached up and grab me and hold me, like she was wanting me to help her . . .", that in walking and kneeling on the bloody floor and touching the two babies he got blood all over his clothes. He said he went to the kitchen sink, probably twice, to get water to drink when he thought he was going to vomit, but he denied that he went into the bathroom at any time or used the bathroom lavatory to wash up, as Nancy Wilson testified she heard someone do after the violence subsided.

He was then suddenly motivated to leave and seek help and he described his exit from the apartment as follows:

> And I left. My motivation was going and banging on some doors, just to knock on some doors and tell someone need help, somebody call somebody, call the ambulance,

> call somebody. And when I -- as soon as I left out the door I saw a police car, and some other feeling just went all over me and just panicked, just like, oh, look at this. I'm coming out of here with blood on me and everything. It going to look like I done this crime.

The shoulder strap on the left shoulder of the blue shirt he was wearing while in the victim's apartment was torn, a fact he did not seem to realize and could not remember when it happened. He said he ran because the officer did not seem to believe him. He claimed that he had the Colt 45 beer with him as he ran; that the open can with beer in it spilled into the sack, as he ran from Owen, the bottom of the sack broke, the beer and tennis shoes were scattered along his route. He said that what witnesses had described as scratches were stretch marks from lifting weights.

Defendant presented five character witnesses who testified that Defendant's reputation for truth and veracity was good. Ruth Wakefield Bell testified that she had known Defendant all of his life. She was age 40 and lived in the same block on Biloxi as the Hiwassee Apartments, across the street. She said that on the Saturday afternoon of the murders, Defendant knocked on her door, identified himself and she looked out her bedroom window and saw him, but she did not let him in -- she was upset with her boyfriend and did not want to see or "entertain" anyone. She denied that she

> was afraid to let him in -- or that there was anything unusual about his appearance. She estimated that it was about twenty minutes after he knocked on her door that she saw police cars and an ambulance across the street. Defendant testified that he knocked on her door just before he decided to go to Sharon Nathaniels and went in the Hiwassee Apartments to pick up his bag and beer.

Payne, 791 S.W.2d at 11-15. The Tennessee Supreme Court later summarized the evidence presented during the penalty phase as follows:

> At sentencing the State presented only two witnesses, Mary Zvolanek, Charisse's mother and Detective Sammy Wilson of the Millington Police Department. Mrs. Zvolanek testified very briefly about how her grandson, Nicholas, cried for his mother and sister and could not understand what had happened. Detective Wilson was one of two detectives that conducted the investigation of these crimes. He testified at the guilt phase of the trial and was recalled at the sentencing phase to identify a videotape that he had made of the crime scene. He did so and the tape was played for the jury, over objection.
>
> Defendant presented the testimony of four witnesses at the sentencing phase of the trial, his mother and father, Bobbie Thomas, and Dr. John T. Hutson.
>
> Bobbie Thomas testified that she joined Defendant's father's church and became acquainted with Defendant; that she had a troubled marriage, was abused by her husband

and it had a bad effect upon her three children; that Defendant was a very caring person and the time and attention he had devoted to her children had "got them back to their old self." She said she did not drink or use drugs and neither did Defendant; that it was inconsistent with Defendant's character to have committed these crimes.

Dr. Hutson is a clinical psychologist, who specializes in criminal court evaluation work. He gave Defendant the Wechsler Adult Intelligence Scale (WAIS) revised version. Defendant's scores were Verbal IQ 78, Performance IQ 82, with a variance of plus or minus 3 on the Verbal and plus or minus 4 on the Performance. He testified that the norm closer to 110; that historically the mental retardation score was 75, but "retardation" is not commonly used anymore. He preferred mentally handicapped. He also gave Defendant the Minnesota Multiphasic Personality Inventory (MMPI). That test consists of 566 questions that tests a number of different things, that give insight into personality functioning, responses to stress and physical performance. Various "scales" measure lying or faking, hypochondria, depression, hysteria, psychopathic deviance, sexuality, paranoia, cyclothymia, schizophrenia and mania. The tests are graded by computer. Dr. Hutson testified that Defendant was in a normal range or near normal range, with the exception of intelligence and schizophrenia. He said that Defendant "was actually lower intellectually than I had

> anticipated. And he is low enough that I consider it significant." He testified that Defendant scored above the normal -- which is moving toward psychotic -- but that in his opinion Defendant was not psychotic or schizophrenic -- that that scale of the MMPI, "has a racial bias to it. [African Americans] tend to look higher on it when actually its very normal for them." The testing was performed in October, about three months after the murders. Dr. Hutson described Defendant as "somewhat naive" and one of the most polite individuals he had ever interviewed in jail.
>
> Defendant's parents testified that Defendant had no prior criminal record, had never been arrested and had no history of alcohol or drug abuse; that he worked with his father as a painter, was good to children and a good son.

Id. at 17.

POST-CONVICTION PROCEEDINGS

The Petitioner subsequently filed a petition for post-conviction relief and a petition for writ of error coram nobis. His allegations included a claim of ineffective assistance of counsel. During the post-conviction hearing, the Petitioner presented testimony from Dr. George Baroff, a clinical psychologist, who examined the Petitioner and confirmed Dr. Hutson's evaluation that the Petitioner had an I.Q. of 78, which placed him in the category of borderline intelligence. *See Pervis Tyrone Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670, at *17 (Tenn. Crim. App. Jan. 15, 1998), *perm. app. denied* (Tenn. June 8, 1998). The post-conviction

court denied relief, and this court affirmed the post-conviction court's judgment on appeal. *See id*.

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 WL 4258178 (Tenn. Crim. App. Dec. 5, 2007), *perm. app. Denied* (Tenn. Apr. 14, 2008).

INTELLECTUAL DISABILITY PROCEEDINGS

On April 4, 2012, the Petitioner filed a motion 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. 2011), established a new constitutional right that was not recognized at the time of his trial. He also argued that he has new scientific evidence that he is intellectually disabled and, thus, actually innocent of capital murder and the death penalty.

The Petitioner attached to his motion the March 20, 2012 affidavit of Dr. Daniel Reschly, a professor of education and psychology at Vanderbilt University. According to Dr. Reschly, the Petitioner was administered the Otis-Lennon Test of Mental Ability, a group-administered I.Q. test, in March of 1976 when the Petitioner was nine years old and received an I.Q. score of 69. In 1987, the Petitioner was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and received a full-scale I.Q. score of 78. In 1996, he was administered the WAIS-R and

received a full-scale I.Q. score of 78. In 2010, he was administered the fourth edition of the Wechsler Adult Intelligence Scale (WAIS-IV) and received a full-scale I.Q. score of 74. Dr. Reschly applied the Flynn Effect to adjust the Petitioner's I.Q. scores. He stated that the Petitioner's adjusted I.Q. scores were 75.4, 72.4, and 73.7. He further stated that based upon his clinical judgment and consideration of the Flynn Effect, estimation of error in the test, practice effect, and cultural differences, the Petitioner's "functional intelligence clearly is at or below 70." Dr. Reschly concluded that the Petitioner has significant deficits in adaptive behavior due to substantial limitations in the conceptual skills and practical skills domains. He further concluded that the Petitioner's functional intelligence and significant deficits in adaptive behavior were present prior to the age of eighteen. Dr. Reschly opined that the Petitioner is intellectually disabled.

On December 20, 2012, the Tennessee Supreme Court released its opinion in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), in which the court rejected the bases upon which the Petitioner sought to reopen his post-conviction proceedings. On December 27, 2012, the Petitioner amended his motion to include a petition for writ of error coram nobis. He also directly invoked the intellectual disability provisions in Tennessee Code Annotated section 39-13-203. The State filed a response arguing that the Petitioner's issues were precluded by *Keen*. The State also argued that Dr. Reschly's affidavit did not include any new test results or information that could not have been discovered in 1987.

On May 7, 2013, the trial court entered an order denying relief. The trial court found that the grounds asserted by the Petitioner in his motion to reopen were precluded by *Keen*. The court further found that "the I.Q. testing could have been done long before it was. The mental status of Petitioner has been available for testing since the inception of the case. The mere fact that Petitioner and his attorneys did not proceed with the avenue does not make it newly discovered." The trial court concluded that the Petitioner's petition for writ of error coram nobis was barred by the one-year statute of limitations and that the Petitioner failed to establish a sufficient basis to justify tolling of the limitation period.

The Petitioner subsequently filed in this court an application for permission to appeal the trial court's denial of his motion to reopen pursuant to Supreme Court Rule 28. On July 29, 2013, this court entered an order denying the Petitioner's application for permission to appeal and holding that in *Keen*, the Tennessee Supreme Court rejected the bases upon which the Petitioner sought to reopen post-conviction proceedings. *See Pervis Tyrone Payne v. State*, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App., at Jackson, July 29, 2013), *perm. app. denied* (Tenn. Nov. 14, 2013). The Petitioner also filed a notice of appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, regarding his claims of coram nobis relief and relief pursuant to Tennessee Code Annotated section 39-13-203.

ANALYSIS

The Petitioner contends that the post-conviction court erred in denying his petition for writ of error

coram nobis in which he claimed that he is intellectually disabled and, therefore, ineligible for the death penalty. He also contends that he should be allowed to directly invoke the provisions of Tennessee Code Annotated section 39-13-203 to establish that he is intellectually disabled.

A. Intellectual Disability and the Death Penalty

In 1990, Tennessee Code Annotated section 39-13-203 was enacted prohibiting the execution of defendants who were intellectually disabled at the time that they committed first degree murder. See Tenn. Code Ann. § 39-13-203(b); *State v. Howell*, 151 S.W.3d 450, 455 (Tenn. 2004); *State v. Van Tran*, 66 S.W.3d 790 (Tenn. 2001). Although the statute is not to be applied retroactively, the execution of intellectually disabled individuals violates constitutional prohibitions against cruel and unusual punishment. *Howell*, 151 S.W.3d at 455 (citing *Van Tran*, 66 S.W.3d at 798-99); *see Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

In Tennessee, "intellectual disability" rendering a defendant ineligible for the death penalty requires:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligent 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). All three prongs must be satisfied to establish intellectual disability.

The defendant has the burden of establishing intellectual disability by a preponderance of the evidence. *See* Tenn Code Ann. § 39-13-203(c); *Howell*, 151 S.W.3d at 465. The issue of whether a defendant is intellectually disabled and, thus, ineligible for the death penalty is a mixed question of law and fact. *State v. Strode*, 232 S.W.3d 1, 8 (Tenn. 2007). A trial court's findings of fact are binding on this court unless the evidence preponderates against those findings. *Id*. The trial court's application of the law to those facts is reviewed de novo. *Id*.

The first prong of intellectual disability under section 39-13-203(a)(1) requires "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligent quotient (I.Q.) of seventy (70) or below." In applying this provision, the Tennessee Supreme Court held in *Howell* that the demarcation of an I.Q. of 70 was a "bright-line" rule that must be met. *Howell*, 151 S.W.3d at 456-59. Following *Howell*, Tennessee Supreme Court released its opinion in *Coleman v. State*, 341 S.W.3d 221, 241 (Tenn. 2011), holding that although an individual's I.Q. is generally obtained through standardized intelligence tests, section 39-13-203 does not provide clear direction regarding how an I.Q. should be determined and does not specify any particular test or testing method that should be utilized. The court noted that section 39-13-203(a)(1) requires a "functional intelligence quotient of seventy (70) or below" and does not require a "functional intelligence quotient test score of seventy (70) or below." *Coleman*, 341 S.W.3d at 241 (emphasis in original). Therefore, "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." *Id*.

The supreme court noted that section 39-13-203(a)(1) differs with clinical practice in one material respect. *Id*. at 247. In diagnosing intellectual disability, clinicians generally report their conclusions regarding an individual's I.Q. within a range, and section 39-13-201(a)(1) requires more definite testimony. *Id*. As a result, "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)." *Id*. at 242.

In determining whether a defendant's functional I.Q. is 70 or below, "a trial court should consider all evidence that is admissible under the rules for expert testimony." *Keen v. State*, 398 S.W.3d 594, 605 (Tenn. 2012). Experts may use relevant and reliable practices, methods, standards, and data in formulating their opinions. *Coleman*, 341 S.W.3d at 242. Moreover,

> 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.

Id. at n.55. The emphasis to be placed upon clinical judgment varies depending upon "the type and amount of information available, the complexity of the issue, and the presence of ore or more challenging conditions or situations." *Id*. at 246. The trial court is not required to follow any particular expert's opinion but must fully and fairly consider all evidence presented, including the results of all I.Q. tests administered to the defendant. *Id*. at 242.

Following *Coleman*, the Tennessee Supreme Court released its opinion in *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), addressing the issue of whether a capital petitioner may allege intellectual disability as a basis for reopening post-conviction proceedings. The petitioner in *Keen* sought to reopen post-conviction proceedings on the ground that he possessed new scientific evidence of actual innocence. *Keen*, 398 S.W.3d at 598. The evidence consisted of a newly-obtained I.Q. score of 67, which the petitioner claimed established that he was intellectually disabled and, therefore, "actually innocent" of the death penalty. *Id*. The petitioner also asserted that *Coleman* established a new rule of constitutional criminal law that required retroactive application. *Id*. at 599. The Tennessee Supreme Court rejected both of the bases upon which the petitioner sought to reopen post-conviction proceedings. The court specifically held that *Coleman* addressed the interpretation and application of Tennessee Code Annotated section 39-13-203 and was not a

constitutional ruling. *Id*. at 609. The court further held that "a claim alleging ineligibility for the death penalty does not qualify as an actual innocence claim." *Id*. at 613. While remaining "committed to the principle that Tennessee has no business executing persons who are intellectually disabled," the court held that the petitioner failed to meet the requirements for reopening post-conviction proceedings. *Id*.

In addressing its holdings in *Howell* and *Coleman*, the court noted:

> Regrettably, 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. 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.

Id. at 603 (citations omitted) (emphasis in original). The petitioner requested that the court remand his case for a new hearing on the issue of intellectual disability, just as the court had done in *Coleman* and in *Smith v. State*. *See Smith v. State*, 357 S.W.3d 322, 354-55 (Tenn. 2011); *Coleman*, 341 S.W.3d at 252-53.

The court in *Keen*, however, rejected the petitioner's contention noting that Coleman and Smith took advantage of the one-year window for reopening their petitions following the recognition of the constitutional prohibition against executing intellectually disabled defendants in *Van Tran* and *Atkins*. *Keen*, 398 S.W.3d at 613. The petitioner in *Keen* failed to avail himself of that opportunity. *Id*.

II. WRIT OF ERROR CORAM NOBIS

A writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." *State v. Mixon*, 983 S.W.2d 661, 672 (Tenn. 1999) (citation omitted). Tennessee Code Annotated section 40-26-105(b) provides that coram nobis relief is available in criminal cases as follows:

> The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial fo the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.

Our supreme court has stated the stand of review as "whether a reasonable basis exists for

concluding that had the evidence been presented at trial, the result of the proceedings might have been different." *State v. Vazques*, 221 S.W.3d 514, 525-28 (Tenn. 2007) (citation omitted).

Unlike the grounds for reopening a post-conviction petition, the grounds for seeking a petition for writ of error coram nobis are not limited to specific categories. *Harris v. State*, 102 S.W.3d 587, 592 (Tenn. 2003). Coram nobis claims may be based upon any "newly discovered evidence relating to matters litigated at the trial" so long as the petitioner establishes that he or she was "without fault" in failing to present the evidence at the proper time. *Id*. Coram nobis claims are "singularly fact-intensive," are not easily resolved on the face of the petition, and often require a hearing. *Id*. at 592-93. The decision to grant or deny coram nobis relief rests within the sound discretion of the trial court. *Vazques*, 221 S.W.3d at 527-28.

The Petitioner asserts that the trial court erred in finding that his claim was barred by the statute of limitations. He submits that the State failed to allege it as an affirmative defense in the trial court.

Coram nobis claims are subject to a one-year statute of limitations. T.C.A. § 27-7- 103. The statute of limitations is computed "from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." *Harris v. State*, 301 S.W.3d 141, 144 (Tenn. 2010). The issue of whether a claim is barred by an applicable statute of limitations is a question of law, which this court

reviews de novo. *See id*. We must construe the coram nobis statute of limitations "consistent with the longstanding rule that persons seeking relief under the writ must exercise due diligence in presenting the claim." *Id*.

The State bears the burden of raising the statute of limitations as an affirmative defense. *Id*. In the present case, the State did not specifically cite to the statute of limitations in section 27-7-103 in its response filed in the trial court. The State's failure to raise the statute of limitations as an affirmative defense, however, does not necessarily result in waiver. *Wilson v. State*, 367 S.W.3d 229, 234 (Tenn. 2012). Failure to raise the statute of limitations as an affirmative defense does not result in waiver "'if the opposing party is given fair notice of the defense and an opportunity to rebut it'" because "'the purpose of the specific pleading requirement is to prevent a party from raising a defense at the last possible moment and thereby prejudicing the opposing party's opportunity to rebut the defense.'" *Id*. (quoting *Sands v. State*, 903 S.W.2d 297, 299 (Tenn. 1995).

On January 31, 2013, the State filed a two-page response to the Petitioner's motion in which the State argued that Dr. Reschly's affidavit "claims no new test results nor information that could not have been known or discovered in 1987. To rule otherwise would render any and all death penalty cases forever in contest as long as a new 'expert' can be found to render another opinion." According to the trial court's order, the parties agreed to submit the issues on the pleadings in February 2013, and the trial court entered its order on May 7, 2013. We conclude that

the language provided in the State's response gave the Petitioner fair notice of the statute of limitations defense and that he had sufficient opportunity to rebut the defense. Accordingly, the State has not waived the statute of limitations defense.

The one-year statute of limitations may be tolled on due process grounds if the petitioner seeks relief based upon newly discovered evidence of actual innocence. *Wilson*, 367 S.W.3d at 234. In determining whether tolling is proper, the court must balance the petitioner's interest in having a hearing with the State's interest in preventing a claim that is stale and groundless. *Harris*, 301 S.W.3d at 145 (citing *Workman v. State*, 41 S.W.3d 100, 102 (Tenn. 2001)). Generally, "before a state may terminate a claim for failure to comply with . . . statutes of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner." *Burford v. State*, 845 S.W.2d 204, 208 (Tenn. 1992). The *Burford* rule consists of three steps:

> (1) determine when the limitations period would normally have begun to run; (2) determine whether the ground for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "laterarising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

The limitations period normally would have begun to run following the Petitioner's trial in 1988. The Petitioner filed his petition for writ of error coram nobis on December 20, 2012, approximately twenty-three years after the one-year statute of limitations expired.

Intellectual disability was not recognized as rendering a defendant ineligible for the death penalty at the time of the Petitioner's trial in 1988. Tennessee Code Annotated section 39-13-203, prohibiting the execution of intellectually disabled defendants, was not enacted until 1990 and did not apply retroactively. *See Howell*, 151 S.W.3d at 455; *Van Tran*, 66 S.W.3d at 798-99. Rather, it was not until 2001, after the Petitioner's post-conviction proceedings concluded in 1996, that our supreme court recognized that the execution of intellectually disabled defendant is constitutionally prohibited. *See Van Tran*, 66 S.W.3d at 798-99. Accordingly, the Petitioner's ground for relief that he is ineligible for the death penalty arose after the limitations period normally would have commenced.

The State asserts that the Petitioner should have sought relief by filing a motion to reopen his post-conviction petition following the Tennessee Supreme Court's decision in *Van Tran* in 2001 or the United States Supreme Court's decision in *Atkins* in 2002. *See* T.C.A. § 40-30-117(a)(1) (providing for a motion to reopen post-conviction proceedings if filed within one year of a "final ruling of an appellate court establishing a constitutional right that was not existing at the time of trial, if retrospective application of that right is required"). The Petitioner

contends that Dr. Reschly's report is "newly available" evidence or evidence that did not become available for presentation until after the trial concluded. While the Petitioner acknowledges that his intellectual disability existed before trial, he argues that circumstances beyond his control prevented him from presenting such evidence. He submits that his intellectual disability first became available for presentation following our supreme court's opinion in *Coleman*.

Generally, to qualify as newly discovered evidence, the evidence must not have been known to the defendant at the time of trial. *Wlodarz v. State*, 361 S.W.3d 490, 506 (Tenn. 2012). A narrow exception, however, exists where "'although not newly discovered evidence, in the usual sense of the term,'" the "' *availability*'" of the evidence "'is newly discovered.'" *Harris v. State*, 301 S.W.3d at 160-61 (Koch, J., concurring) (quoting *Taylor v. State*, 171 S.W.2d 403, 405 (Tenn. 1943)); *see David G. Housler, Jr. v. State*, No. M2010- 02183-CCA-R3-PC, 2013 WL 5232344, at *44 (Tenn. Crim. App. Sept. 17, 2013).

Courts have applied this narrow exception where previously unavailable evidence became available following a change in factual circumstances. *See, e.g., Taylor*, 171 S.W.2d at 405 (applying the exception when at the time of trial, one witness was hospitalized and one witness was working outside the state and they later became available to testify); *Misty Jane Brunelle v. State*, No. E2010-00662-CCA-R3-PC, 2011 WL 2436545, at *10 (Tenn. Crim. App., at Knoxville, June 16, 2011), *perm. app. denied* (Tenn. Oct. 18, 2011) (noting that the petitioner

should have sought coram nobis relief when a DCS report that was known to the petitioner but sealed at the time of trial later became available). Many of these cases involve testimony of a co-defendant or a witness who previously refused to testify by asserting the constitutional privilege against self-incrimination. *See, e.g., David G. Housler, Jr.*, 2013 WL 5232344, at *44; *United States v. Guillette*, 404 F. Supp. 1360, 1372-74 (D. Conn. 1975); *Brantley v. State*, 912 So. 2d 342, 343 (Fla. App. 2005); *State v. Williams*, 246 So.2d 4, 6 (La. 1971); *Commonwealth v. Brown*, 431 A.2d 343, 344 (Pa. Super. Ct. 1981); *State v. Gerdes*, 258 N.W.2d 839, 843 (S.D. 1977).

The Petitioner failed to cite to any authority applying this narrow unavailability exception based upon a change in the law. Issues regarding whether a change in the law should apply post-trial relate to retroactivity and are more properly addressed in post-conviction proceedings or a motion to reopen post-conviction proceedings. Even if the unavailability exception applies to a change in law, the petitioner is not entitled to relief.

The Petitioner argues that following *Howell* and prior to *Coleman*, courts only could consider raw I.Q. scores in determining intellectual disability pursuant to Tennessee Code Annotated section 39-13-203(a)(1). We note that the Tennessee Supreme Court's opinion in *Howell* was released on November 16, 2004, more than one year after the deadline for filing a motion to reopen post-conviction proceedings following *Van Tran* and *Atkins*. Accordingly, the Petitioner cannot rely upon the holding in *Howell* in claiming he would not have been able to file a motion to reopen because

mental health expert was limited in the information that he could consider in determining whether the Petitioner is intellectually disabled.

Moreover, the Tennessee Supreme Court in *Keen* stated that *Howell* did not provide for such a limitation. *Keen*, 398 S.W.3d at 603. Rather, the court in *Howell* instructed trial courts to "'giv[e] full and fair consideration to all tests administered to the petitioner'" and to "'fully analyz[e] and consider[] all evidence presented'" concerning the Petitioner's I.Q. *Id*. (quoting *Howell*, 151 S.W.3d at 459).

The Tennessee Supreme Court noted in *Coleman* that its review of all cases involving the application of section 39-13-203 reflected that "the parties and the courts have not been limiting their consideration of whether a criminal defendant has a 'functional intelligence quotient of seventy (70) of below' to the defendant's raw I.Q. test scores." *Coleman*, 341 S.W.3d at 247. The court explained:

> For example, in *Cribbs v. State*, both the State and Mr. Cribbs presented evidence that his raw I.Q. test scores did not accurately reflect his actual I.Q. On behalf of the State, Dr. Wyatt Nichols stated that Mr. Cribbs's intellectual level was actually higher than the I.Q. test score of 73 and was "[m]ore like the mid to high 80s." *Cribbs v. State*, 2009 WL 1905454, at *22, 32. Dr. Pamela Auble, appearing for Mr. Cribbs, stated in her initial report that his I.Q. was between 71 and 84. *Cribbs v. State*, 2009 WL 1905454, at *17. However, Dr. Auble later revised her opinion based on information obtained after her first

> report and concluded that Mr. Cribbs's I.Q. was below seventy. *Cribbs v. State*, 2009 WL 1905454, at *17. Based on all the evidence, the trial court concluded that the I.Q. test that produced the score of 73 was the most reliable. The trial court found that Dr. Auble's explanation for the change in her opinion was not credible and that Dr. Nichols's testimony was persuasive. *Cribbs v. State*, 2009 WL 1905454, at *32.
>
> The consideration of I.Q. test scores in *Cribbs v. State* is but one example of cases in which the State has argued and presented evidence that scores on I.Q. tests should not be considered on their face value. *See also State v. Strode*, 232 S.W.3d at 5 (the State presented evidence challenging the score on the basis that the defendant had been malingering); *Smith v. State*, 2010 WL 3638033, at *30 (the State presented evidence that the defendant's I.Q. test score should be discounted because of malingering); *Van Tran v. State*, 2006 WL 3327828, at 4-6 (the State argued that the Vietnamese-born defendant's low I.Q. test score reflected cultural and linguistic bias).

Id. The Tennessee Supreme Court concluded that these cases reflected "the parties' and the courts' existing awareness that, as a practical matter, a criminal defendant's 'functional intelligence quotient' cannot be ascertained based only on raw I.Q. scores." *Id*. The court further concluded that the cases also reflected "the parties' conclusion that Tenn. Code

Ann. § 39-13-203(a) does not prevent them from presenting relevant and competent evidence, other than the defendant's raw I.Q. test scores, either to prove or to disprove that the defendant's 'functional intelligence quotient' when the crime was committed was 'seventy (70) or below.'" *Id*. at 247-48.

We note that recently in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the United States Supreme Court held that Florida courts' interpretation of the significantly subaverage intellectual functioning provision in Florida's intellectual disability statute is unconstitutional. Florida courts interpreted the statute as requiring a strict I.Q. raw test score of 70 without consideration of the standard error of measurement. *Hall*, 134 S. Ct. at __. The Supreme Court agreed "with medical experts that when a defendant's I.Q. 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." Id. Unlike the defendant in *Hall*, however, the petitioner has not been precluded during his original trial or during post-conviction proceedings from presenting evidence, other than his raw I.Q. test scores, to establish that his "functional intelligence quotient" when he committed the murder was 70 or below.

Contrary to the petitioner's claims, the information in Dr. Reschly's affidavit was available for presentation prior to Coleman. Nothing prevented the Petitioner from filing a motion to reopen post-conviction proceedings within one year of *Van Tran* or *Atkins* and presenting relevant and competent

evidence, other than his raw I.Q. test scores, to prove that his "functional intelligence quotient" when the crime was committed was "seventy (70) or below."

Almost ten years after the one-year statute of limitations for filing a motion to reopen expired, the Petitioner filed his petition claiming intellectual disability. The information upon which Dr. Reschly relied in his affidavit was available to the Petitioner during the one year following *Van Tran* or *Atkins*. Nothing prevented Dr. Reschly from administering I.Q. testing and adjusting the test scores during the one year following *Van Tran* or *Atkins*. The new testing in 2010 is merely cumulative to the evidence previously available to the Petitioner. *See Wlodarz*, 361 S.W.3d at 499 (noting that newly discovered evidence that is merely cumulative does not warrant the issuance of a writ). Because the Petitioner's claim could have been litigated in a motion to reopen filed within one year of *Van Tran* or *Atkins*, the grounds are not "later-arising," justifying the tolling of the one-year statute of limitations. *See* Tenn. Code Ann. § 40-26-105(b) (confining coram nobis relief to "matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding" and requiring the defendant to show that he was without fault in failing to present the evidence at the proper time).

Even if *Coleman* provides new grounds for relief, the petitioner did not file his petition for writ of error coram nobis until twenty months following the issuance of *Coleman*. The coram nobis petition does

not relate back to the Petitioner's motion to reopen his post-conviction petition filed in April 2012. "No statute in Tennessee nor tolling rule developed at common law provides that the time for filing a cause of action is tolled during the period in which a litigant pursues a related but independent cause of action." *Harris*, 301 S.W.3d at 146. When the Petitioner filed his motion to reopen in April 2012, he chose not to file a petition for writ of error coram nobis. It was not until after our supreme court released its opinion in *Keen* rejecting the bases upon which the Petitioner relied in filing his April 2012 motion to reopen that he filed a petition for writ of error coram nobis. A petitioner may not delay presenting a coram nobis claim until "every other avenue of relief ha[s] been exhausted." *Billy Ray Irick v. State*, No. E2010-02385-CCA-R3-PD, 2011 WL 1991671, at *18 (Tenn. Crim. App., at Knoxville, May 23, 2011), *perm. app. denied* (Tenn. Aug. 25, 2011). Therefore, we conclude that under the circumstances of this case, the delay in seeking coram nobis relief is unreasonable.

We hold that the trial court properly found that the Petitioner's petition was barred by the one-year statute of limitations. Accordingly, the Petitioner is not entitled to coram nobis relief.

C. Intellectual Disability Statute

The Petitioner asserts that the intellectual disability provisions in Tennessee Code Annotated section 39-13-203 provide an independent cause of action allowing him to challenge his eligibility for the death penalty. In construing a statute, we must ascertain and give effect to the legislative intent

without unduly restricting or expanding a statute's coverage beyond its intended scope. *State v. Strode*, 232 S.W.3d 1, 9 (Tenn. 2007). We must give the words in the statute their natural and ordinary meaning in light of their statutory context. *Keen*, 398 S.W.3d at 610. We must avoid any "forced or subtle construction that would limit or extend the meaning of the language." *Id*. (citation omitted). "If the statutory language is clear and unambiguous, we apply the statute's plain language in its normal and accepted use." *Id*.

Tennessee Code Annotated section 39-13-203 lists the requirements of intellectual disability, the burden of proof, and the procedure when the issue is raised at trial. The plain language of the statute does not create an independent cause of action allowing a defendant to challenge his or her eligibility for the death penalty. Had the General Assembly intended to create a separate and independent cause of action in which to allege intellectual disability, they would have stated so in the statute. *See, e.g*., T.C.A. § 40-30-301, *et seq*. (creating a cause of action to allow certain defendants to request DNA testing of evidence). The Petitioner is not entitled to relief with regard to this issue.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court denying the Petitioner relief.

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ALAN E. GLENN, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON
February 5, 2013

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. P9594 J. Robert Carter, Jr., Judge

No. W2013-01248-CCA-R3-PD - Filed October 30, 2014

CAMILLE R. MCMULLEN, J., concurring in part and dissenting in part.

For the reasons that follow, I would remand this matter for an evidentiary hearing in order to determine whether the Petitioner is intellectually disabled. To the extent the majority differs from this conclusion, I respectfully disagree.

This capital Petitioner's case has been subject to extensive appellate review in both state and federal courts for more than twenty years.[1] During that

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[1] *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990) (affirming conviction and sentence); *Payne v. Tennessee*, 501 U.S. 808, *reh'g denied*, 501 U.S. 1277 (1991) (granting certiorari on the limited issue of the

time, the landscape for how Tennessee courts determine whether an individual facing the death penalty is intellectually disabled dramatically changed. The United States Supreme Court and the Tennessee Supreme Court held that the execution of the intellectually disabled is prohibited by the Eighth Amendment of the United States Constitution and article I, section 16 of the Tennessee Constitution.

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admissibility of victim impact evidence); *Pervis Tyrone Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998), *perm. app. denied* (Tenn. June 8, 1998) (affirming denial of post-conviction relief); *Payne v. Bell*, 194 F. Supp.2d 739 (W.D. Tenn. 2002) (denial of habeas corpus relief); *Payne v. Bell*, 399 F.3d 768 (6th Cir. 2005) (granting temporary relief based on the use of the heinous, atrocious, or cruel aggravating circumstance instruction violated the Petitioner's Eighth Amendment rights, and the Tennessee state court's rejection of the Petitioner's challenge was contrary to clearly established United States Supreme Court precedent); *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005), *cert. denied*, 548 U.S. 908 (2006) (affirming district court's denial of habeas corpus relief upon rehearing); *Pervis Payne v. State*, No. W2007-01096-CCA-R3-PD, 2007 WL 4258178 (Tenn. Crim. App. Dec. 5, 2007), *perm. app. denied* (Tenn. Apr. 14, 2008) (affirming denial of motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001).

Atkins v. Virginia, 536 U.S. 304, 321 (2002); *State v. Howell*, 151 S.W.3d 450, 455 (Tenn. 2004); *State v. Van Tran*, 66 S.W.3d 790, 798-99 (Tenn. 2001); *see* T.C.A. § 39-13-203(b). Even after the Petitioner's case was argued and submitted to this court, the United States Supreme Court further refined the rule in *Atkins* by invalidating a Florida intellectual disability statute, as interpreted by its courts, as unconstitutional. *Hall v. Florida*, 572 U.S. ——, 134 S. Ct. 1986, 1990 (2014).

Significantly, the capital petitioner in *Hall* was convicted, sentenced, and denied post-conviction relief before the Supreme Court ruled that executing intellectually disabled individuals violated the Eighth Amendment. Two years after *Atkins*, Hall filed his motion claiming that he was intellectually disabled. Florida provided Hall with a hearing, albeit five years later, but rejected his claim. It reasoned that Florida law required, as a threshold matter, that Hall show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability. The Supreme Court reversed and rejected Florida's IQ cut-off rule as well as the court's failure to take into account the standard error of measurement when determining whether an individual was intellectually disabled. *Hall*, 134 S. Ct. at 1990. In doing so, it held 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." *See id*. at 2000-01. The Court stated:

> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.

Id.

I view the procedural posture of this case no differently than in *Hall*. Just as in *Hall*, the Petitioner has not been afforded the opportunity to present evidence of his intellectual disability or deficits in adaptive functioning over his lifetime to any court in this State. This case is distinguishable from several other cases in which an *Atkins*-based claim has been made and denied by this court, *see, e.g.*, *Tyrone Chalmers v. State*, No. W2013-023170CCAR3- PD, 2014 WL 2993863 (Tenn. Crim. App. June 30, 2014) and *Dennis Wade Suttles v. State*, No. E2013-01016-CCA-R3-PD, 2014 WL 2902271 (Tenn. Crim. App. June 25, 2014), because the Petitioner was precluded during his original trial, sentencing, and post-conviction proceedings from presenting evidence, other than his raw IQ test scores, to establish that his "functional intelligence quotient" when he committed capital murder was 70 or below. Dr. Reschly's affidavit states that the Petitioner's functional IQ is seventy or below. This is sufficient to trigger a hearing pursuant to *Hall*. *See also Sidney Porterfield v. State*, No. W2012-00753-CCA-R3-PD, 2013 WL 3193420, at * 2 (Tenn. Crim. App., June 20, 2013) (granting Rule 28 motion and remanding for hearing based on expert's consideration of factors other than raw IQ test scores of 67, 72, and 91 in concluding that petitioner was

intellectually disabled). Although *Atkins* left to the states the task of developing appropriate ways to enforce the constitutional prohibition against executing an intellectually disabled individual, such discretion is not unfettered. *Hall*, 134 S. Ct. at 1998. A state cannot execute a person whose IQ test score falls within the test margin of error, as in this case, *unless that individual has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits. Id.* (emphasis added).

The Petitioner may or may not be intellectually disabled, but *Atkins* and *Hall* require that he have an opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime. The Petitioner has been denied this opportunity. I am unable to ignore the fact that, given the posture of this case, Tennessee runs the risk of executing an intellectually disabled individual in violation of both the federal and state constitutions. Accordingly, I would remand this matter to the trial court for reconsideration in light of *Hall*.

Additionally, I conclude that the Petitioner is not barred by the statute of limitation and I would remand for an evidentiary hearing in order to determine whether or not the Petitioner is intellectually disabled. [2] The Petitioner concedes that

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[2] In *Keen v. State*, 398 S.W.3d 594, 613 (Tenn. 2012), the majority did not foreclose "any other remedy currently available to [the petitioner]. If he is

he filed his petition for writ of error coram nobis over twenty years after the one-year statute of limitations expired.[3] The majority agrees with the trial court and concludes that the Petitioner's claim is barred by the statute of limitation because it is not "later-arising." In other words, the trial court believed that the information in Dr. Reschly's affidavit concluding that the Petitioner was intellectually disabled could have been discovered prior to the trial. The State also asserted that a strict application of the limitations period would not effectively deny the Petitioner a reasonable opportunity to present this claim because he has had prior reasonable opportunities to raise his claim of intellectual disability but failed to do so.

The Petitioner contends that Dr. Reschly's report is "newly available" evidence or evidence that did not become available for presentation until after the trial concluded. While the Petitioner acknowledges that his intellectual disability existed before trial, he

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indeed intellectually disabled, this issue deserves to be heard. Likewise, it does not foreclose the ability of the General Assembly to create a procedure that accommodates prisoners on death row whose intellectual disability claims cannot be raised under Tenn. Code Ann. § 40-30-117(a)(1) or (2)."

[3] This is the Petitioner's second petition for a writ of error coram nobis. His first petition was denied by this court in *Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670 (Tenn. Crim. App., January 15, 1998).

argues that circumstances beyond his control prevented him from presenting such evidence. He submits that his intellectual disability first became available for presentation following our supreme court's opinion in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). I agree.

As previously noted, intellectual disability was not recognized as rendering a defendant ineligible for the death penalty at the time of the Petitioner's trial in 1988. Tennessee Code Annotated section 39-13-203, prohibiting the execution of intellectually disabled defendants, was not enacted until 1990 and did not apply retroactively. *See Howell*, 151 S.W.3d at 455; *Van Tran*, 66 S.W.3d at 798-99. Rather, it was not until 2001, after the Petitioner's post-conviction proceedings concluded in 1996, that our supreme court recognized that the execution of an intellectually disabled defendant is constitutionally prohibited. *See Van Tran*, 66 S.W.3d at 798-99. Accordingly, the Petitioner's ground for relief that he is ineligible for the death penalty arose after the limitations period normally would have commenced.

The majority, agreeing with the State, asserts that the Petitioner should have sought relief by filing a motion to reopen his post-conviction petition following the Tennessee Supreme Court's decision in *Van Tran* in 2001 or the United States Supreme Court's decision in *Atkins* in 2002. See T.C.A. § 40-30-117(a)(1) (providing for a motion to reopen post-conviction proceedings if filed within one year of a "final ruling of an appellate court establishing a constitutional right that was not existing at the time of trial, if retrospective application of that right is

required"). In 1987, prior to trial, the Petitioner received an IQ score of 78 on the WAIS-R. In 1996, around the time of post-conviction proceedings, he received the same score on the WAIS-R.[4] Pursuant to *Howell* and opinions from this court applying *Howell*, the demarcation of an IQ score of 70 was a "bright-line" rule that was required to be met. *See Howell*, 151 S.W.3d at 456-59; *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *37 , *40 (Tenn. Crim. App. July 1, 2009), *perm. app. denied* (Tenn. Dec. 21, 2009); *Byron Lewis Black v. State*, No. M2004-01345-CCA-R3-CD, 2005 WL 2662577, at *14, *17-18 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006). In *Howell*, the Tennessee Supreme Court held that "[t]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with a IQ above seventy could be considered [intellectually disabled]." *Howell*, 151 S.W.3d at 456. Thus, under *Howell* and this court's interpretation of *Howell*, the Petitioner's request for relief would have been denied had he filed a motion to reopen following the release *Van Tran* or *Atkins*. I cannot fault the Petitioner for

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[4] At his sentencing hearing, a clinical psychologist testified that the Petitioner had "a full scale IQ of 78 with a variance of plus or minus three, with a verbal IQ of 78, plus or minus 3, and a performance IQ of 82, plus or minus 4," thus, placing the Petitioner "approximately one standard deviation below the norm of average intelligence."

failing to seek relief when based on our law the request would not have been successful.

It was not until 2011, slightly over a year from the date of the Petitioner's coram nobis filing, that our supreme court clarified in *Coleman* that "trial courts may receive and consider any relevant and admissible evidence regarding whether the defendant's functional IQ at the time of the offense was seventy (70) or below." *Coleman*, 341 S.W.3d at 241. The court held in *Coleman* that courts were not limited to raw test scores, but could also consider other factors such as the Flynn Effect, the practice effect, the standard error of measurement, malingering, and cultural differences. *Id*. at 242 n.55, 247; *see Keen*, 398 S.W.3d at 608. Dr. Reschly applied these factors in concluding that the Petitioner's functional IQ is seventy or below. Given the demonstrated flux in this area of Tennessee law, I would conclude that Dr. Reschly's report constitutes "newly available" evidence and that the Petitioner's claim that he is ineligible for the death penalty due to intellectual disability is a later-arising ground.[5]

Finally, I conclude that the principles of due process demand that this Petitioner be allowed to have the opportunity to present evidence of his intellectual disability. Tennessee courts must balance

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[5] *Harris v. State*, 301 S.W.3d at 160-61 (Koch, J., concurring) (quoting *Taylor v. State*, 171 S.W.2d 403, 405 (Tenn. 1943)); *see David G. Housler, Jr. v. State*, No. M2010 02183-CCA-R3-PC, 2013 WL 5232344, at *44 (Tenn. Crim. App. Sept. 17, 2013).

"the governmental interests involved and the private interests affected by the official action." *Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001). In this case, the governmental interest in asserting the statute of limitation is the prevention of stale and groundless claims. *See id*. The private interest involved is the Petitioner's opportunity to have a hearing on grounds that he is ineligible for the death penalty due to intellectual disability. If the statute of limitations is applied, the Petitioner will be forever barred from any opportunity to have the merits of his claim evaluated by a court of this State. In my view, the Petitioner's interest in obtaining a hearing to present evidence that may establish that he is intellectually disabled and, therefore, ineligible for the death penalty outweighs any governmental interest in preventing the litigation of stale claims. It bears repeating that the Petitioner was precluded from raising this issue during the trial and post-conviction proceedings because the constitutional ban against the execution of intellectually disabled defendants had not yet been recognized. Prior to *Coleman*, courts did not permit the consideration of evidence other than raw IQ scores to determine a defendant's functional IQ. As a result, any attempt by the Petitioner to seek relief would have been futile.

The Petitioner is now foreclosed from seeking any other form of post-conviction relief because it is questionable whether *Coleman* has retrospective application. *See Keen*, 398 S.W.3d at 609 (concluding that it was unnecessary to address retroactivity because *Coleman* concerned the interpretation and application of Tenn. Code Ann. § 39-13-203 and was

not a constitutional ruling). At the top of this opinion, I outlined the lengthy appellate history of this case and the fact that it is now over twenty-four years old. At the very least, an argument can be made that judicial economy necessitates a hearing based on the federal courts repeated retroactive application of *Coleman* to Tennessee's implementation of the rule in *Atkins*. *See Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2012) (vacating district court's denial of *Atkins* claim and remanding for reconsideration in light of retrospective application of *Coleman*); *Van Tran v. Colson*, 764 F.3d 594, 617-619 (6th Cir. 2014) (applying *Coleman* retroactively to *Atkins* claim and granting a writ of habeas corpus prohibiting imposition of the death penalty, conditioned upon the fresh determination by the Tennessee courts whether the petitioner was intellectually disabled under the clarified principles set out in *Coleman*). As it stands, no court in this State has held a hearing to fully evaluate the strength of the Petitioner's Eighth Amendment based intellectual disability claim.

Following the release of *Coleman* on April 11, 2011, the Petitioner filed a motion to reopen post-conviction proceedings on April 4, 2012. Once the Tennessee Supreme Court released its opinion in *Keen* on December 20, 2012, the Petitioner amended his motion on December 27th to include a petition for writ of error coram nobis. The time within which the Petitioner filed his petition does not exceed the

reasonable opportunity afforded by due process.[6] Rather, "'the magnitude and gravity of the penalty of death persuades [me] that the important values which justify limits on untimely . . . petitions are outweighed'" by the Petitioner's interest in having a court evaluate evidence that may show that he is ineligible for the death penalty. *Workman*, 41 S.W.3d at 103-04 (quoting *In re Clark*, 5 Cal. 4th 750, 855

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[6] Interestingly, courts that have considered this issue "agree that the claim may be asserted at any stage of the proceedings, presumably up to the moment of execution." *See Bowling v. Com.*, 163 S.W.3d 361, 370-71 (Ky. 2005), as modified (Apr. 22, 2005) (collection of cases including *In re Holladay*, 331 F.3d 1169, 1173, 1176 (11th Cir. 2003) (granting successive habeas petition asserting entitlement to mental retardation exemption, staying execution three days before date of scheduled execution, and observing that petitioner's mental retardation claim had never been adjudicated); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003); *State v. Williams*, 831 So.2d 835, 851 n.21 (La. 2002) ("The mandate of *Atkins* that the State may not execute a mentally retarded person is retroactive to any case at any stage of the proceedings, . . . in which the defendant is facing the prospect of capital punishment."); *State v. Lott*, 97 Ohio St.3d 303 (2002) (*Atkins* was decided after the execution date was set; principle of res judicata did not bar the claim because petitioner had not been afforded the opportunity to fully litigate the issue)).

P.2d 729, 760 (Cal. 1993)). As our supreme court has recognized, "Tennessee has no business executing persons who are intellectually disabled." *Keen*, 398 S.W.3d at 613. Under this narrow set of circumstances, the Petitioner has made a threshold showing to warrant an evidentiary hearing. I would reverse the judgment of the trial court and remand this matter for a hearing to determine whether the Petitioner is in fact intellectually disabled and entitled to the issuance of a writ of error coram nobis.

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CAMILLE R. McMULLEN, JUDGE

APPENDIX C

IN THE CRIMINAL COURT FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION Ill

Pervis Tyrone Payne

vs. **Indictment Numbers: 87-04408, 09, 10**

State of Tennessee **Docket Number P-9594**

Order Denying "Motion to Re-Open Petition for Post-Conviction Relief' and "Amended Petition for Relief from Death Sentences"

This cause came to be heard upon the Petitioner's Motion to Reopen Petition for Post-Conviction Relief, the Amended Petition for Relief from Death Sentences, the State's Response and the entire record in this cause.

FROM ALL OF WHICH IT APPEARS TO THE COURT:

Petitioner, Pervis Payne, is represented by Assistant Federal Public Defender, Christopher Minton, who filed the above mentioned pleadings on his behalf. Neither Petitioner, nor the Assistant

District Attorney General representing the State of Tennessee requested an evidentiary hearing, relying upon their respective written pleadings. This Court's opinion is based upon those pleadings, the record and the law as cited throughout the Court's Order.

I. **PROCEDURAL HISTORY**

The following procedural history is initially taken from the Motion to Re-Open.

On February 16, 1988, a Shelby County, Tennessee, jury convicted Mr. Payne of two counts of capital murder and sentenced him to death on both convictions.

On April 16, 1990, the Tennessee Supreme Court affirmed Payne's capital murder convictions and death sentences. *Payne v. State*, 791 S.W.2d 10 (Tenn. 1990). The United States Supreme Court granted Mr. Payne's certiorari petition, and on June 27, 1991, it affirmed the Tennessee Supreme Court's judgment. *Payne v. Tennessee*, 501 U.S. 808 (1991).

On January 13, 1992, Mr. Payne filed in this Court a petition for Post-Conviction Relief. On October 10, 1996, this Court filed its Order denying Mr. Payne Post-Conviction Relief.

On June 26, 1992, while Mr. Payne's Post-Conviction proceeding was pending in this Court, Mr. Payne filed a petition for writ of error coram nobis. On February 10, 1997, this Court entered its Order denying that petition.

Mr. Payne appealed this Court's dismissal of his Post-Conviction and Error Coram Nobis Petitions. On January 15, 1998, the Tennessee Court of Criminal Appeals affirmed those dismissals. On June 8, 1998, the Tennessee Supreme Court issued an order

denying Mr. Payne's request for permission to appeal. *See Payne v State*, 1998 WL 12670 (Tenn. Crim. App. 1998).

On November 3, 1998, Mr. Payne initiated habeas corpus proceedings in the United States District Court for the Western District of Tennessee. On March 29, 2002, the District Court entered its judgment denying Mr. Payne Habeas relief.

Mr. Payne appealed to the United States Court of Appeals for the Sixth Circuit. On July 22, 2005, that Court affirmed the District Court's denial of habeas relief. *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005). On June 26, 2006, the United States Supreme Court denied certiorari. *Payne v. Bell*, 548 U.S. (2006).

Petitioner, through counsel, filed his Motion to Re-Open Petition for Post-Conviction Relief on April 4, 2012. No action was taken seeking a hearing on the matter. It was apparently the intention of the parties to wait for the decision of the Supreme Court of the State of Tennessee in *Keen v. State*, No. 2011-00-789-SC-R11-PD (December 20, 2012). The Amended Petition for Relief from Death Sentences, (which refers, obviously, to the Motion to Re-Open) was filed December 27, 2012. The State filed its Response January 31, 2013 and in February, 2013 the parties agreed to submit the issues on the pleadings.

II. **ISSUES PRESENTED**

Petitioner seeks to re-open his Post-Conviction proceeding, pursuant to T.C.A. § 40-30-117_, based upon his .assertion that he is intellectually disabled. He asserts that *Coleman v. State*, 341 S.W.3d 221

(Tenn. 2011) establishes a "new constitutional right" that was not recognized at the time of his trial.

Petitioner also asserts that his Post-Conviction should be re-opened as a result of newly discovered evidence. He offers an affidavit of Daniel Reschly, Ph.D. as evidence which was previously unavailable that Petitioner is "actually innocent" of the death penalty as a result of Dr. Reschly's interpretation of Petitioner's mental status.

In the Amended Petition, the attorney for Petitioner urges that these same issues should serve as a basis for the issuance of a Writ of Error Coram Nobis, pursuant to T.C.A. § 40-26-105.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a case factually very similar to the one before this Court, the Supreme Court of Tennessee ruled on the same issues. In *Keen*, supra, the Supreme Court ruled specifically that *Coleman*, supra, did not establish a new constitutional right. The Supreme Court further ruled that "newly obtained" l.Q. test scores did not constitute "newly discovered evidence of actual innocence" of the sort necessary to re-open post-conviction proceedings.

The "new constitutional right" referred to is the constitutional prohibition against executing intellectually disabled persons. This is based in the Eighth Amendment to the United States Constitution and Article 1 § 16 of the Tennessee Constitutuion which prohibits "cruel and unusual punishment."

The Court in *Keen*, supra, pointed out that this right was to be applied retroactively as a result of the

decision in *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).

The Supreme Court pointed out that several individuals including Michael Angelo Coleman, Leonard Smith and Michael Wayne Howell took advantage of the "one year window" created by *Van Tran*, supra.

Petitioner, Payne, like Mr. David Keen did not raise this question of intellectual disability until long after the one year period had run. It appears that like Mr. Keen, Petitioner had matters based upon other grounds pending in various courts.

As determined in *Keen*, there is no newly created right. *Keen*, supra at page 11. In the matter at hand, Petitioner has also asserted that recent l.Q. testing constitutes "new scientific evidence" that he is "actually innocent of the offense". The Supreme Court stated that intellectual disability does not equate to "actual innocence" under T.C.A. § 40-30-117 (a) (2). *Keen*, (supra), at page 14.

This court further finds that the l.Q. testing could have been done long before it was. The mental status of Petitioner has been available for testing since the inception of the case. The mere fact that Petitioner and his attorneys did not proceed with this avenue does not make it newly discovered.

Petitioner's delay constitutes a waiver of this issue.

Petitioner, perhaps cognizant of the ruling in *Keen*, also urges the consideration of these issues as grounds for the issuance of a Writ of Error Coram Nobis. T.C.A. § 40-26-105.

Since 1955, Tennessee has had available a statutory remedy in certain criminal cases. The Writ of Error Coram Nobis was outlined in T.C.A. § 40-26-105, and designed to allow the direct challenge of convictions where evidence is discovered which was not known at the time of a trial. There is a one year statute of limitations for the bringing of a Petition for Writ of Error Coram Nobis.

That statute of limitations may be tolled only when necessary so as not to offend due process requirements. *Workman v. State*, 41 S. W .3d 100, 103 (Tenn. 2001).

The question of Petitioner's IQ is not one requiring the tolling of the statute of limitations. This is not a case where the information was unavailable to or withheld from the Petitioner.

The writ of error coram nobis is an "extraordinary procedural remedy". filling only a "slight gap into which few cases fall". *State v. Mixon*, 983 S.W.2d 661 (Tenn 1999) at page 672.

As the Supreme Court in *Keen* observed, it is unclear why Petitioner did not proceed to inquire into this issue after the decision in *Van Tran* in 2001. Therefore, no reason exists to toll the one year statute of limitations.

Ill. **CONCLUSION**

Petitioner, Payne, has failed to demonstrate any reason for the reopening of his Petition for Post-Conviction Relief. This is not a situation involving a new constitutional right nor is this matter one concerning newly discovered evidence which could not have been presented in a timely fashion.

Finally, a Writ of Error Coram Nobis will not be granted where Petitioner waited over ten years to explore the issue of his intellectual capacity.

IT IS THEREFORE ORDERED that the Petition to Re-Open Petition for Post-Conviction Relief and Amended Petition for Relief from Death Sentences are hereby denied.

This is the 7th day of May, 2013.

/s/ J. Robert Carter, Jr.
J. Robert Carter, Jr.
Judge Division III

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON
September 30, 2015 Session Heard at Lebanon[1]

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

Appeal from the Court of Criminal Appeals
Criminal Court for Shelby County
No. P-09594 J. Robert Carter, Jr., Judge

No. W2013-01248-SC-R11-PD
Filed April 29, 2016

ORDER

Pervis Tyrone Payne has filed a petition to rehear the opinion of this Court filed on April 7, 2016. *See* Tenn. R. App. P. 39. After careful review, the petition is respectfully denied.

PER CURIAM

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[1] We heard oral argument in this case on September 30, 2015, at Cumberland University in Lebanon, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

MICHAEL EUGENE SAMPLE v. STATE OJF TENNESSEE

Shelby County Criminal Court
Pl4252

No. W2015-00713-SC-R11-PD

Date Printed: 10/15/2015 **Notice/Filed Date: 10/15/2015**

NOTICE - Notice (Outgoing) - TRAP 11 Delay Notice

The application for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure previously filed in the Tennessee Supreme Court is being held pending the decision in Pervis Tyrone Payne v. State, W2013-01248-SC-Rl 1-PD, which was argued on September 30, 2015. As soon as the Court rules on this application, you will be promptly notified.

James M. Hivner
Clerk of the Appellate Courts

APPENDIX F

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P9594

No. W2013-01248-SC-Rll-PD
FILED Feb 13 2015

ORDER

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

In addition to the other issues raised in Mr. Payne's application for permission to appeal, the Court is particularly interested in briefing and argument on the questions of

(1) the appropriate remedy for an intellectual disability claim under these circumstances if coram nobis relief is not available; and

(2) the relevance, if any, of the holding in Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014), regarding retroactive application of this

Court's decision in Coleman v. State, 341 S.W.3d 221(Tenn. 2011).

The Clerk is directed to place this matter on the docket for oral argument upon the completion of briefing.

PER CURIAM

APPENDIX G

EXPERT WITNESS REPORT OF DR. DANIEL J. RESCHLY, Ph.D. RE: PERVIS PAYNE

EXECUTIVE SUMMARY

1. Mr. Pervis Payne is a person with mental retardation-intellectual disability (MR-ID) within the meaning of the State of Tennessee MR-ID Statute, consistent as well with leading professional association criteria, American Association on Mental Retardation, now the American Association on Intellectual and Developmental Disabilities (Luckasson et al., 2002; Schalock et al., 2010), and the Diagnostic and Statistical Manual of Mental Disorders IV TR (American Psychiatric Association, 2000).

2. Mr. Payne meets the Tennessee MR-ID Statute requirement of significantly subaverage intellectual function if the recommendations in the *Coleman v. Tennessee*, 2011 are applied regarding the standard error of measurement and correcting obsolete normative standards by the Flynn factor. Mr. Payne's functional intelligence is significantly subaverage compared to population normative standards.

3. Significant defects in adaptive behavior were identified in Mr. Payne's childhood and young adult performance, particularly in the conceptual and practical skills domains of adaptive behavior. The adaptive behavior deficits in everyday performance are caused by the significantly subaverage functional intelligence.

4. Mr. Payne was MR-ID during the developmental period, during childhood and adolescence.

5. Mr. Payne meets the 3 prongs of the MR-ID definitions cited in paragraph 1, that is, he displays significantly subaverage functional intelligence, significant deficits in adaptive behavior, and MR-ID presence during the developmental period of birth through age 18. Mr. Payne therefore is a person with MR-ID.

* * *

54. Ample evidence exists to show that the Flynn Effect applied to the WAIS-R, acknowledged implicitly in the next revision of the Wechsler Adult Intelligence Scale in 1997 at p. 8-9 in the manual (Wechsler, 1997) (see paragraph 25 in this report). The Flynn Effect means that accurate IQ scores and appropriate interpretation require acknowledgment of the phenomenon of the increasingly obsolescence of intellectual test normative standards and adjustment of scores to account for changes in normative standards.

55. The WAIS versions administered to Mr. Payne over the past 25 years yielded largely consistent results if the appropriate adjustments are made for the age of the normative standards when the test was administered. In all cases the scores were within about 3 to 4 points above or below the IQ score of 75 when taking into account the Flynn Effect. The Full Scale scores varied only from 72.4 in 1996 to 75.4 in 1987. On the most recent Wechsler test, Mr. Payne obtained a WAIS-IV (Wechsler, 2008) Flynn-corrected score of 73.7.

Table 1. Summary of Mr. Payne's Wechsler Adult Intelligence Test Performance from 1987-2010.

Date Test/ Score	Verbal	Verbal Correctd	Performance/ Perceptual	Perf/ Percept Corrected	Full Scale	Full Scale Corrected
1987/ WAIS-R Norms 1979	78	75.4	82	79.4	78	75.4
1996/ WAIS-R Norms 1979	78	72.4	85	79.4	78	72.4
2010/ WAIS IV Norms 2006	81	79.7	77	75.7	74	73.7

Note: Corrected scores are used to account for the obsolescence of the norms when the tests were administered to Mr. Payne.

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56. Mr. Payne's Flynn-corrected Verbal and Performance IQ scores did not vary significantly over the three administrations of the WAIS. In all cases, the scores were within approximately one standard error of measurement (SEm=5), suggesting no changes in his mental abilities over the past 25 years. It is clear that Mr. Payne has been operating in the very low range of ability, **and** within the widely

accepted standard for the identification of mental retardation of an IQ at or below 75. Mr. Payne meets the AAMR-AAIDD Classification Manual and the American Psychiatric Association Diagnostic and Statistical Manual of the Mental Disorders (2000) criteria for MR-ID on the intellectual dimension of the MR-ID diagnosis. Based on these standards Mr. Payne is a person with MR-ID.

57. Results of IQ tests should not be applied rigidly to the determination of MR-ID without consideration of other sources of information, (*Coleman v. Tennessee*, 2011). Clinical judgment by experts in MR-ID is required to determine MR-ID status, taking into account performance on tests of general intellectual functioning and other information about both intellectual competencies and adaptive behaviors. Clinical judgment is required to make sound judgments about functional intelligence, including other factors such as everyday practical coping competencies, literacy skills applied to practical challenges, and understanding consequences of different courses of action. In addition, depending on the court, fundamental characteristics of tests must be considered in clinical judgments about MR-ID such as the Flynn Effect (see prior discussion), estimation of error in the test, practice effects, and cultural differences, all of which are relevant to the person's functional intelligence (in contrast to the simple IQ score). When these factors are taken into account, it is my expert opinion that Mr. Payne's functional intelligence clearly is at or below 70 and otherwise in the range of MR-ID, a conclusion that is further supported by the

significant limitations in adaptive behavior described below.

* * *

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