APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

VINCENT SIMS v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P25898

No. W2015-01713-CCA-R28-PD
Filed Jan 28 2016

ORDER

This matter is before the Court on the Petitioner Vincent Sims' application for permission to appeal the post-conviction court's order denying his motion to reopen his post-conviction petition. The Petitioner relies upon the United States Supreme Court's decision in *Hall v. Florida,* 134 S.Ct. 1986 (2014), which addresses the issue of intellectual disability as it relates to a capital defendant's eligibility for the death penalty. The State has filed a response in opposition.

In May 1998, the Petitioner was convicted of first degree premeditated murder and especially aggravated burglary in connection with the shooting death of Forrest Smith. The Petitioner received consecutive sentences of death for first degree murder and twenty-five years for especially aggravated burglary. The jury found four aggravated circumstances in sentencing the Petitioner to death:

(1) the Petitioner was previously convicted of one or more felonies with statutory elements that involve the use of violence against the person; (2) the murder was especially heinous, atrocious, or cruel; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the Petitioner or another; and (4) the murder was committed during the commission of a burglary or theft. *See* Tenn. Code Ann. § 39-13-204(i)(2), (5), (6), (7) (1997). The Tennessee Supreme Court affirmed the Petitioner's convictions and sentences on direct appeal. *See State v. Sims,* 45 S.W.3d 1, 5 (Tenn. 2001).

Post-Conviction Proceedings

The Petitioner filed a pro se petition for post-conviction relief on November 15, 2001. *See Vincent Sims v. State,* No. W2014-00166-CCA-R3-PD, 2014 WL 7334202, at *3 (Tenn. Crim. App. Dec. 23, 2014), *perm. app. denied* (Tenn. May 18, 2015). The Petitioner filed an amended petition on August 8, 2002, following the appointment of counsel. *Id.* The Petitioner did not raise a claim of intellectual disability. *Id.* The evidence presented during the post-conviction proceedings related to the Petitioner's intelligence previously was summarized by this Court as follows:

> In preparation for the post-conviction proceedings, Dr. Pamela Auble, a clinical neuropsychologist, evaluated the Petitioner in July 2002 and April 2003 and provided a report of her findings dated August 20, 2004. Dr. Auble testified regarding her findings

during the post-conviction hearing on September 17, 2004.

In evaluating the Petitioner, Dr. Auble interviewed him, administered testing, and reviewed numerous records. These records included the transcript of testimony of other witnesses during the post-conviction hearing, school records, medical records, the Tennessee Supreme Court's opinion on direct appeal, the Petitioner's pre-sentence report, and a timeline. In both her report and during her testimony, Dr. Auble discussed the Petitioner's family history, medical history, educational history, achievement testing, history of alcohol and drug abuse, criminal history, and employment history.

Dr. Auble administered the Wechsler Adult Intelligence Scale-Ill test (WAIS-III) to the Petitioner. The Petitioner received a verbal I.Q. score of 72, a performance I.Q. score of 81, and a full scale I.Q. score of 75. In her report, Dr. Auble stated:

> Mr. Sims's Full Scale IQ of 75 would not meet current legal criteria for [intellectual disability] as defined by the Tennessee statute on [intellectual disability] (TCA 39-13- 203). The Diagnostic and Statistical Manual of Mental Disorders (Fourth Edition, Text Revision) states that mild [intellectual disability] can be diagnosed with Full Scale Wechsler IQ's as high as 75 if there are concurrent adaptive deficits because there is a measurement error of five points on the scale. From the DSM-IV,

> deficits in at least two of ten areas of adaptive functioning are required (communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety). Mr. Sims' language deficits, his impaired verbal memory, his limited verbal knowledge and reasoning, and his mental rigidity raise the possibility of deficits in several of these areas (for example, communication, social/interpersonal, self-direction).

During the post-conviction hearing, Dr. Auble also testified that the standard for intellectual disability pursuant to Tennessee statute differed from the standard set forth in other sources.

The Petitioner was also evaluated by Dr. George Woods, a neuropsychiatrist. Dr. Woods interviewed the Petitioner, administered testing, and reviewed many of the same records reviewed by Dr. Auble. Dr. Woods did not administer I.Q. testing but relied upon the results obtained by Dr. Auble.

Dr. Woods testified during post-conviction proceedings on September 17 and November 5, 2004. He stated that although the Petitioner's I.Q. score of 75 did not meet the legal standards of intellectual disability, the score fell within the range of intellectual disability set forth by the American Association of Mental Retardation and the Diagnostic and Statistical Manual. Dr. Woods

> also stated that the Petitioner had brain impairments that were "greater than what a 75 IQ could predict."

On October 1, 2008, the post-conviction court entered an order denying post-conviction relief. This Court affirmed the post-conviction court's judgment on appeal. *See Vincent Sims v. State,* No. W2008-02823-CCA-R3-PD, 2011WL334285, at *1 (Tenn. Crim. App. Jan. 28, *2011), perm. app. denied* (Tenn. Aug. 31, 2011).

Prior Intellectual Disability Proceedings

On April 9, 2012, the Petitioner filed a motion to reopen his post-conviction petition. *See Vincent Sims,* 2014 WL 7334202, at *4. He alleged that he was ineligible for the death penalty because he is intellectually disabled. *Id.* The Petitioner asserted 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 the trial. *See id.* He also asserted that new scientific evidence established that he is intellectually disabled and, therefore, "actually innocent" of capital murder and the death penalty. *Id.*

In support of his claims, the Petitioner relied upon an affidavit from Dr. Auble dated April 5, 2012. *Id.* This Court summarized Dr. Auble's affidavit as follows:

> Dr. Auble stated that she performed a neuropsychological evaluation on the Petitioner in 2002 and 2003. She said that in evaluating the Petitioner, she considered the results of testing that she administered,

testimony from the post-conviction hearing, medical records, school records, the Tennessee Supreme Court's opinion on direct appeal, the Petitioner's pre-sentence report, and a timeline. Dr. Auble stated that at the time she conducted the evaluation, she understood that Tennessee courts required a raw test score of 70 or below before an expert could opine that an individual had significantly subaverage general intellectual functioning as provided in Tennessee Code Annotated section 39-13-203(a)(l).

Dr. Auble quoted from her 2004 report in which she stated the Petitioner's full scale I.Q. score of 75 on the WAIS-III would not meet the current legal criteria for intellectual disability as defined by Tennessee statute and the DSM-IV provided that intellectual disability could be diagnosed with a full scale score of 75 on the Wechsler tests because there is a measurement error of five points on the scale. Dr. Auble said that she understood that the Tennessee Supreme Court abandoned the "bright line requirements" of a raw test l.Q. score of 70 or below in Coleman. As a result, she re-analyzed the information that she had available in 2004 and supplemented it with additional information that she obtained in examining the Petitioner's adaptive deficits.

Dr. Auble adjusted the Petitioner's I.Q. score of 75 based upon the Flynn Effect and the errors in the nonnative sample on the WAIS-III. These adjustments resulted in a

full scale l.Q. of 70.26. She also considered the five-point measurement error on the WAIS-III. Dr. Auble noted that the 95% confidence interval for an I.Q. test score of 70 would be 67-75 and that the 95% confidence interval for an I.Q. test score of 71 would be 68-76. Dr. Auble stated that intellectual disability can be diagnosed with intelligence test scores that are above 70 if the range of error of the test includes an I.Q. of 70 or below, and there is corollary evidence of other impairments in intelligent or adaptive functioning. She noted that in the Petitioner's case, there is evidence of significant adaptive deficits and significant deficits on tests measuring intelligent functioning. As a result, Dr. Auble opined that the Petitioner has significant subaverage general intellectual functioning as evidenced by a functional I.Q. of 70 or below and meets the first prong of intellectual disability set forth in the Tennessee statute.

Dr. Auble stated that in 2004, she did not conduct a formal evaluation of adaptive behavior deficits. She administered the Independent Living Scale to the Petitioner on March 19, 2012. Dr. Auble determined that the Petitioner had significant adaptive deficits under the DSM-IV criteria in the areas of communication, social/interpersonal skills, self-direction, and functional academic skills. She found that the Petitioner had mild impairments in home living, work, and health and safety. Dr. Auble determined that the

> Petitioner had significant adaptive deficits under the AAIDD criteria in the conceptual and social domains. She further determined that the Petitioner's intellectual impairments have been present since early childhood. Accordingly, Dr. Auble concluded the Petitioner met the criteria for intellectual disability provided in the Tennessee statute.

Id. at *4-5.

In December 2012, following the release of *Keen v. State,* 398 S.W.3d 594 (Tenn. 2012), in which the Tennessee Supreme Court rejected the basis upon which the Petitioner sought to reopen his post-conviction petition, the Petitioner amended his motion to include a petition for writ of error coram nobis and an independent claim of relief under Tennessee's intellectual disability statute. *Vincent Sims,* 2014 WL 7334202, at *5. The trial court subsequently entered an order denying the Petitioner relief. *Id.*

The Petitioner filed an application for permission to appeal the trial court's denial of his motion to reopen his post-conviction petition, pursuant to Supreme Court Rule 28. This Court denied the Petitioner's application for permission to appeal, concluding that his claims in his motion to reopen were precluded by *Keen*. *See Vincent Sims v. State,* No. W2013-02594-CCA-R28-PD (Tenn. Crim. App. Feb. 5, 2014) (order), *perm. app. denied* (Tenn. May 28, 2014).

The Petitioner also filed a notice of appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure of the trial court's denial of his

coram nobis petition and claim for relief under the Tennessee intellectual disability statute. This Court upheld the trial court's order on appeal. *See Vincent Sims,* 2014 WL 7334204, at *l. This Court rejected the Petitioner's claim that he was entitled to due process tolling of his untimely coram nobis petition and his argument that his intellectual disability claim first became available for presentation following our supreme court's opinion in *Coleman. Id.* at *9-12. This Court held in part that

> the information in Dr. Auble's affidavit was available for presentation prior to *Coleman.* Nothing prevented the Petitioner from presenting during post-conviction proceedings 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."

Id. at *11.

This Court also addressed the impact of the United States Supreme Court's decision in *Hall v. Florida,* 134 S.Ct. 1986 (2014). *See Vincent Sims,* 2014 WL 7334202, at *11. After summarizing the holding in *Hall,* this Court stated that "[u]nlike 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." *Id.* The Tennessee Supreme Court denied the Petitioner's application for permission to appeal on May 18, 2015.

Motion to Reopen Based on *Hall v. Florida*

In May 2015, the Petitioner filed a motion to reopen his petition for post-conviction relief in which he contended that *Hall v. Florida* created a new rule of constitutional law that applies retroactively pursuant to Tennessee Code Annotated section 40-30-1l7(a)(l). The Petitioner attached to his motion an affidavit from Dr. Auble dated May 5, 2015. This affidavit is similar to Dr. Auble's affidavit which was attached to the Petitioner's 2012 motion to reopen. On July 6, 2015, the State filed a response in opposition to the Petitioner's motion. On August 10, 2015, the post-conviction court entered an order denying the motion.

Analysis

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

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense

> or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann.§ 40-30-117(a).

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

In 1990, the General Assembly enacted Tennessee Code Annotated section 39-13-203, which prohibits the execution of defendants who were intellectually disabled at the time that they committed first degree murder. The statute sets forth

the following three criteria for establishing intellectual disability:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (1.Q.) of seventy 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).

In December 2001, the Tennessee Supreme Court held that the execution of intellectually disabled individuals violates the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution. *Van Tran v. State,* 66 S.W.3d 790, 792 (Tenn. 2001). The court concluded that its holding under article 1, § 16 constituted a new rule of constitutional law that warranted retroactive application. *Id.* at 811.

In June 2002, the United States Supreme Court likewise held that the execution of intellectually disabled individuals constituted cruel and unusual punishment in violation of the Eighth Amendment. *Atkins v. Virginia,* 536 U.S. 304, 321 (2002). The Court, however, left to the states "'the task of developing appropriate ways to enforce the constitutional restriction.'" *Id.* at 317 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405 (1986)).

In 2004, the Tennessee Supreme Court released *State v. Howell,* holding 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. The court rejected the

claim that an I.Q. score of seventy "should be interpreted, under our statute, to include a range of scores between sixty-five and seventy-five" based on a standard error of measurement of five points." *Id.* at 457-58.

In 2011, the Tennessee Supreme Court held in *Coleman v. State,* 341 S.W.3d 221, 241 (Tenn. 2011), that although an individual's I.Q. is generally obtained through standardized intelligence tests, section 39-13-203 does not specify how an I.Q. should be determined or the particular test or testing method that should be utilized. Noting that section 39-13-203(a)(l) only requires a "functional intelligence quotient" of 70 or below and not a "functional intelligence quotient *test score*" of 70 or below, the court held that "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." *Coleman,* 341 S.W.3d at 241 (emphasis in original). Unlike clinical practice, section 39-13-203(a)(l) prohibits the expression of a defendant's I.Q. within a range. *Id.* at 242, 247. Rather, the expert's opinion "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 formulating an opinion regarding a defendant's functional I.Q., experts may rely upon relevant and reliable practices, methods, standards, and data. *Id.* 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 one 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.

The Tennessee Supreme Court in *Keen v. State,* 398 S.W.3d 594 (Tenn. 2012), addressed whether a petitioner sentenced to death may allege intellectual disability as a basis for reopening post-conviction proceedings. Keen sought to reopen post-conviction proceedings, claiming new scientific evidence of actual innocence. *Keen,* 398 S.W.3d at 598. This new evidence was a newly-obtained I.Q. score of 67, which Keen claimed established that he was intellectually disabled and, therefore, "actually innocent" of the offense of first degree murder. *Id.* Keen also argued that *Coleman* established a new rule of constitutional law that should be required retroactively. *Id.* at 599. Our supreme court rejected both of these arguments. The court 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 also 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 Keen failed to meet the requirements for reopening his post-conviction proceedings. *Id.*

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

> Regrettably, several courts misconstrued our holding in *Howell* that Tenn. Code Ann. § 39-13-203(a)(l) 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 pain 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" considering the petitioner's I.Q.

Id. at 603 (citations omitted) (emphasis in original). Keen requested that the supreme 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, however, rejected Keen's request and noted that Coleman and Smith, unlike Keen, took advantage of the one-year window for seeking relief following the recognition of the constitutional prohibition against executing intellectual disabled defendants in *Van Tran* and *Atkins. Keen,* 398 S.W.3d at 613. Keen failed to avail himself of that opportunity. *Id.*

In *Hall v. Florida, 134* S.Ct. 1986 (2014), the United States Supreme Court held that the 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 raw I.Q. test score of 70 without considering the standard error of measurement. *Hall,* 134 S.Ct. at 1995-2000.

The Court noted that Florida's rule disregarded established medical practice by (1) considering "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence"; and (2) relying upon a "purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995. The Court further noted that the "inherent error in IQ testing" was acknowledged in *Atkins. Id.* at 1998. In *Atkins,* the Court cited to definitions of intellectual disability which rejected a strict IQ test score cutoff of70. *Id.* at 1998-99 (citing *Atkins,* 536 U.S. at 308 n.3, 309 n.5, 317). The Court in *Hall* stated that the Florida courts' interpretation of its intellectual disability statute ran "counter to

the clinical definition cited throughout *Atkins.*" *Id.* at 1999.

While the Court acknowledged that "the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed," the Court stated that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998. Rather, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999.

The Court held that the Florida courts' interpretation of its intellectual disability statute "'goes against the unanimous professional consensus'" by failing to take into account the standard error of measurement and setting a strict I.Q. score cutoff at 70. *Id.* at 2000. The Court agreed "with medical experts 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." *Id.* at 2001.

We note that Tennessee was not listed in *Hall* as one of the nine states that mandate a strict I.Q. score cutoff at 70. Moreover, the Tennessee Supreme Court recently held that Tennessee's intellectual disability statute, "as currently interpreted," is "constitutionally sound under the Eighth Amendment." *State v. Rickey Alvis Bell,* _ S.W.3d _,

2015 WL 5297587 (Tenn. 2015). The Court explained that "unlike the Florida Supreme Court, we have not interpreted our statute to bar the presentation of other proof of a defendant's intellectual disability in the event that the defendant cannot produce a raw I.Q. test score of less than 71." *Id.*

We must determine whether *Hall* announced a new constitutional right that was not recognized at the time of trial and whether *Hall* should be applied retroactively. *See* Tenn. Code Ann. § 40-30-ll 7(a)(l). For purposes of post-conviction proceedings, Tennessee Code Annotated section 40-30-122 provides that "a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." This standard is similar to the standard announced in *Teague v. Lane,* in that a case establishes a new rule of constitutional law "when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put if differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane,* 489 U.S. 288, 301 (1989); *see Desist v. United States,* 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (distinguishing between "whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

We note that the United States Court of Appeals for the Eleventh Circuit has concluded that *Hall* announced a new rule of constitutional law. *See In re Henry,* 757 F.3d 1151, 1158 (11th Cir. 2014). The court reasoned that in *Hall,* "the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled." *Id.* The Eleventh Circuit noted that the Court in *Hall* explained that the basis for its holding stretched beyond *Atkins* alone. *Id.* (citing *Hall,* 134 S.Ct. at 1999-2000). The Eleventh Circuit held:

> Nothing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff. This is plainly a new obligation that was never before imposed on the states, under the clear language of *Atkins,* and of *Hall* itself.

Id.

We note, however, that the Supreme Court held in *Hall* that Florida courts "misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Hall,* 134 S.Ct. at 2001. The Court in *Hall* relied extensively upon *Atkins* in striking down the strict I.Q. test score cutoff at 70 as unconstitutional. The Court in *Hall* noted that *Atkins* "itself acknowledges that the inherent error in IQ testing" and that *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 1998 (citing *Atkins,* 536

U.S. at 308 n.3, 309 n.5). The Court in *Hall* further explained, "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins.*" *Id.* at 1999.

Accordingly, it does not appear that *Hall* announced a new rule. Rather, *Hall* appears to have clarified provisions in *Atkins* that the Florida courts had misconstrued. Regardless of whether *Hall* established a new rule of constitutional law, however, we conclude that the rule does not apply retroactively.

Tennessee Code Annotated section 40-30-122 provides:

> A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

The Tennessee Supreme Court recently held that this provision applies in determining the retroactivity of new constitutional rules in post-conviction proceedings. *Bush v. State,* 428 S.W.3d 1, 16 (Tenn. 2014). While *Hall* addresses provisions of the United States Constitution, "the states are not 'bound by federal retroactivity analysis when a new federal rule is involved.'" *Id.* at 13 n.6; *see Danforth v. Minnesota,* 552 U.S. 264, 288 (2008). Moreover, the retroactivity standard in section 40-30-122 is similar to the federal

standard of *Teague v. Lane,* 489 U.S. 288, 307 (1989). *Bush,* 428 S.W.3d at 19-20.

In examining whether a rule that "places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" pursuant to Tennessee Code Annotated section 40-30-122, our supreme court has noted that

> [e]xamples of this type of rule include *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), in which the United States Supreme Court held that states could not criminalize homosexual intercourse between consenting adults, and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in which the United States Supreme Court held that states could not in most cases criminally penalize doctors for performing early-term abortions.

Bush, 428 S.W.3d at 17.

In *Penry v. Lynaugh,* 492 U.S. 302, 330 (1989), in which the United States Supreme Court held that retroactivity applies to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Hall,* however, only provides a new procedure "for ensuring that States do not execute members of an already protected group." *In re Henry,* 757 F.3d at 1161. The class protected by *Hall,* those with intellectual disabilities, is the same class protected by *Atkins. See Hall,* 134 S.Ct. at 1990 (citing to the holding in *Atkins* that the ·execution of intellectually disabled defendants violated the United States Constitution and holding that Florida's "rigid rule ... creates an

unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional"). *Hall* did not expand this already protected class but rather, "limited the states' power to define the class because the state definition did not protect the intellectually disabled as understood in *Atkins.*" *In re Henry,* 757 F.3d at 1161(citing *Hall*, 134 S.Ct. at 1986).

Even if *Hall* expanded the class described in *Atkins, Hall* did not categorically place the class beyond the state's power to execute. *Id.* Instead, *Hall* created a "procedural requirement that those with IQ test scores within the test's standard error would have the *opportunity* to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief." *Id.* (emphasis in original). Accordingly, *Hall* does not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *See* Tenn. Code Ann. § 40-30-122.

We next must determine whether the holding in *Hall* "requires the observance of fairness safeguards that are implicit in the concept of ordered liberty." *See id.* In this context, "safeguards" refer to "criminal procedural rules designed to guard against defendants being denied their due process right to a fundamentally fair adjudication of guilt." *Bush,* 428 S.W.3d at 18. Not all constitutionally-derived "fairness safeguards," however, warrant retroactive application in post-conviction cases. *Id.* Only those "fairness safeguards" that are "implicit in the concept of ordered liberty" are to be applied retroactively. *See* Tenn. Code Ann. § 40-30-122; *Bush,* 428 S.W.3d at 18.

The Tennessee Supreme Court has held that the General Assembly intended that the phrase "fairness safeguards that are implicit in the concept of ordered liberty" should be interpreted in a manner similar to the federal standard for retroactivity set forth in *Teague v. Lane,* 489 U.S. 288 (1989). *Bush,* 428 S.W.3d at 20. The "fairness safeguards" in section 40-30-122 are "equivalent to the *Teague v. Lane* standard's 'watershed rules of criminal procedure' or 'those new procedures without which the likelihood of an accurate conviction is seriously diminished.'" *Id.* (quoting *Teague,* 489 U.S. at 313).

Accordingly, we must give retroactive effect to "only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004) (quoting *Saffle* v. *Parks,* 494 U.S. 484, 495 (1990); *Teague,* 489 U.S. at 311). The fact that a new rule is "'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague,* 489 U.S. at 313) (emphasis in original). The United States Supreme Court has recognized that this class of rules is "extremely narrow, and 'it is unlikely that any ... ha[s] yet to emerge.'" *Id.* (quoting *Tyler* v. *Cain,* 533 U.S. 656, 667 n. 7 (2001); *Sawyer v. Smith,* 497 U.S. 227, 243 (1990)).

To qualify as a watershed rule of criminal procedure, a new rule must meet two requirements. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction .... Second, the rule must alter our understanding of the bedrock procedural elements essential to the

fairness of a proceeding." *Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (internal citations and quotation marks omitted).

The United States Supreme Court has acknowledged that

> in the years since *Teague,* we have rejected every claim that a new rule satisfied the requirements for watershed status. *See, e.g., Summerlin,* [542 U.S. at 352] (rejecting retroactivity for *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)); *Beard v. Banks,* 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (rejecting retroactivity for *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *O'Dell [v. Netherland,* 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997)] (rejecting retroactivity for *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)); *Gilmore v. Taylor,* 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v. Smith,* 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (rejecting retroactivity for *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)).

Id.

The only case in which the United States Supreme Court has identified as qualifying under this exception is *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). *See Whorton,* 549 U.S at 419. In *Gideon,* the Court held that counsel must be appointed for any

indigent defendant charged with a felony. *Gideon,* 372 U.S. at 344-45. The Court explained that when an indigent defendant who seeks representation is denied such representation, an intolerably high risk of an unreliable verdict exists. *Id.; see Whorton,* 549 U.S. at 419.

The rule announced in *Hall* is not comparable to the rule announced in *Gideon.* The rule in *Hall* has a much more limited scope, and the relationship of the rule to the accuracy of the fact-finding process is less direct and profound. The issue is not whether *Hall* resulted in a net improvement in the accuracy of fact-finding in criminal cases. *See Whorton,* 549 U.S. at 420. Rather, the question is whether the *Hall* rule is "one without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* (citations omitted) (emphasis in original). *Hall* did not result in a change of this magnitude.

Hall also did not "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer,* 497 U.S. 242 (emphasis in original). It is insufficient to simply show that a rule is "*based* on a 'bedrock' right." *Whorton,* 549 U.S. at 420-21 (emphasis in original). Rather, in order to meet this requirement, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. In applying this requirement, the Supreme Court has looked to *Gideon* as an example and has not "'hesitated to hold that less sweeping and fundamental rules' do not qualify." *Id.* (quoting *Beard,* 542 U.S. at 418).

Hall did not expand the class already protected by *Atkins, i.e.,* defendants who are intellectually disabled. Instead, *Hall* limited the power of the states to define that class. Accordingly, *Hall* did not "alter[ ] our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *See id.; Sawyer,* 497 U.S. at 242.

The Petitioner has failed to establish that *Hall* applies retroactively to petitioners in post-conviction proceedings. Therefore, he may not rely upon *Hall* as a basis for reopening his petition for post-conviction relief.[1]

The Petitioner has failed to demonstrate that he is entitled to reopen his post-conviction petition pursuant to Tennessee Code Annotated section 40-30-117(a). IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because the Petitioner is indigent, costs of the appeal are taxed to the State.

/s/ John Everett Williams

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[1] The Petitioner also challenges the post-conviction court's finding that even if Hall created a new constitutional right that must be applied retroactively, the principles established in Hall were not violated during the initial post-conviction proceeding. Because we have concluded that Hall did not establish a new constitutional right and that Hall is not afforded retroactive application, we need not address the issue.

John Everett Williams,
Judge

/s/ Alan E. Glenn
Alan E. Glenn, Judge

CAMILLE R. McMULLEN, JUDGE, dissenting

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

VINCENT SIMS v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P25898

No. W2015-01713-CCA-R28-PD
Filed Jan 28 2016

CAMILLE R. MCMULLEN J., dissenting.

For many of the reasons stated in my dissenting opinion in *Pervis Tyrone Payne v. State*, No. W2013-01248-CCA-R3-PD, 2014 WL 5502365 (Tenn. Crim. App. Oct. 30, 2014) (McMullen, J., concurring in part and dissenting in part), *perm. app. granted* (Tenn. Feb. 13, 2015), I respectfully dissent from the majority's conclusion in this case. As *Payne* is currently under review by the Tennessee Supreme Court, I would hold resolution of this case in abeyance.

/s/ Camille R. McMullen

Camille R. McMullen, Judge

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

MICHAEL EUGENE SAMPLE v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P14252

No. W2015-00713-CCA-R28-PD
Filed Jul 01 2015

ORDER

This matter is before the Court on the Petitioner Michael Eugene Sample's application for permission to appeal the post-conviction court's order denying his motion to reopen his post-conviction petition. The Petitioner relies upon the United States Supreme Court's decision in *Hall* v. *Florida,* 134 S.Ct. 1986 (2014), and the Tennessee Supreme Court's decision in *State v. Jones,* 450 S.W.3d 866 (Tenn. 2014), in seeking to reopen post-conviction proceedings. The State has filed a response in opposition.

Procedural History

Following a jury trial, the Petitioner and his co-defendant, Larry McKay, each were convicted of two counts of first degree felony murder in connection with the 1981 armed robbery and shooting deaths of Benjamin Cooke and Steve Jones. Both the Petitioner and McKay were sentenced to death. In sentencing

the Petitioner to death, the jury found three aggravating circumstances: (1) that the Petitioner created a great risk of death to two or more persons other than the victims who were murdered; (2) that he committed the murders to avoid, interfere with, or prevent a lawful arrest or prosecution; and (3) that the murders were committed in the course of committing a felony. *See Sample v. State,* 82 S.W.3d 267, 269 (Tenn. 2002) (citing Tenn. Code Ann. § 39-2404(i)(3), (6), (7) (Supp. 1981)). The Tennessee Supreme Court affirmed the Petitioner's convictions and sentence on direct appeal. *See State v. McKay,* 680 S.W.2d 447 (Tenn. 1984). The United States Supreme Court denied certiorari on March 4, 1985. *See Sample v. Tennessee,* 4 70 U.S. 1034 (1985).

The Petitioner has filed numerous petitions for post-conviction relief, all of which the post-conviction court denied. This Court upheld the post-conviction court's judgment on appeal. *See State v. Larry McKay and Michael Eugene Sample,* No. 02C01-9506-CR-00175, 1996 WL 417664, at *1 (Tenn. Crim. App. July 26, *1996),perm. app. denied* (Tenn. Dec. 2, 1996); *Michael E. Sample and Larry McKay v. State,* No. 02C01-9104-CR-00062, 1995 WL 66563, at *1 (Tenn. Crim. App. Feb. 15, *1995),perm. app. denied* (Tenn. Jan. 27, 1997).

In January 1995, the Petitioner filed another petition for post-conviction relief. The post-conviction court dismissed the petition because the Petitioner had an appeal from the denial of a prior post-conviction petition pending in this Court. *See Michael Eugene Sample v. State,* No. 02C01-9505-CR-000131, 1996 WL 551754, at *1 (Tenn. Crim. App. Sept. 30, 1996), *perm. app. denied* (Tenn. Jan. 27, 1997). On

appeal, this Court reversed the post-conviction court's judgment and remanded the case for further proceedings. *Id.* On remand, the post-conviction court again dismissed the Petitioner's petition, and this Court upheld the dismissal on appeal. *See Michael Eugene Sample and Larry McKay,* No. W1999-01202-CCA-R3-PC, 2001 WL 43381, at* 1 (Tenn. Crim. App. Jan. 17, 2001). The Tennessee Supreme Court granted the Petitioner's application for permission to appeal, reversed the dismissal of the Petitioner's post-conviction petition, and remanded the case to the post-conviction court for further proceedings. *Sample v. State,* 82 S.W.3d 267, 268 (Tenn. 2002). On remand, the post-conviction court again denied the Petitioner relief, and this Court affirmed the post-conviction court's judgment on appeal. *Michael Eugene Sample v. State,* No. W2008-02466-CCA-R3-PD, 2010 WL 2384833, at *7 (Tenn. Crim. App. June 15, 2010), *perm. app. denied* (Tenn. Nov. 12, 2010).

On August 13, 2014, the Petitioner filed a motion to reopen his petition for post-conviction relief in which he contended that (1) *Hall v. Florida,* 134 S.Ct. 1986 (2014), created a new rule of constitutional law that applies retroactively under Tennessee Code Annotated section 40-30-117(a)(l); and (2) an affidavit from a mental health expert who concluded that the Petitioner is intellectually disabled constitutes new scientific evidence of actual innocence under section 40-30-117(a)(2). The Petitioner subsequently amended his motion to include a claim based upon the Tennessee Supreme Court's opinion in *State v. Jones,* 450 S.W.3d 866 (Tenn. 2014). On November 10, 2014, the State filed a response in opposition to the Petitioner's motion and amended motion. On

March 24, 2015, the post-conviction court entered an order denying the motion to reopen and the amendment.

Analysis

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

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling

> holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

Tenn. Code Ann. § 40-30-117(a).

In his application filed in this Court, the Petitioner relies upon the decisions in *Hall v. Florida* and *State v. Jones* in seeking to reopen his post-conviction petition. The Petitioners does not claim in this Court that the affidavit of a mental health professional who concluded that the Petitioner is intellectual disabled constitutes new scientific evidence of actual innocence under section 40-30-117(a)(2). Nevertheless, we note that in *Keen v. State,* 398 S.W.3d 594, 613 (Tenn. 2012), the Tennessee Supreme Court rejected this claim as a basis for reopening a post-conviction petition.

A. *Hall v. Florida*

The Petitioner contends that the United States Supreme Court's opinion in *Hall v. Florida,* 134 S.Ct. 1986 (2014), established a "constitutional right that was not recognized as existing at the time of trial" and that "retrospective application of that right is required." *See* Tenn. Code Ann. § 40-30-l l 7(a)(l). The Petitioner maintains that as a result of the Court's decision in *Hall,* he is intellectually disabled and, therefore, ineligible for the death penalty.

In 1990, the General Assembly enacted Tennessee Code Annotated section 39-13-203, which prohibits the execution of defendants who were

intellectually disabled at the time that they committed first degree murder. The statute sets forth the following three criteria for establishing intellectual disability:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy 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).

In December 2001, the Tennessee Supreme Court held that the execution of intellectually disabled individuals violates the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution. *Van Tran v. State,* 66 S.W.3d 790, 792 (Tenn. 2001). The court concluded that its holding under article 1, § 16 constituted a new rule of constitutional law that warranted retroactive application. *Id.* at 811.

In June 2002, the United States Supreme Court likewise held that the execution of intellectually disabled individuals constituted cruel and unusual punishment in violation of the Eighth Amendment. *Atkins v. Virginia,* 536 U.S. 304, 321 (2002). The Court, however, left to the states '"the task of developing appropriate ways to enforce the constitutional restriction."' *Id.* at 317 (quoting *Ford v. Wainwright,* 477 U.S. 399, 405 (1986)).

The Tennessee Supreme Court has issued several opinions within the past few years addressing

the application of the first criteria requiring "[s]ignificantly subaverage general intellectual functioning as evidence by a functional intelligent quotient (I.Q.) of seventy (70) or below." *See* Tenn. Code Ann. § 39-13-203(a)(l). In 2004, the Tennessee Supreme Court released *State v. Howell,* holding 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. In 2011, the Tennessee Supreme Court held in *Coleman v. State,* 341 S.W.3d 221, 241 (Tenn. 2011), that although an individual's I.Q. is generally obtained through standardized intelligence tests, section 39-13-203 does not specify how an I.Q. should be determined or the particular test or testing method that should be utilized. Noting that section 39-13-203(a)(l) only requires a "functional intelligence quotient" of 70 or below and not a "function intelligence quotient *test score*" of 70 or below, the court held that "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." *Coleman,* 341 S.W.3d at 241 (emphasis in original). Unlike clinical practice, section 39-13-203(a)(l) prohibits the expression of a defendant's I.Q. within a range. *Id.* at 242, 24 7. Rather, the expert's opinion "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 formulating an opinion regarding a defendant's functional I.Q., experts may rely upon relevant and reliable practices, methods, standards, and data. *Id.* 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 one 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 in *Keen v. State,* 398 S.W.3d 594 (Tenn. 2012), addressed whether a petitioner sentenced to death may allege intellectual disability as a basis for reopening post-conviction proceedings. Keen sought to reopen post-conviction proceedings, claiming new scientific evidence of actual innocence. *Keen,* 398 S.W.3d at 598. This new evidence was a newly-obtained I.Q. score of 67, which Keen claimed established that he was intellectually disabled and, therefore, "actually innocent" of the offense of first degree murder. *Id.* Keen also argued that *Coleman*

established a new rule of constitutional law that should be required retroactively. *Id.* at 599. Our supreme court rejected both of these bases. The court 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 also 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 Keen failed to meet the requirements for reopening his post-conviction proceedings. *Id.*

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

> Regrettably, several courts misconstrued our holding in *Howell* that Tenn. Code Ann. § 39-13-203(a)(l) 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 pain 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" considering the petitioner's I.Q.

Id. at 603 (citations omitted) (emphasis in original). Keen requested that the supreme 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.W3d 322, 354-55 (Tenn. 2011); *Coleman,* 341 S.W3d at 252-53. The court, however, rejected Keen's request and noted that Coleman and Smith, unlike Keen, took advantage of the one-year window for seeking relief following the recognition of the constitutional prohibition against executing intellectual disabled defendants in *Van Tran* and *Atkins. Keen,* 398 S.W3d at 613. Keen failed to avail himself of that opportunity. *Id.*

In *Hall v. Florida,* 134 S.Ct. 1986 (2014), the United States Supreme Court held that the 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 raw I.Q. test score of 70 without considering the standard error of measurement. *Hall,* 134 S.Ct. at 1995-2000.

The Court noted that Florida's rule disregarded established medical practice by (1) considering "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence"; and (2) relying upon a "purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." *Id.* at 1995. The Court further noted that the "inherent error in IQ testing" was acknowledged in *Atkins. Id.* at 1998. In *Atkins,* the Court cited to

definitions of intellectual disability which rejected a strict IQ test score cutoff of 70. *Id.* at 1998-99 (citing *Atkins,* 536 U.S. at 308 n.3, 309 n.5, 317). The Court in *Hall* stated that the Florida courts' interpretation of its intellectual disability statute ran "counter to the clinical definition cited throughout *Atkins.*" *Id.* at 1999.

While the Court acknowledged that "the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed," the Court stated that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 1998. Rather, "[i]f the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999.

The Court held that the Florida courts' interpretation of its intellectual disability statute '"goes against the unanimous professional consensus"' by failing to take into account the standard error of measurement and setting a strict I.Q. score cutoff at 70. *Id.* at 2000. The Court agreed "with medical experts 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." *Id.* at 2001. We note that Tennessee was not listed in *Hall* as one of the nine states that mandate a strict I.Q. score cutoff at 70.

We must determine whether *Hall* announced a new constitutional right that was not recognized at the time of trial and whether *Hall* should be applied retroactively. *See* Tenn. Code Ann. § 40-30-117(a)(l). For purposes of post-conviction proceedings, Tennessee Code Annotated section 40-30-122 provides that "a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds." This standard is similar to the standard announced in *Teague v. Lane,* in that a case establishes a new rule of constitutional law "when it breaks new ground or imposes a new obligation on the States or the Federal Government. ... To put if differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane,* 489 U.S. 288, 301 (1989); *see Desist v. United States,* 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (distinguishing between "whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law").

We note that the United States Court of Appeals for the Eleventh Circuit has concluded that *Hall* announced a new rule of constitutional law. *See In re Henry,* 757 F.3d 1151, 1158 (11th Cir. 2014). The court reasoned that in *Hall,* "the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states'

previously recognized power to set procedures governing the execution of the intellectually disabled." *Id.* The Eleventh Circuit noted that the Court in *Hall* explained that the basis for its holding stretched beyond *Atkins* alone. *Id.* (citing *Hall,* 134 S.Ct. at 1999-2000). The Eleventh Circuit held:

> Nothing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff. This is plainly a new obligation that was never before imposed on the states, under the clear language of *Atkins,* and of *Hall* itself.

Id.

We note, however, that the Supreme Court held in *Hall* that Florida courts "misconstrue[d] the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'" *Hall,* 134 S.Ct. at 2001. The Court in *Hall* relied extensively upon *Atkins* in striking down the strict I.Q. test score cutoff at 70 as unconstitutional. The Court in *Hall* noted that *Atkins* "itself acknowledges that the inherent error in IQ testing" and that *Atkins* "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 1998 (citing *Atkins,* 536 U.S. at 308 n.3, 309 n.5). The Court in *Hall* further explained, "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins.*" *Id.* a 1999.

Accordingly, it does not appear that *Hall* announced a new rule. Rather, *Hall* appears to have

clarified provisions in *Atkins* that the Florida courts had misconstrued. Regardless of whether *Hall* established a new rule of constitutional law, however, we conclude that the rule does not apply retroactively.

Tennessee Code Annotated section 40-30-122 provides:

> A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

The Tennessee Supreme Court recently held that this provision applies in determining the retroactivity of new constitutional rules in post-conviction proceedings. *Bush* v. *State,* 428 S.W.3d 1, 16 (Tenn. 2014). While *Hall* addresses provisions of the United States Constitution, "the states are not 'bound by federal retroactivity analysis when a new federal rule is involved.'" *Id.* at 13 n.6; *see Danforth* v. *Minnesota,* 552 U.S. 264, 288 (2008). Moreover, the retroactivity standard in section 40-30-122 is similar to the federal standard of *Teague* v. *Lane,* 489 U.S. 288, 307 (1989). *Bush,* 428 S.W.3d at 19-20.

The Petitioner contends that the holding in *Hall* is a rule that "places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Tenn. Code Ann. § 40-30-122. Our supreme court has noted that

> [e]xamples of this type of rule include *Lawrence* v. *Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), in which the United States Supreme Court held that states could not criminalize homosexual intercourse between consenting adults, and *Roe* v. *Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), in which the United States Supreme Court held that states could not in most cases criminally penalize doctors for performing early-term abortions.

Bush, 428 S.W.3d at 17.

The Petitioner relies upon *Penry* v. *Lynaugh,* 492 U.S. 302, 330 (1989), in which the United States Supreme Court held that retroactivity applies to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Hall,* however, only provides a new procedure "for ensuring that States do not execute members of an already protected group." *In re Henry,* 757 F.3d at 1161. The class protected by *Hall,* those with intellectual disabilities, is the same class protected by *Atkins. See Hall,* 134 S.Ct. at 1990 (citing to the holding in *Atkins* that the execution of intellectually disabled defendants violated the United States Constitution and holding that Florida's "rigid rule ... creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional"). *Hall* did not expand this already protected class but rather, "limited the states' power to define the class because the state definition did not protect the intellectually disabled as understood in

Atkins." *In re Henry,* 757 F.3d at 1161 (citing *Hall,* 134 S.Ct. at 1986).

Even if *Hall* expanded the class described in *Atkins, Hall* did not categorically place the class beyond the state's power to execute. *Id.* Instead, *Hall* created a "procedural requirement that those with IQ test scores within the test's standard error would have the *opportunity* to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief." *Id.* (emphasis in original). Accordingly, *Hall* does not place "primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *See* Tenn. Code Ann. § 40-30-122.

We next must determine whether the holding in *Hall* "requires the observance of fairness safeguards that are implicit in the concept of ordered liberty." *See id.* In this context, "safeguards" refer to "criminal procedural rules designed to guard against defendants being denied their due process right to a fundamentally fair adjudication of guilt." *Bush,* 428 S.W.3d at 18. Not all constitutionally-derived "fairness safeguards," however, warrant retroactive application in post-conviction cases. *Id.* Only those "fairness safeguards" that are "implicit in the concept of ordered liberty" are to be applied retroactively. *See* Tenn. Code Ann. § 40-30-122; *Bush,* 428 S.W.3d at 18.

Our supreme court has held that the General Assembly intended that the phrase "fairness safeguards that are implicit in the concept of ordered liberty" should be interpreted in a manner similar to the federal standard for retroactivity set forth in *Teague v. Lane,* 489 U.S. 288 (1989). *Bush,* 428

S.W.3d at 20. The "fairness safeguards" in section 40-30-122 are "equivalent to the *Teague v. Lane* standard's 'watershed rules of criminal procedure' or 'those new procedures without which the likelihood of an accurate conviction is seriously diminished.'" *Id.* (quoting *Teague,* 489 U.S. at 313).

Accordingly, we must give retroactive effect to "only a small set of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Schriro v. Summerlin,* 542 U.S. 348, 352 (2004) (quoting *Saffle v. Parks,* 494 U.S. 484, 495 (1990); *Teague,* 489 U.S. at 311). The fact that a new rule is "'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague,* 489 U.S. at 313) (emphasis in original). The United States Supreme Court has recognized that this class of rules is "extremely narrow, and 'it is unlikely that any ... ha[s] yet to emerge.'" *Id.* (quoting *Tyler v. Cain,* 533 U.S. 656, 667 n. 7 (2001); *Sawyer v. Smith,* 497 U.S. 227, 243 (1990)).

To qualify as a watershed rule of criminal procedure, a new rule must meet two requirements. "First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction .... Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting,* 549 U.S. 406, 418 (2007) (internal citations and quotation marks omitted).

The United States Supreme Court has acknowledged that

> in the years since *Teague,* we have rejected every claim that a new rule satisfied the requirements for watershed status. *See, e.g., Summerlin,* [542 U.S. at 352] (rejecting retroactivity for *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)); *Beard v. Banks,* 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (rejecting retroactivity for *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988)); *O'Dell* [v. *Netherland,* 521U.S.151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997)] (rejecting retroactivity for *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)); *Gilmore v. Taylor,* 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993) (rejecting retroactivity for a new rule relating to jury instructions on homicide); *Sawyer v. Smith,* 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (rejecting retroactivity for *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)).

Id.

The only case in which the United States Supreme Court has identified as qualifying under this exception is *Gideon v. Wainwright,* 372 U.S. 335 (1963). *See Whorton,* 549 U.S at 419. In *Gideon,* the Court held that counsel must be appointed for any indigent defendant charged with a felony. *Gideon,* 372 U.S. at 344-45. The Court explained that when an indigent defendant who seeks representation is denied such representation, an intolerably high risk

of an unreliable verdict exists. *Id.; see Whorton,* 549 U.S. at 419.

The rule announced in *Hall* is not comparable to the rule announced in *Gideon.* The rule in *Hall* has a much more limited scope, and the relationship of the rule to the accuracy of the fact-finding process is less direct and profound. The issue is not whether *Hall* resulted in a net improvement in the accuracy of fact-finding in criminal cases. *See Whorton,* 549 U.S. at 420. Rather, the question is whether the *Hall* rule is "one without which the likelihood of an accurate conviction is *seriously* diminished." *Id.* (citations omitted) (emphasis in original). *Hall* did not result in a change of this magnitude.

Hall also did not "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer,* 497 U.S. 242 (emphasis in original). It is insufficient to simply show that a rule is "*based* on a 'bedrock' right." *Whorton,* 549 U.S. at 420-21 (emphasis in original). Rather, in order to meet this requirement, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Id.* at 421. In applying this requirement, the Supreme Court has looked to *Gideon* as an example and has not "'hesitated to hold that less sweeping and fundamental rules' do not qualify." *Id.* (quoting *Beard,* 542 U.S. at 418).

Hall did not expand the class already protected by *Atkins, i.e.,* defendants who are intellectually disabled. Instead, *Hall* limited the power of the states to define that class. Accordingly, *Hall* did not "alter[ ] our understanding of the bedrock procedural

elements essential to the fairness of a proceeding." *See id.; Sawyer,* 497 U.S. at 242.

The Petitioner has failed to establish that *Hall* applies retroactively to petitioners in post-conviction proceedings. Therefore, he may not rely upon *Hall* as a basis for reopening his petition for post-conviction relief.

B. *State v. Jones*

The Petitioner seeks to reopen his post-conviction petition based upon the Tennessee Supreme Court's opinion in *State v. Jones,* 450 S.W.3d 866 (Tenn. 2014). In *Jones,* our supreme court held that the trial court in a capital murder trial erred by admitting evidence of a separate murder allegedly committed by the defendant because the evidence failed to meet the requirements of Tennessee Rule of Evidence 404(b). *Jones,* 450 S.W.3d at 892-900. The Petitioner contends that his conviction and death sentence were based upon other crimes in violation of *Jones* and that as a result, he has been denied equal protection and due process of the law. He also contends that the admission of evidence of other crimes renders his death sentence unconstitutional.

The Petitioner concedes that his claims based upon *Jones* does not "strictly meet the statutory requirements to file a motion to reopen." *Jones* does not serve as a basis for reopening post-conviction proceedings pursuant to Tennessee Code Annotated section 40-30-ll 7(a)(l) because *Jones* did not announce a new constitutional right. *See Jones,* 450 S.W.3d at 900 (proving that the evidentiary error was "neither structural nor constitutional").

The Petitioner asserts that he should be permitted to reopen post-conviction proceedings based upon principles of due process and the Open Courts Clause in Article I, section 17 of the Tennessee Constitution. He relies upon the Tennessee Supreme Court's decisions in *Sands v. State,* 903 S.W.2d 297 (Tenn. 1995), and *Harris v. State,* 301 S.W.3d 141 (Tenn. 2010), in support of his due process argument. *Sands* and *Harris* address whether due process requires tooling of the applicable statute of limitations for filing a post-conviction petition and a petition for writ of error coram nobis. *See Harris,* 301 S.W.3d at 145; *Sands,* 903 S.W.2d at 300-01. The Petitioner, however, seeks to create new grounds for reopening a post-conviction petition, in addition to the grounds provided in Tennessee Code Annotated section 40-30-ll 7(a). Our supreme court, however, has repeatedly declined to expand the grounds for reopening a post-conviction petition beyond those limited grounds provided in section 40-30-ll 7(a). *See, e.g., Keen,* 398 S.W.3d at 608-13 (holding that a capital petitioner's claims related to his alleged intellectual disability did not meet the requirements to reopen his petition); *Coleman,* 341 S.W.3d at 256-57 (noting that a capital petitioner's claims of ineffective assistance of trial counsel did not provide a basis for reopening a post-conviction petition and declining to recognize a due process right to present the claim); *Harris v. State,* 102 S.W.3d 587, 591 (Tenn. 2003) (concluding that a claims that the State failed to disclose exculpatory evidence is not a cognizable ground for reopening post-conviction proceedings). We likewise decline to expand the grounds for reopening a post-conviction

petition to include a claim based upon the Tennessee Supreme Court's holding in *Jones*.

Conclusion

The Petitioner has failed to demonstrate that he is entitled to reopen his post-conviction petition pursuant to Tennessee Code Annotated section 40-30-117(a). IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because the Petitioner is indigent, costs of the appeal are taxed to the State.

/s/ Roger A. Page
Roger A. Page, Judge

/s/ John Everett Williams
John Everett Williams, Judge

/s/ Alan E. Glenn
Alan E. Glenn, Judge