CAPITAL CASE
NO EXECUTION DATE SET

No. 16-____

IN THE

Supreme Court of the United States

VINCENT SIMS,

and

MICHAEL SAMPLE,

Petitioners,

v.

TENNESSEE

Respondent.

On Petition for a Writ of Certiorari
to the Tennessee Court of Criminal Appeals,
Western Division

PETITION FOR A WRIT OF CERTIORARI

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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 sentenced during this period and had IQ scores just over 70 would thus be denied any further hearing on their intellectual-disability claims.

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 Court of Criminal Appeals below and the Tennessee Supreme Court in *Payne*, Pet. No. 16-395—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 Courts 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 retroactively on collateral review?

PARTIES TO THE PROCEEDINGS BELOW

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This petition involves two of three closely related cases in which the Tennessee courts denied retroactive effect to this Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014). The third case is *Payne v. Tennessee*, No. 16-395 (petition filed September 26, 2016). All three petitioners are represented by the same counsel and all raise the same, single question of *Hall*'s retroactivity, an issue that is plainly worthy of this Court's review. All agree, moreover, that this petition presents the best vehicle for the Court to address that question because, while the Tennessee Supreme Court rendered its substantive decision on the issue in *Payne*, that case involves an arguable vehicle issue not present here. Accordingly, the petitioners' collective view is that this petition should be granted and the *Payne* petition held for its resolution and a possible grant, vacatur, and remand.

Because of the close relationship among the cases, and to avoid duplication, this petition relies on the substantive discussion of the certiorari criteria in *Payne*, Pet. No. 16-395 at 14-31. Although some of those reasons are also rehearsed below, the focus of this petition is on the unique vehicle strengths of these cases for the question that the Tennessee Supreme Court's decision in *Payne* presents.

Briefly, when the Tennessee Supreme Court decided that *Hall* did not apply retroactively in *Payne v. State*, No. W2013-01248-SC-R11-PD, 2016 WL 1394199 (Tenn. Apr. 7, 2016), it also denied two other applications for review from petitioners Vincent Sims and Michael Sample—whom the Tennessee Court of Criminal Appeals (CCA) had denied relief on the same grounds. Unlike in *Payne*, however, there is no possi-

ble dispute about whether Sims and Sample sought timely post-conviction review of their death sentences in light of *Hall*, or whether they utilized the appropriate state-law vehicle for that relief (known as a motion to reopen post-conviction proceedings). Accordingly, the Tennessee Supreme Court did not decide their petitions until it held that *Hall* was not retroactive in *Payne*, whereupon it immediately denied both. Thus, like *Payne*, these petitions present the plainly certworthy question of *Hall*'s retroactivity. Unlike *Payne*, however, they do so in a posture that is completely free of any even arguable, confounding issues of state law.

As the *Payne* petition explains (at 1), a good vehicle for the question presented clearly merits a grant because the holding below denying *Hall* retroactive effect is (1) a manifestly incorrect decision on (2) a life-or-death issue of the greatest importance, that (3) has engendered disagreement among the lower courts and disparate outcomes in capital cases. In fact, not only has the disagreement among lower courts fully developed the question for this Court's consideration, but there are also special reasons under AEDPA for the Court not to delay its review. In this case, the Court has the vehicle it needs to timely consider this critical issue. Certiorari should thus be granted.

Alternatively, for reasons explained below and in the *Payne* petition, the Court may choose to GVR all three cases. *Hall* held that, at a minimum, the federal Constitution prohibits executing individuals with borderline IQ scores (essentially, from 71-75) without individualized consideration to ensure that they are not actually disabled and thus ineligible for capital punishment. 134 S. Ct. at 2000-01. That holding is structurally identical to the holding in *Miller v. Alabama*,

132 S. Ct. 2455, 2470 (2012), which prohibited sentencing juveniles to life without parole absent individualized consideration to ensure that they, too, are constitutionally eligible for that punishment. In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), this Court made *Miller* retroactive on state collateral review, and although the Tennessee courts were well aware of *Montgomery* when these cases were finally decided, no Tennessee court addressed that indistinguishable precedent. Moreover, this Term the Court will consider *Moore v. Texas*, No. 15-797, a case that raises the effect of *Hall* on Texas's scheme for intellectual-disability claims *in a retroactive posture* that is identical to this case. Thus, if the Court is not inclined to grant this petition outright (as petitioners request), then *Montgomery* already provides a sufficient basis for a GVR, and *Moore* is likely to add another as well.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Vincent Sims and Michael Sample respectfully seek a writ of certiorari to review judgments of the Tennessee Court of Criminal Appeals.

OPINIONS BELOW

For petitioner Sims, the Tennessee Supreme Court order denying his application for appeal (Pet. App. 2a), the CCA's decision affirming the denial of his motion to reopen his post-conviction petition (Pet. App. 3a), and the decision of the trial court denying relief (Pet. App. 31a) are unreported.

For Petitioner Sample, the Tennessee Supreme Court order denying his application for appeal (Pet. App. 55a), the CCA's decision affirming the denial of his request to reopen his post-conviction petition (Pet.

App. 56a), and the decision of the trial court denying relief (Pet. App. 78a) are unreported.

JURISDICTION

The judgments below were entered on May 6, 2016 (Sims) and May 9, 2016 (Sample). Pet App. 2a, 55a. Justice Kagan extended the time for filing Sims's petition to October 3, 2016, *see* No. 16A37, and for filing Sample's petition to October 6, 2016, *see* No. 16A53. In each case, the decision below denies the petitioner's application to appeal from a CCA decision affirming the complete denial of relief, and therefore is a final judgment of the state's highest court. Petitioners sought retroactive application of *Hall* to their intellectual-disability claims immediately after *Hall* was decided, and the judgment on review denied those claims on the ground that *Hall* is not retroactive as a matter of federal law, thus vesting this Court with jurisdiction under 28 U.S.C. §1257.

STATEMENT OF THE CASE

1. Petitioner Vincent Sims was initially convicted and sentenced to death in 1998, and his sentence was finalized on direct appeal in 2001. Petitioner Michael Sample was convicted and sentenced to death in 1982, and his sentence was finalized on direct appeal in 1984. Both Sims and Sample thus had final convictions predating this Court's holding in 2002 that the federal Constitution prohibits execution of the intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). As explained below, however, both petitioners are in fact almost certainly intellectually disabled, and yet are slated for execution because Tennessee has denied them the means to establish their disability under the rule set forth in *Hall*.

2. A detailed background on Tennessee's approach to intellectual-disability claims is provided in *Payne*, Pet. No. 16-395 at 4-8. The short story, however, is that while Tennessee predated *Atkins* in forbidding capital punishment for the intellectually disabled, its statute and state supreme court created a bright-line cutoff for claims of intellectual disability at an *un*adjusted IQ score of 70 or below. *See* Tenn. Code Ann. §39-13-203; *Howell v. State*, 151 S.W.3d 450, 459 (Tenn. 2004). That same bright-line rule applied to federal claims as well because the Sixth Circuit, like others, interpreted *Atkins* to permit the States to define and determine intellectual disability largely as they saw fit. *Black v. Bell*, 664 F.3d 81, 91-96 (6th Cir. 2011); *Howell*, 151 S.W.3d at 457. Thus, for a long time, no Tennessee court, state or federal, permitted capital offenders with a raw IQ score above 70 to make a claim of intellectual disability.

Tennessee largely abandoned that rule in 2011 in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), which permitted psychological experts to at least take account of statistical principles and other effects in formulating "corrected" IQ scores of 70 or below, even if an offender's absolute score was above that line.[1] But the Tennessee Supreme Court held shortly thereafter that this change was not retroactive, *Keen v. State*, 398 S.W.3d 594, 609 (Tenn. 2012), preventing offenders

[1] Most importantly, these newly permitted considerations include the standard error of measurement, the "Flynn Effect" (which explains that IQ scores on any given test tend to drift up over time from the date any version of that test is released), and a "practice effect" for those who take the same test more than once. *See, e.g.*, *Coleman,* 341 S.W.3d at 242 n.55.

with convictions that were finalized before *Coleman* and IQ scores even slightly above 70 from bringing their intellectual-disability claims. This regime prevailed until this Court held in *Hall*, 134 S. Ct. at 1986, that the federal Constitution imposes a minimum floor on how the States define and determine intellectual disability, and—in particular—that it requires additional consideration for offenders with IQ test results of 75 or below.

Simply put, because of *Howell* and *Keen*, there is a class of offenders in Tennessee with IQ scores just over 70 whose (very plausible) claims of intellectual disability have never been entertained or assessed under the reliable, constitutionally-required standards enunciated by *Hall*. Of course, if *Hall* is retroactive on state collateral review, it requires the exact opposite result. As shown below, Sims and Sample both clearly fall within that class of offenders, and exemplify the concerns attendant in denying any retroactive effect to a holding, like *Hall*'s, that exempts such a class of people from capital punishment.

a. Sims began pursuing issues of intellectual disability at least as early as his initial petition for state post-conviction relief. In that petition, he filed an affidavit from a psychological expert, Dr. Pamela Auble, who assessed him using the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), on which Sims scored a 75. Dr. Auble determined that, based on the application of the standard error of measurement (SEM) and other corrective effects, Sims met the clinical definition for intellectual disability. But any potential intellectual-disability claim never got off the ground, because Sims could not meet the bright-line standard from *Howell*, which categorically precluded

consideration of the SEM of Sims's IQ score of 75. The CCA ultimately denied Sims any relief, and the Tennessee Supreme Court denied his application for permission to appeal. *Sims v. State*, No. W2008-0283-CCA-R3-PD (Tenn. Crim. App. Jan. 28, 2011), *perm. app. denied* (Tenn. Aug. 31, 2011).

The effect of Tennessee's bright-line requirement that Sims's disability be "evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below," Tenn. Code Ann. §39-13-203, was vividly demonstrated by a colloquy between the trial court that heard his petition and his counsel. Sims's counsel attempted to explain that an IQ between 70 and 75 is "in a mild mentally retarded range by all definitions I'm aware of," to which the court responded that, because the score was not 70 or below, he "wanted to make sure that [counsel] understood that I don't have proof before me to be able to consider that argument." As the court put it:

> I'm letting ya'll know that I'm not taking that if he did have an IQ at some point of 75, I'm not taking that as he was close to mildly mentally retarded under the statute because I don't think the statute's meant for that. . . . [I] just don't want ya'll to have . . . a false idea of how I'm taking that statute because I'm not using the statute you mentioned at all to apply to an IQ of 75. I don't think it's meant for that.[2]

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[2] This exchange was filed in the record of a federal case and is available at W.D. Tenn. Dkt. No. 11-2946, Doc. 47-11, pp.53-55.

It is therefore clear that, even though Sims's expert believed he was actually intellectually disabled at the time of his initial petition, his IQ score blocked his path to relief under *Howell* and the Tennessee statute's 70-point, bright-line rule.

After *Coleman* changed that state-law rule, Sims filed a motion to reopen his post-conviction petition under Tenn. Code Ann. §40-30-117(a). Dr. Auble submitted a new affidavit, explaining that she had reassessed her 2002 and 2003 evaluation of Sims in light of the factors *Coleman* newly permitted. Upon adjusting Sims's absolute IQ score of 75 for the Flynn effect and other considerations, Dr. Auble determined that Sims's adjusted, full-scale IQ score was 70.26. Aff. of Clinical Psychologist Pamela Auble, Ph.D., *Sims v. Colson*, No. 2:11-cv-02946, at 8 (W.D. Tenn. filed July 13, 2015) (No. 48-5). And based on the SEM and other factors, Dr. Auble concluded that "Sims has significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient of seventy (70) or below, and he meets the standard set forth in the Tennessee statute for the first prong of intellectual disability." *Id.* at 10. Dr. Auble, on the basis of a reanalysis of her prior evaluation and consideration of new testing evidence regarding adaptive deficits, found that Sims also met the other two prongs of the Tennessee statutory standard for intellectual disability—he displayed deficits in adaptive behavior and his intellectual disability manifested prior to or by the age of 18. *Id.* at 16, 22.

Like Payne's, Pet. No. 16-395 at 9, Sims's motion to reopen was critically undermined when the Tennessee Supreme Court issued *Keen* and held that *Coleman* was not to be applied retroactively on a motion to reo-

pen. Thus, like Payne, Sims amended his motion to reopen to include a petition for a writ of error coram nobis. The trial court denied both requests, concluding that *Keen* barred his motion to reopen and that Dr. Auble's affidavit did not present new evidence sufficient to justify issuing a writ of error coram nobis. *Sims v. State*, No. P-25898 (Crim. Ct. Tenn. Memphis Div. VIII Nov. 4, 2013). The CCA ultimately agreed with both decisions, for which state law required separate appeals. *See Sims v. State*, No. W2013-02594-CCA-R28-PD (Tenn. Crim. App. Feb. 5, 2014); *Sims v. State*, No. W2014-00166-CCA-R3-PD, 2014 WL 7334202, at *8-12 (Tenn. Crim. App. Dec. 23, 2014).

After this Court decided *Hall*, however, Sims filed another motion to reopen, this time isolating his request for relief to the federal Constitution and reliance on *Hall* as a retroactive rule. Sims filed that new motion to reopen under Tenn. Code Ann. §40-30-117(a) on May 18, 2015—less than one year after *Hall*—asserting that *Hall* applied retroactively and created a new rule of constitutional law that justified reopening his post-conviction proceedings. The trial court disagreed, however, and again denied relief. Pet. App. 52a.

A divided panel of the CCA affirmed on January 28, 2016. Pet. App. 28a. The court first determined that, on the basis of this Court's opinion in *Teague v. Lane*, 489 U.S 288 (1989), *Hall* did not announce a new rule and therefore did not "establish[ ] a constitutional right that was not recognized at the time of trial," as required by Tenn. Code Ann. §40-30-117(a)(1). Pet. App. 20a-22a. Further, the court concluded that, even if *Hall* established a new rule, it does not apply retroactively. Pet. App. 22a-28a. The CCA held that *Hall* did not fit within the first *Teague* exception, as

discussed in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Pet. App. 23a. Then, following the analysis set forth in *In re Henry*, 757 F.3d 1151 (11th Cir. 2014), the court agreed with the Eleventh Circuit that *Hall* merely recognized new procedures for identifying members of the group already protected by *Atkins*. Pet. App. 22a-28a. Judge McMullen dissented, explaining that she would have granted Sims a new opportunity to present his evidence of intellectual disability consistent with her dissent in *Payne v. State*, No. W2013-01248-CCA-R3-PD, 2014 WL 5502365, at *17-22 (Tenn. Crim. App. Oct. 30, 2014) (McMullen, J., dissenting) (available at *Payne*, Pet. No. 16-395 at Pet. App. 68a-80a).

Sims then filed an application for permission to appeal with the Tennessee Supreme Court. At essentially the same time as the CCA ruled against Sims, this Court held in *Montgomery* that the federal Constitution required state courts to apply its decision in *Miller* retroactively. *See Montgomery*, 136 S. Ct. at 733-36. Sims's application to the Tennessee Supreme Court thus specifically requested that the Court determine whether *Hall* applied retroactively in light of *Montgomery*. The Court, however, denied his application consistent with its decision in *Payne*, thus concluding that *Hall* did not apply retroactively without a word on how *Montgomery* affected that question.

In sum, Sims's case is much like Payne's, except that he unquestionably pursued relief *in this proceeding* through the correct state-law vehicle (a motion to reopen), which he unquestionably filed within one year of *Hall*. Accordingly, the sole basis for the denial of relief in the judgment on review was the CCA's determination that *Hall* does not apply retroactively, which the Tennessee Supreme Court endorsed in its pub-

lished opinion in *Payne*. Sims's petition thus cleanly presents the case of a capital petitioner who has long been trying to vindicate a claim of intellectual disability, but has been prohibited from doing so because Tennessee first had a regime that was contrary to *Hall*, and then decided to deny *Hall* retroactive effect.

b. Petitioner Michael Sample's case is similar, but specifically highlights other concerns about the potential consequences of denying *Hall* any retroactive effect. He filed a motion to reopen his post-conviction proceedings on August 13, 2014, seeking retroactive application of *Hall*, and relying on a new IQ assessment. Up to that point, however, he too lacked any viable claim for relief on the basis of intellectual disability. When Sample was a child, his IQ was tested in two group tests and he scored a 77 at age 9 and a 73 at age 11. Forensic Neuropsychological Evaluation Report, *Sample v. Colson*, No. 2:11-cv-02362, at 2 (W.D. Tenn. filed Sept. 3, 2014) (No. 96-1). Accordingly, he could not seek relief at least until *Coleman* abrogated the bright-line, 70-point cutoff in 2011, and seeking it would have been futile in any event because of the holding in *Keen* that *Coleman* was not retroactive. Thus, Sample's 2014 motion to reopen—filed just months after *Hall*—was his first meaningful opportunity to seek relief on an intellectual-disability claim.

Sample's motion asserted, similar to Sims's, that he was intellectually disabled under *Atkins* and *Hall*, and incorporated further IQ testing by psychological expert Dr. Joette James. Dr. James recently administered the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) and calculated a full-scale IQ score for Sample of 68. Forensic Neuropsychological Evaluation Report, *supra* at 2. Dr. James also noted Sam-

ple's childhood test results, and further found that Sample suffered severe adaptive deficits and had suffered from a developmental disorder consistently throughout his life. *Id.* at 3. In light of her evaluation of Sample and the proper adjustment to Sample's test results, Dr. James concluded that Sample easily met both the clinical and legal criteria for intellectual disability. *Id.* Indeed, Sample's very low score on retesting vividly demonstrates the very danger to which *Hall* is addressed: Because of the error rate in IQ testing, applying a bright-line cutoff at an unadjusted score of 71-or-above creates the palpable risk of executing a person who is *actually* intellectually disabled, and who will also frequently test well below 70 on any given IQ assessment.

Notwithstanding Dr. James's affidavit, the trial court denied Sample's motion to reopen his post-conviction proceedings. Pet. App. 93a. As with Sims, the trial court concluded that *Hall* did not create a new constitutional right that would justify reopening his post-conviction proceedings. Pet. App. 92a-93a.

In an opinion with text largely identical to its decision in *Sims*, the CCA affirmed the trial court's denial of relief in *Sample* as well. The court concluded that *Hall* did not appear to announce a new rule and, to the extent it did, *Hall* would not apply retroactively. Pet. App. 67a-75a. Consistent with the holding of the Eleventh Circuit in *Henry*, 757 F.3d at 1158, the CCA asserted that *Hall* merely provided further procedural opportunities to an already protected class. Pet. App. 68a-70a.

Sample then filed an application for permission to appeal with the Tennessee Supreme Court, claiming

that *Hall* applied retroactively in light of *Teague* and *Penry*. The Tennessee Supreme Court held that application in light of its pending decision in *Payne*, issuing Sample a letter to that effect. *See Payne*, Pet. No. 16-395 at Pet. App. 89a. During the pendency of his application, Sample filed a supplement with the court, fully briefing *Montgomery* and requesting that the court consider its impact on the retroactivity of *Hall*. The Court declined, however, eventually denying Sample's application in a one-line order in light of its decision in *Payne* denying *Hall* any retroactive effect. Pet. App. 55a.

REASONS FOR GRANTING THE WRIT

As explained in the petition in *Payne*, No. 16-395, the decision below, holding *Hall* inapplicable on collateral review, easily meets all of the criteria for a grant of certiorari: (1) There is a clear split that is unlikely to benefit from further percolation; (2) special concerns caution against further delaying this Court's review; (3) the question is of vital importance; and (4), at least after *Montgomery*, the decision below is plainly incorrect. *See Payne*, Pet. No. 16-395 at 17-31. Indeed, as *Payne* explains, the only reason to deny plenary review here may be in favor of a GVR directing the Tennessee courts to account for this Court's decision in *Montgomery*, or even its impending decision in *Moore*, which likewise may impact the question of *Hall*'s retroactivity. *See Payne*, Pet. No. 16-395 at 33-34.

Rather than duplicate the discussion that is fully elaborated in *Payne*, however, the remainder of this petition focuses on the strengths of these cases as vehicles for the question presented. As demonstrated below, given the clarity with which they raise the fed-

eral question of *Hall*'s retroactivity and the absence of any confounding questions of state law, these twin cases represent an ideal vehicle for this Court to consider the retroactivity of *Hall*, which it should establish without further delay.

I. This Petition Is An Excellent Vehicle For The Question Presented.

As described in detail below, this petition presents an ideal opportunity for this Court to clarify that *Hall* applies retroactively on collateral review. The petition comes directly from a state court, and so avoids the many layers of difficulty and interfering standards of review that can be created by AEDPA. The sole basis for the holding in both CCA cases, which use essentially identical language, is the court's determination that *Hall* is not retroactive as a matter of federal law.[3] Moreover, the Tennessee Supreme Court approved that holding with its own decision in *Payne*, so there is no question whether the reasoning of the state courts has been fully elaborated, or whether those courts are likely to change course. Unlike in *Payne*, however, there can be no dispute for either of these petitioners whether state law interferes with this Court's ability to reach the question presented. Moreover, the

[3] As the *Payne* petition explains, Tennessee has long looked to federal law to establish its retroactivity standards, and expressly relied on federal decisions here. And, in any event, the constitutional holding in *Montgomery* requires the courts to apply federal retroactivity standards in state post-conviction review, at least when it comes to cases that proscribe a certain punishment for a certain set of offenders. *See Payne*, Pet. No. 16-395 at 10 n.3.

presentation of two vehicles in one petition here—and, with *Payne*, essentially, three cases at once—eliminates any risk that the Court might be unable to reach the question presented, and simultaneously extinguishes any possible argument that this capital-punishment issue is fact-bound or too idiosyncratic to merit review.

1. Most importantly, neither of the cases in this petition suffers from any possible argument regarding an independent and adequate state ground of decision. As Payne's petition explains, the Tennessee Supreme Court dismissed Payne's petition for a writ of error coram nobis both because it was the improper vehicle to bring a challenge on the basis of a change in law, *Payne*, 2016 WL 1394199, at *4-6, *and* because it found that *Hall* did not apply retroactively on collateral review, *id.* at *8-10. The Tennessee Supreme Court also questioned whether Payne had made a motion to reopen within one year of *Hall* as state law required. *Id.* at *8 n.8.[4] But neither of these arguably independent and adequate state grounds of decision are presented here: Both Sims and Sample were denied relief in the CCA *exclusively* on the ground that *Hall* is not retroactive, the Tennessee Supreme Court only denied their petitions for review after reaching the same conclusion in *Payne*, and both filed their motions to reopen within one year of *Hall*'s decision.[5]

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[4] In truth, he had, but in a different proceeding that remains pending in the lower state courts.

[5] The trial court in each case suggested that petitioners would not prevail even if *Hall* were applied retroactively because they were free to present additional evidence of intellectual disability even before *Coleman* abrogated Tennessee's bright-line rule.

2. Moreover, unlike in *Payne*, both of the motions to reopen brought by these petitioners were filed initially in the trial court after *Hall* was decided, providing a full briefing and decision on the issue at every stage. By contrast, this Court's decision in *Hall* did not come down until the middle of Payne's litigation—after only his coram nobis appeal remained—so that it was first discussed by the CCA, and only with respect to coram nobis relief. *See Payne*, Pet. No. 16-395 at 9-11. Here, it could not be clearer that the petitioners were raising federal, *Hall*-based arguments regarding their intellectual disabilities through the appropriate state-law vehicle, beginning with the motion to reopen itself. Nor could it be clearer that they lost on those motions because Tennessee held that *Hall* was not retroactive on state post-conviction review.

3. These cases also both highlight, in a particularly vivid way, the dangers that lurk in treating *Hall* as only applicable to new cases. Sample's previous IQ testing made him apparently ineligible for relief under Tennessee's bright-line, 70-or-below version of *Atkins*. Under *Hall*, however, his childhood score of 73 would qualify his claim of intellectual disability for further, individualized consideration in order to confirm that

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Pet. App. 50a-52a (Sims); Pet. App. 93a (Sample). That does not affect this Court's review, however, because the CCA did not endorse that holding in any respect. That is likely because it is manifestly untrue, as demonstrated by the Tennessee Supreme Court's decision in *Howell*, 151 S.W.3d at 459, the extensive catalog of cases in which disability claims were denied by the Tennessee courts under their bright-line rule despite other evidence of disability, *see Payne*, Pet. No. 16-395 at 5-6, and the trial court's *own colloquy* to the contrary in *Sims's own case*, *see supra* p.7.

he is in fact disabled and so ineligible for the death penalty. And as this case shows, that individualized consideration would certainly make all the difference, because—among other things—a newly administered, individualized IQ assessment of petitioner Sample yielded an *unadjusted* score of 68, which is far into the range that signifies intellectual disability.[6] In addition, Sample's test result shows precisely why *Hall*'s rule is so important: It acknowledges that, because of mere statistical sampling error, a person with an IQ *test* score of 73 might have a real IQ of 68, which in turn makes it critical to provide more individualized consideration for those with borderline IQ test results. Put otherwise, Sample's case demonstrates through the very numbers involved that, unless *Hall* is applied retroactively, there is every chance that those whose intellectual-disability claims were disqualified by the earlier bright-line rule will be executed when they are in fact constitutionally ineligible for the death penalty.

Sims's case demonstrates this same risk through different but equally illuminating facts. In his initial state post-conviction proceedings, the trial court expressed incredulity that having an IQ close to but slightly above the 70-point cutoff was evidence that Sims was intellectually disabled. *See supra* p.7. But

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[6] Although precise calculations vary, a typical estimate of the Flynn Effect requires a correction of 0.3 points per year between the date the test was "normed" for the population and the date it was administered to a subject. Aff. of Clinical Psychologist Pamela Auble, Ph.D., *Sims v. Colson*, No. 2:11-cv-02946, at 4 (W.D. Tenn. filed July 13, 2015) (No. 48-5). It appears Sample's WAIS-IV was normed in 2007 and administered in 2013, so his corrected score would be approximately 66.

Hall essentially holds that the opposite is true; courts must now acknowledge, under *Hall*, that IQ scores just over 70 *are* evidence of a serious possibility of intellectual disability because—even absent correction for factors like the Flynn Effect—they fall within the standard error of measurement for a score of 70 or below. Notably, Sims's score of 75, which his trial court rejected as essentially meaningless, corrects to a score of 70.26 on the basis of the Flynn effect and the normative sample effect. *See supra* p.8. So even before considering the SEM, Sims's score is strongly indicative of intellectual disability. Thus, like Sample, he falls within a class of people who could be executed before *Hall*, and almost certainly cannot be executed anymore.

These are perfect facts on which to consider the question presented. As the *Payne* petition explains, that question will reduce to the question whether, under *Teague*'s first exception, *Hall* is a constitutional "rule[] prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330; *see also Payne*, Pet. No. 16-395 at 27-31. This Court's decision in *Montgomery* clarified that this class includes constitutional rules holding that a particular "class of defendants" must get additional, individualized consideration before being deemed eligible for a "certain category of punishment." *See* 136 S. Ct. at 732-36. That is because the additional process serves merely as the method to sort offenders into or out of the class that receives substantive protection—a step which will always be necessary. *Id.* at 734-35. Here, Sims and Sample are both concrete, human examples of *Hall*'s substantive force: The procedure that *Hall* requires sorted them into the

constitutionally ineligible class, whereas the procedure that Tennessee employed before *Hall* necessarily sorted them out. Put otherwise, because Sims and Sample so clearly fall within a class of *actually disabled offenders* who are *newly* ineligible for capital punishment, they are ideal representatives for the argument that *Hall* must be a substantive rule within the meaning of *Montgomery* and *Teague*.

4. Indeed, another ideal aspect of this vehicle is that Sims fully briefed *Montgomery* in his petition for review in the Tennessee Supreme Court, removing any doubt that the lower court was aware of this Court's holding and simply passed up the opportunity to give it its obvious effect. Sample briefed *Montgomery* for the Tennessee Supreme Court as well, albeit in a supplement. By contrast, the timing in *Payne* meant that *Montgomery* did not appear in the briefing until the rehearing stage. *See Payne*, Pet. No. 16-395 at 14. The posture in these two cases accordingly eliminates any doubt that the issue is ripe for a grant of certiorari review.

5. Yet another vehicle strength for these cases is that the answer to the underlying *Hall* question is unambiguous. As the *Payne* petition explains, Pet. No. 16-395 at 19, part of what makes *Hall* so important is its broader holding that there is a federal constitutional floor on how the States may define and determine intellectual disability. *Hall* grounds that floor in clinically accepted practices, but its precise parameters remain largely undefined. Thus, many future *Hall* cases—like *Moore v. Texas*, No. 15-797, which the Court will consider this Term—will require this Court to decide hard questions about whether *Hall* invalidates a state-law regime for intellectual-disability

claims *on the merits*, which will potentially cloud the issue of retroactivity. These cases do not create such a confounding issue because Tennessee's pre-*Hall* standard unambiguously violated *Hall*'s four-corners holding that States cannot impose a bright-line cutoff at an IQ score of 70. Put otherwise, these cases *isolate* the question of *Hall*'s retroactivity in a way that other cases will not.

6. This, in turn, suggests yet another powerful reason to grant plenary review on the question presented in this case without further delay. *Hall* itself was a state post-conviction review case, and *Moore* is too. As the *Payne* petition explains, when this Court grants relief to petitioners under the federal Constitution in a retroactive posture, it is essentially holding by implication that the rule it is announcing *is* retroactive on collateral review. *See Payne*, Pet. No. 16-395 at 21.[7] The Court should not continue to decide this critical question regarding its own power to order relief in such a drive-by fashion. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("Our recent cases evince a marked desire to curtail such drive-by jurisdictional rulings[.]").

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[7] *Teague* itself makes this implication explicit. *Teague*, 489 U.S. at 316 ("[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."). And *Montgomery* holds that *Teague*'s same framework applies alike to state and federal collateral review. 136 S. Ct. at 729-32.

That is particularly true for two reasons. First, although petitioners believe that this Court's implicit holdings on *Hall*'s retroactivity are correct, there are state and federal courts that have explicitly considered this question and come out on the other side. At a minimum, holding repeatedly that a case is retroactive by implication without the benefit of briefing or focusing on that question does not square with this Court's preferred approach to correctly deciding critical federal questions. Second, acting on the assumption that *Hall* is retroactive while waiting to decide that question creates the possibility of a radically unjust outcome where the only individuals granted retroactive relief under *Hall* in federal court are those whose cases are decided before this Court determines that it was making a mistake. If this Court is going to continue deciding *Hall*-related cases in a collateral review posture, it is certainly incumbent on the Court to decide—as soon as possible—whether *Hall* is in fact controlling on state-court collateral review. Indeed, *Teague* itself *committed* this Court to that course. *See* 489 U.S. at 316.

7. Finally, these cases are excellent vehicles for review because they arise from the state court system, and so do not come freighted with the baggage of AEDPA's strict substantive standard and procedural limitations. The *Payne* petition explains that AEDPA's strict standard of review could make the question of *Hall*'s retroactivity non-determinative in many federal habeas cases, *see* Pet. No. 16-395 at 24-26, *Prieto v. Zook*, 791 F.3d 465, 470 (4th Cir. 2015), and that its procedural limitations may prevent this Court from even reviewing the Courts of Appeals' determinations regarding the retroactivity of *Hall*. *See Payne*, Pet.

No. 16-395 at 25 (noting that both essential Court of Appeals decisions on this issue were ineligible for certiorari review under 28 U.S.C. §2244(b)(3)(E)). But there is more. For one, AEDPA cases always present very difficult questions about when it is appropriate to supplement the record (for example, with critical psychological testing). *See Cullen v. Pinholster*, 563 U.S. 170 (2011). For another, even if a new rule is retroactive for purposes of *Teague*, there may be circumstances in which the state court's contrary holding on the exact same question must still be left intact under AEDPA because, at the time the state court's judgment was rendered, it was not contrary to clearly established federal law. *See Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (noting divergence between *Teague* and AEDPA rules). In fact, in denying a petitioner's request to certify the question of *Hall*'s retroactivity to this Court in order to avoid AEDPA's bar on certiorari review, the Eleventh Circuit specifically relied on the superiority of a vehicle like this one (*i.e.*, direct review from state proceedings) for presenting the question to the Court. *In re Hill*, 777 F.3d 1214, 1226 n.6 (11th Cir. 2015); *id.* at 1227-29 (Martin, J., dissenting).

Simply put, the Court is very unlikely to be presented with better vehicles than these for this important question. Indeed, because AEDPA forces the lower federal courts to wait for this Court to make its holdings retroactive, *id.* at 1229 (Martin, J. dissenting), and those courts are affirmatively urging this Court to take up the question in a state-court review posture, *id.* at 1226 n.6 (majority opinion), there is a special reason not to delay any longer. For the reasons given above and in the petition in *Payne*, No. 16-395,

the Court should thus grant plenary review in this case and hold *Payne* for its disposition.

II. Alternatively, The Court Should Grant, Vacate, And Remand Both These Cases And *Payne*.

Indeed, as the *Payne* petition explains, the only alternative disposition that makes sense is to GVR all three cases, either in light of *Montgomery*, or potentially in light of *Moore*. *See* Pet. No. 16-395 at 33-34. To be sure, the fact that Sims placed *Montgomery* squarely before the Tennessee Supreme Court before it denied his petition for review demonstrates that a grant of certiorari is the more appropriate course—especially when combined with the many factors explained above that counsel in favor of immediate review. Nonetheless, the complete silence of the Tennessee courts on such a closely analogous case demonstrates that, at a minimum, the broad GVR standard is clearly met here. *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996); *Payne*, Pet. No. 16-395, at 33-34. Accordingly, if this Court is not inclined to grant plenary review in this case, it should GVR both this petition and *Payne* in light of *Montgomery* and/or *Moore*.

CONCLUSION

The Court should grant this petition and hold the petition in *Payne* for its resolution. Alternatively, it should GVR both petitions.

Respectfully submitted,

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October 3, 2016

APPENDIX

PART I

VINCENT SIMS v. STATE OF TENNESSEE

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

VINCENT SIMS v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P25898

No. W2015-01713-SC-Rll-PD
Filed May 06 2016

ORDER

Upon consideration of the application for permission to appeal of Vincent Sims and the record before us, the application is denied.

PER CURIAM

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 C

IN THE CRIMINAL COURT FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION VIII

VINCENT SIMS	)	
	)	
v.	)	**No. P-25898**
STATE OF TENNESSEE	)	

ORDER DENYING MOTION TO REOPEN PETITION FOR POST-CONVICTION RELIEF

This matter came to be heard upon the above-styled petitioner's Motion to Reopen his Post Conviction Petition and the State's motion to dismiss. Petitioner contends he is intellectually disabled and the United States Supreme Court opinion in *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986; 188 L. Ed. 2d 1007 (2014) created a new constitutional right which is retroactively applicable to his case. The State argues *Hall v. Florida* does not create a new constitutional right and further asserts: (1) petitioner has failed to meet the statutory requirements for re-

opening his post conviction petition; (2) has failed to file his motion to reopen within the one year statute of limitations; (3) has waived his claims of intellectual disability by failing to timely raise such claims; and (4) the Tennessee Court of Criminal Appeals has previously addressed and rejected petitioner's claims. Following a review of petitioner's motion to reopen and the state's response, this court agrees with the State's contention *Hall v. Florida* did not create a new constitutional right applicable to petitioner's case and petitioner has otherwise failed to comply with the statutory requirements for reopening his post conviction petition. Thus, petitioner's Motion to Re-open his Post Conviction proceedings is hereby denied.

PROCEDURAL HISTORY

In May of 1998 petitioner was convicted of the first degree premeditated murder of Forrest Smith and especially aggravated burglary. He was sentenced to death by a jury for the first degree premeditated murder of Smith and was sentenced to an additional twenty five years by the trial judge for especially aggravated burglary. The Tennessee Supreme Court affirmed the Petitioner's convictions and sentences on direct appeal. *See State v. Sims*, 45 S.W.3d 1 (Tenn. 2001). On November 15, 2001, petitioner filed a *prose* Petition for Post Conviction Relief. Post conviction counsel were appointed and in August 2002 an amended petition was filed raising the following issues: (1) ineffective assistance of both trial and appellate counsel; (2) constitutional violations relating to the jury's failure to unanimously agree on the aggravating circumstances; (3) constitutional challenges to the

State of Tennessee's comparative proportionality review; (4) constitutional violations relating to a pretrial offer of a sentence of life without the possibility of parole; (5) challenges to the constitutionality of lethal injection as a means of execution; (6) challenges to his sentence based upon international law; (7) challenges to the constitutionality of Tennessee's death penalty scheme in general; (8) prosecutorial misconduct; (9) constitutional challenges to the limitations placed on the presentation of mitigation; (10) sufficiency of the evidence; and (11) constitutional flaws in the selection of the jury.

No claim relating to petitioner's intellectual disability was raised prior to trial, during trial or as part of petitioner's initial post conviction petition. However, petitioner was evaluated by a neuropsychologist and neuropsychiatrist in preparation for the presentation of petitioner's post conviction claims. *See Vincent Sims v. State of Tennessee*, No. W2014-00166-CCA-R3-PD, 2014 Tenn. Crim. App. LEXIS 1151, *6 (filed September 3, 2014), *perm. app. denied* (Tenn. May 18, 2015). At the 2004 hearing on petitioner's post conviction claims, Dr. Pamela Auble testified that she administered the Wechsler Adult Intelligence Scale - III (WAIS-III) and found petitioner had a full scale IQ of 75. *Id*. Specifically, Dr. Auble stated that "Mr. Sims' full scale IQ of 75 would not meet current legal criteria for [intellectual disability] as defined by the Tennessee statute." Tenn. Code Ann. §39-13-203. *Id*. However, Dr. Auble noted, based upon the standard error of measurement associated with the WAIS-III, "the Diagnostic and Statistical Manual of Mental

Disorders (Fourth Edition, Text Revision) states mild [intellectual disability] can be diagnosed as high as 75 if there are concurrent adaptive deficits." *Id*. Dr. Auble opined petitioner may suffer from deficits in several areas of adaptive functioning. *Id*. However, she did not perform any testing related to adaptive deficits. Dr. George Woods also testified at petitioner's post conviction proceeding, concurring in Dr. Auble's findings. *Id*. at *10. On October 1, 2008, the post conviction court entered an order denying post conviction relief. The court's order was affirmed on appeal. *See Vincent Sims v. State*, No. W2008-0283-CCA-R3- PD, 2011 Tenn. Crim. App. LEXIS 70 (Tenn. Crim. App. filed Jan. 28, *2011), perm. app. Denied* (Tenn. Aug. 31, 2011).

In April of 2012 petitioner filed a Motion to Reopen Post Conviction Relief, alleging for the first time that he was intellectually disabled and therefore ineligible for the death penalty. The petitioner argued the Tennessee Supreme Court's decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), established a new constitutional right not recognized at the time of his trial. Petitioner further argued new scientific evidence demonstrating he is intellectually disabled proved he was actually innocent of the charge of capital murder. Petitioner relied upon a 2012 affidavit from Dr. Auble stating that in light of the *Coleman* decision, she had reanalyzed her previous testing and evaluation of petitioner and adjusted petitioner's IQ score of 75 to account for the Flynn Effect and the standard error of measurement associated with the WAIS-III. Auble found, based upon these adjustments that petitioner had a full scale IQ of 70.26. Dr. Auble stated that considering

other normative factors within the testing instrument, she found petitioner had an IQ which fell within a range of 67-76. *See State v. Sims*, 2014 Tenn. Crim. App. LEXIS 1151, *13. Additionally, on March 19, 2012, for the first time Dr. Auble administered the Independent Living Scale, a test for evaluating adaptive functioning and found petitioner has deficits in the areas of "communication, social/interpersonal skills, self-direction, and functional academic skills." *Id*. at *14. She further found petitioner has mild impairments in the areas of "home living, work, and health and safety." *Id*. Finally, Dr. Auble determined petitioner's deficits have been present since early childhood. *Id*. Therefore, Dr. Auble stated she found petitioner met Tennessee's statutory definition for intellectual disability.

In December 2012 the Tennessee Supreme Court reviewed a similar Motion to Reopen and rejected the very basis upon which the petitioner sought to reopen his post conviction proceedings. *See Keen vs. State*, 398 S.W.3d 594 (Tenn. 2012). Thereafter, Mr. Sims amended his Motion to Reopen to include a Petition for Writ of Error Coram Nobis. He also raised an independent claim for relief under Tennessee's intellectual disability statute. This court denied petitioner's Motion to Reopen his Post Conviction petition. This court concluded that the basis upon which petitioner sought to reopen his post conviction petition was precluded by the Tennessee Supreme Court's decision in *Keen*. With regard to petitioner's Writ of Error Coram Nobis and his claim that newly discovered evidence demonstrated he was intellectually disabled and proved his "actual

innocence" of the offense of capital murder, this court determined Dr. Auble's 2012 report was merely cumulative to the evidence presented by Auble and Woods at petitioner's initial post conviction proceeding and was available to petitioner at the time of his initial post conviction proceeding. Additionally, this court concluded petitioner's claim was barred by the one-year statute of limitations and found the statute should not be tolled merely to accommodate re-evaluation of previous testing as such re-evaluation did not constitute "newly discovered" evidence. Petitioner sought an appeal of both the denial of his Motion to Reopen Petition for Post Conviction Relief and his Petition for Writ of Error Coram Nobis. The appellate courts denied petitioner's application for permission to appeal his Motion to Reopen his post conviction proceeding, concluding that the claims in his motion to reopen were precluded by *Keen*. *See Vincent Sims vs. State*, No. W2013-02594-CCA-R28-PD, 2014 Tenn. Crim. App. LEXIS 1179 (Tenn. Crim. App. Feb. 5, 2014), *perm. app. denied* (Tenn. May 28, 2014).

The Tennessee Court of Criminal Appeals did grant petitioner permission to appeal this court's denial of his Petition for Writ of Error Coram Nobis. In reviewing petitioner's claims, the Court acknowledged a narrow exception does exist for tolling the statute of limitations applying to writs of error coram nobis where "although not newly discovered evidence, in the usual sense of the term, the availability of the evidence is newly discovered." *See Sims*, 2014 Tenn. Crim. App. LEXIS 1151, *27, citing *Harris vs. State*, 102 S.W.2d 587, 160-61 (Tenn. 2003), (Koch J. concurring). However, the court

determined in the instant case that petitioner had "failed to cite to any authority applying this narrow unavailability exception based upon a change in the law." *Sims*, 2014 Tenn. Crim. App. LEXIS 1151 at *28. The Court further found that even if the unavailability exception were to apply to a change in the law, petitioner was not entitled to relief. *Id*. The Court determined that *Keen* specifically rejected the claim by petitioner that there is a different legal standard for determining intellectual disability following the Tennessee Supreme Court's decision in *Coleman*. *Id*. at *30-31. Moreover, the Court noted that even if *Coleman* did create new ground for relief, petitioner failed to file his petition for writ of error coram nobis until twenty months following the issuance of the Court's opinion in *Coleman. Id*. at 34. Finally, the Court found that "the information provided in Dr. Auble's affidavit was available for presentation prior to *Coleman*" and that "nothing prevented the petitioner from presenting during post-conviction proceedings relevant and competent evidence, other than his raw IQ test scores, to prove that his 'functional intelligence quotient' when the crime was committed was 'seventy (70) or below.'" *Id*. at *33. Thus, the Court held that court had properly found petitioner's Petition for Writ of Error Coram Nobis was barred by the one-year statute of limitations. Id. at *35.[1]

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[1] The Court also rejected petitioner's independent cause of action based upon Tenn. Code Ann. § 39-13-203. The Court held that the statue merely "lists the

On May 18, 2015, petitioner filed a second Motion to Reopen his Post Conviction Proceedings claiming the United States Supreme Court opinion in *Hall v. Florida*, 134 S.Ct. 1986 (2014), established a new constitutional right not recognized as existing at the time of his trial which requires retroactive application to his case.

MOTION TO REOPEN POST CONVICTION PROCEEDINGS

Petitioner argues he is entitled to reopen his petition for post conviction relief under Tenn. Code Ann. §40-30-117(a)(l) and contends that *Hall v. Florida*, decided in May of 2014, created a new rule of constitutional law not recognized in 2001 when he was tried and convicted of first degree murder and sentenced to death. He asserts that the Court's decision in *Hall* dictates a result not required by precedent existing at the time his conviction became final and that reasonable minds could find application of the rule debatable. *See* Tenn. Code Ann. § 40-30-122. Petitioner argues that at the time his conviction became final, no rule required a State court to conduct an Eighth Amendment intellectual disability inquiry in which the application of an IQ

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requirements of intellectual disability, the burden of proof and the procedure when the issue is raised at trial" and found that "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." *See Sims*, 2014 Tenn. Crim. App. LEXIS II51, *36.

tests standard error of measurement (SEM) to a defendant's IQ test score indicated the range of defendant's potential IQ includes an IQ of at least 70. Petitioner asserts that even *Coleman* does not require a court evaluating intellectual disability in the capital litigation context to consider an IQ test's SEM, but rather left to the reviewing court's discretion the application of the SEM. Thus, he contends that the mandate in *Hall* requiring a hearing on intellectual disability in which the application of the SEM creates a range of scores that includes 70 creates a new rule of constitutional law not required by any prior precedent in place at the time of his trial. Petitioner contends that, at the time of his trial, Tennessee courts characterized 70 as a "maximum score" for an intellectual disability finding under Tenn. Code Ann. §39-13-203(a)(l). Thus, he argues that at the time of his trial the application of a rule allowing for a hearing on intellectual disability when a defendant had obtained an IQ score of 70 or above was debatable. Essentially, he argues that *Hall* dictates a result - namely, the holding of an intellectual disability hearing previously unavailable to him - that prior precedent, including *Coleman*, did not mandate.

The State asserts petitioner fails to meet the statutory requirements of section (a)(l) of Tenn. Code Ann. § 40-30-117. In response to petitioner's argument that *Hall v. Florida* created a new constitutional right which should be retroactively applied to petitioner's case, the State argues that *Hall* found that the Florida Supreme Court's application of the Florida statute in a manner which precluded consideration of other evidence

demonstrating that a petitioner's faculties were limited when a petitioner has an IQ score above seventy violated the constitution. The State argues that Tennessee courts have already addressed the issue raised in *Hall* and have determined that there is no bright line cut off for IQ scores under the Tennessee statute. It also argues that Tennessee Courts have further established that such scores must be considered in conjunction with deficits in adaptive behavior, asserting that this interpretation of the Tennessee statute was first established in 2001 in *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001). Thus, the State argues that petitioner has failed to raise such claims within the one year statute of limitations established by Tenn. Code Ann. §40-30-117. The State further argues that the review by the appellate courts of this court's prior order denying petitioner's first Motion to Reopen his post conviction claims directly addressed petitioner's claims under *Hall v. Florida* and specifically held that petitioner did not suffer the harm imposed by the Florida statute which was found to be unconstitutional in *Hall*. Thus, the State asserts petitioner's claims have been previously reviewed and denied by the appellate courts of this state.

REOPENING POST CONVICTON PROCEEDINGS

Tenn. Code Ann. § 40-30-117 governs the reopening of post conviction proceedings: Petitioner relies on section (a)(l) which provides:

> (a) A petitioner may file a motion in the trial court to reopen the first postconviction petition only if the following applies:

> (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.

This court must determine whether the United States Supreme Court's decision in Hall v. Florida created a new constitutional right which did riot exist at the time of petitioner's trial and which requires retroactive application to petitioner's case. A brief review of the development of the law in Tennessee relating to intellectual disability in the capital litigation context is necessary in order to properly evaluate petitioner's claims.

INTELLECTUAL DISABILITY
IN TENNESSEE DEATH PENALTY
JURISPRUDENCE

Tenn. Code Ann. §39-13-203

Tennessee Code Annotated §39-13-203 precludes a defendant who is intellectually disabled[2] at the

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[2] In 2010 the statute was amended and the term "mental retardation" was replaced with the terms "intellectually disabled" or "intellectual disability." As the Tennessee Supreme Court noted in *Coleman*

time of committing first degree murder from being sentenced to death. *See* Tenn. Code Ann. §39-13-203. The statute defines intellectual disability as: (1) significantly sub-average general intellectual functioning as evidenced by an IQ of seventy (70) or below; with (2) deficits in adaptive behavior; and (3) manifestation of symptoms prior to the age of eighteen (18). Tenn. Code Ann. §39-13-203(a). All three prongs of this definition must be satisfied to establish intellectual disability. A defendant relying on the statute as a bar to execution bears the burden of demonstrating, by a preponderance of the evidence, that he meets the statutory definition of "intellectually disabled" at the time of the commission of the offense for which the state is seeking a sentence of death. Tenn. Code Ann. §39-13-203(c). The statute states that "the determination of whether the defendant is intellectually disabled at the time of the offense of first degree murder shall be made by the court." Tenn. Code Ann. § 39-13-203(c).

Significantly Sub-average General Intellectual Functioning *Atkins*, *Van Tran*, and *Howell*

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v. State, 341 S.W.3d 221, 226 (Tenn. 2011), "the terms "'intellectual disability"' and "'mental retardation"' refer to the same population in number, kind, type, and duration of disability. Thus, the terms are interchangeable." However, the Court noted the preferred term is now "intellectual disability." Some of the cases use the outdate terminology, "mental retardation." When discussing these cases, the court has used the language of the case.

Following the legislature's enactment of Tenn. Code Ann. §39-13-203, the Tennessee Supreme Court held that the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution prohibits the execution of the mentally retarded. *Heck Van Tran v. State of Tennessee*, 66 S.W.3d 790, 809 (Tenn. 2001). In so holding, the court found that the execution of intellectually disabled individuals violated evolving standards of decency, was grossly disproportionate and failed to achieve legitimate penalogical objectives for punishment. *Id*. The Court in *Van Tran* instructed trial courts reviewing claims of intellectual disability to apply the applicable criteria set forth by Tenn. Code Ann. § 39-13-203. *Id*.

In the year that followed, the United States Supreme Court held that the execution of intellectually disabled individuals was also prohibited by the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (Tenn. 2002). The Court found that intellectually disabled individuals "who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes." 536 U.S. at 341, 122 S.Ct. at 2244. However, the Court also found that "because of their disabilities in areas of reasoning, judgment, and control of their impulses" such persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id*. The Court in *Atkins* acknowledged that there is some disagreement in the clinical community about which offenders should in fact be considered intellectually disabled. 536 U.S at 347-48. However, the Court found that generally the

most widely accepted definitions of intellectual disability included two common components: 1) significantly subaverage intellectual functioning accompanied by related limitations in two or more adaptive skills areas, and 2) manifestation of the condition before the age of 18. *See Atkins*, 536 U.S. 348, 122 S.Ct. 2250 (quoting both the American Association of Mental Retardation and the American Psychiatric Association definition of mental retardation). The Court left it to the states to develop appropriate definitions, statutes and/or procedures for enforcing the constitutional prohibition. *Id*.

In decisions following *Van Tran* and *Atkins*, trial courts have received additional guidance from the Tennessee Appellate Courts regarding how to appropriately evaluate the statutory criteria. In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Tennessee Supreme Court answered the question of whether or not the Tennessee statute should be interpreted as requiring a "bright line" rule for determining IQ. In *Howell*, the defendant argued that the statute's inclusion of an IQ score of seventy as an absolute cutoff score is contrary to the customary practice and methods of diagnosis utilized by mental health professionals in determining if a person is in fact mentally retarded. However, the Court held that the language of the statute was "perfectly clear and unambiguous." 151 S.W.3d at 458. To be considered mentally retarded, the Court held that the statute required that a defendant must have an IQ of seventy (70) or below. *Id*.

Coleman v. State

341 S.W.3d 221 (Tenn. 2011)

In 2011, the Tennessee Supreme Court revisited the holdings in *Van Tran* and *Howell* in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). In Coleman, the Court found that Tennessee Code Annotated § 39-13-203 neither provides clear direction regarding how an individual's IQ should be determined nor specifies any particular test or testing method which should be utilized. *Coleman*, 341 S.W.221, 241 (*citing Howell v. State*, 151 S.W.3d at 459). The Tennessee Supreme Court in *Coleman* acknowledged *Howell* correctly interpreted the Tennessee statute in holding, "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range but must be expressed specifically." *Coleman*. 341 S.W.3d at 242. However, the court in Coleman found that the lower state courts had misinterpreted *Howell* by extending its reasoning too far. As the Court explained,

> following *Howell v. State,* some trial courts and the Court of Criminal Appeals have construed our holding that *Tenn. Code Ann. § 39-J 3-203(a)(J)* provided a "clear and objective guideline" for determining whether a criminal defendant is a person with intellectual disability to have established 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.

Id. at 240.

The Court specifically held that section (a)(l) of the statute required a "functional intelligence quotient score of seventy (70) or below" and did not require a "functional intelligence quotient *test score* of seventy (70) or below." *Id*. (emphasis in original). The Court concluded that as a result, "the trial court 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." *Id*. at 241. It also noted that the statute's purpose was for the courts to arrive at the defendant's true functional I.Q. score. *Id*. The Court held that because the statute did not specify how a criminal defendant's functional I.Q. should be determined, experts may utilize, and the court may consider, relevant and reliable practices, methods, standards and data. *Id*. The Court further stated that

> if the trial court determines that professionals who assess a person's IQ 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 IQ, 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 242.

Allowing for the consideration of these factors was also found by the Court to be "consistent with current clinical practice," which may "require

information from multiple sources." *Id*. at 244. Moreover, the Court held that recent practice in the Tennessee courts

> reflect[s] 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. test scores. More importantly, they also reflect 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. "In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields." *Id*. at 242. As the Tennessee Supreme Court explained in *Coleman*, allowing defendants to *present* evidence regarding the Flynn Effect and the SEM is not enough. Tennessee courts must also *consider* this evidence in assessing a defendant's ultimate functional I.Q. Coleman. 341 S.W.3d at 241-42. (emphasis added); See also *Black v. Bell*, 664 F.3d 81 (6th Cir. 2011). Following the *Coleman* decision the United States Supreme Court had the opportunity to evaluate the Florida Supreme Court's application of its intellectual disability statute. It is this opinion the petitioner now relies upon to support his claims.

Hall v. Florida
134 S. Ct. 1986; 188 L. Ed. 2d 1007

Like the Tennessee Supreme Court in *Coleman*, the Florida appellate courts recently evaluated the application of the Florida statute governing intellectual disability in the capital litigation context. The Florida statute is similar to the Tennessee statute. However, unlike the Tennessee Supreme Court, the Florida Supreme Court interpreted the statue narrowly, finding that it precluded the evaluation of a raw IQ test scores standard error of measurement and preempts a petitioner's ability to introduce evidence relating to adaptive deficits which might indicate intellectual disability when a petitioner has a test score above seventy. The United States Supreme Court held that such an interpretation violated the constitutional principles established in *Atkins*.

The United States Supreme Court found that the Florida law defined intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. The Court held this rigid rule creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional. In addition to limiting the evidence of adaptive deficits where raw tests scores exceeded 70, the Florida courts also refused to consider the standard error of measurement when evaluating IQ scores. The Supreme Court concluded that Florida "goes against the unanimous professional consensus" and simply does not provide adequate constitutional

protections for intellectual disabled defendants. *Hall*, 134 S. Ct. at 2000; 188 L. Ed. 2d at 1025.

FINDINGS

This court finds that *Hall* did not create a new constitutional right which did not exist at the time of petitioner's trial. Rather, *Hall* held that the Florida Supreme Court's application of the Florida statute governing intellectual disability claims relating to capital litigation was unconstitutional. The Court's opinion specifically applied the principles established in *Atkins* to the Florida Supreme Court's interpretation of the Florida statute. The Florida Supreme Court refused to consider the standard error of measurement when evaluating raw IQ scores and demanded an IQ score of seventy or below before considering a defendant's adaptive deficits. The Court in *Hall* found such application could not meet the constitutional standard established in *Atkins.* The Court did not create a new right or guiding principle with regard to the application of intellectual disability conclusions in the capital litigation context; rather, the court merely explained and enforced the principles established years before in *Atkins.* Thus, this court does not find that petitioner is entitled to relief under Tenn. Code Ann. §40-30-117(a)(l). Moreover, this court notes that, unlike the Florida Supreme Court, our Supreme Court has specifically held that the requirement that a defendant demonstrate that he has an IQ of seventy or below does not preclude consideration of the standard error of measurement, and has further held that IQ tests must be considered in conjunction with deficits in adaptive behavior which may indicate defendant's IQ is actually lower than the raw test data suggests.

This interpretation of the Tennessee statute was fully explored in *Coleman*, a decision released four years prior to the filing of the petitioner's current motion to reopen, and relied upon the analysis of the Court in *Van Tran*, which was decided in 2001. Therefore, this court finds petitioner is not entitled to reopen his petition based upon this claim.

While this court agrees with the petitioner that the issue presented for review in his second Motion to Reopen was not squarely addressed by the appellate court in *Vincent Sims vs. State of Tennessee*, No. W2014-00166-CCA-R3-PD, 2014 Tenn. Crim. App. LEXIS 1151 (Tenn. Crim. App. filed Sept. 3, 2014), *perm. app. denied* (Tenn. May 18, 2015), this court finds that such a conclusion does not change this court's assessment of the petitioner's claims. Sims addressed the issue of whether the statute of limitations should be tolled for purposes of raising issues relating to a writ of error coram nobis where the evidence was not unknown, but was merely unavailable, and the unavailability was related to a change in the law. Although discussing *Hall*, the Court did not directly address whether *Hall* created a right which did not exist to petitioner at the time of trial. Thus, this court does not find the Motion to Reopen should be dismissed based upon the Tennessee Court of Criminal Appeal's previous holding in *Sims*. However, the Court's comments regarding *Hall* and the relationship of the United States Supreme Court's holding in *Hall* to the application of the Tennessee statute, and in particular the petitioner's case, are instructive in this court's evaluation of petitioner's current claims. The Court wrote that "unlike the defendant in *Hall*, . . .

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." The Court found that "contrary to petitioner's claims," 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." Likewise, this court concludes that petitioner was not denied the right he now asserts was created by *Hall*, namely a full and fair hearing on his claims of intellectual disability.

Clearly, at the time of petitioner's original post conviction hearing Dr. Auble made a decision, based upon petitioner's performance on the WAIS-III intelligence test, not to test petitioner's adaptive skills. However, it does not appear that Dr. Auble or post conviction counsel were precluded by the post-conviction court from presenting such evidence. The court put no limitations on Dr. Auble's evaluation and testing of petitioner or post conviction counsels' presentation of evidence in support of a claim of intellectual disability. The defense team, in consultation with their experts, chose to forego further testing and the presentation of this evidence. Nevertheless, Dr. Auble did testify she believed petitioner suffered from deficits in adaptive behavior and both Auble and Woods stated that it was their opinion that the petitioner was intellectually disabled

despite the fact that he scored higher than 70 on the administered test for intellectual functioning. Thus, at the time of petitioner's initial post conviction hearing, petitioner was not precluded by this court or any holding of the Tennessee appellate courts from presenting evidence of his adaptive deficits or other evidence relating to the claim that he is indeed intellectually disabled. Therefore, even if this court found that *Hall* created a new constitutional right in the form of a hearing relating to the presentation of evidence of adaptive deficits despite an IQ score above 70, and this court were to find that such a right should be retroactively applied to petitioner's case, this court would conclude such right was not violated.

CONCLUSION

This court finds petitioner is not entitled to relief under either part (a)(l) of Tenn. Code Ann. §40-30-117. *Hall v. Florida* did not create a new constitutional right which did not exist at the time of petitioner's trial and which now requires retroactive application to petitioner's case. Moreover, even if this court were to find that *Hall* created a new right applicable to petitioner's case, this court finds the principles established in *Hall* were not violated during the initial post conviction proceedings. Petitioner had a full and fair opportunity to present the evidence sought to be introduced, and was not precluded by this court from presenting evidence relating to his adaptive deficit or other evidence demonstrating that despite having an IQ score above 70, he is in fact intellectually disabled. Therefore, the Motion to Reopen his post conviction petition is hereby denied.

Entered this 10th day of August, 2015.

/s/ Chris Craft
Chris Craft
Criminal Court Judge, Div. VIII
30th Judicial District at Memphis

PART II

MICHAEL EUGENE SAMPLE v. STATE OF TENNESSEE

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

MICHAEL EUGENE SAMPLE v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. P14252

No. W2015-00713-SC-R11-PD
Filed May 09 2016

ORDER

Upon consideration of the application for permission to appeal of Michael Eugene Sample and the record before us, the application is denied.

PERCURIAM

ROGER A. PAGE, J., not participating

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

APPENDIX F

IN THE CRIMINAL COURT FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION I

MICHAEL SAMPLE	)	**Filed 3-24-15**
	)	
v.		
	)	**No. P-14252**
STATE OF TENNESSEE		
	)	

ORDER

This matter came to be heard upon petitioner, Michael Sample's, Motion to Re-open his Post Conviction Petition and the State's motion to dismiss the petitioner's motion to re-open. Petitioner contends he is intellectually disabled and the United States Supreme Court opinion in *Hall v. Florida*, 572 U.S. ___, 134 S. Ct. 1986; 188 L. Ed. 2d 1007 (2014) created a new constitutional right which is retroactively applicable to his case. The State argues *Hall v. Florida* does not create a new constitutional right and further asserts: (1) petitioner has failed to

meet the statutory requirements for re-opening his post conviction petition; (2) has failed to file his motion to reopen within the one year statute of limitations; and (3) has waived his claims of intellectual disability by failing to timely raise such claims. Following a review of petitioner's motion to reopen and the state's response and after hearing arguments of counsel, this court agrees with the State's contention *Hall v. Florida* did not create a new constitutional right applicable to petitioner's case and petitioner has otherwise failed to comply with the statutory requirements for reopening his post conviction petition. Thus, petitioner's Motion to Re-open his Post Conviction proceedings is hereby, **DENIED**.[1]

MOTION TO REOPEN POST CONVICTION PROCEEDIGNS

Petitioner argues: (1) he is entitled to reopen his petition for post conviction relief under Tenn. Code Ann. §40-30-l17(a)(l), allowing a petitioner to reopen his post conviction proceedings when a new rule of constitutional law is established requiring retroactive application to his case; (2) new testing and evaluation of his intellectual disability establish new scientific evidence demonstrating "actual innocence" as it relates to his sentence of death entitling him to

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[1] Petitioner filed both a Motion to Reopen Petition for Post Conviction Relief and an Amended Motion to Reopen Petition for Post Conviction Relief. This court has reviewed petitioner's claims in both the original motion and the amended motion.

reopen his post conviction petition under Tenn. Code Ann. §40-30-l17(a)(2); and (3) his rights to equal protection and due process were violated by the appellate courts disparate treatment of his claims under Tenn. R. Evid. 404(b) when compared to the appellate courts treatment of the claims of similarly situated capita] defendant, Henry Lee Jones as addressed by the Tennessee Supreme Court in *State v. Jones*, 2014 Tenn. LEXIS 669 (filed September 25, 2014).

With regard to petitioner's claims new IQ testing and evaluation of intellectual ability amounts to newly discovered evidence, this court notes petitioner acknowledges this argument was rejected by the Tennessee Supreme Court in *Keen v. State*, 398 S.W.3d 594, 610-613 (Tenn. 2012).[2] Such claim having been previously rejected by our appellate courts, this court finds petitioner is not entitled to relief based upon this claim and declines to further address petitioner's arguments relating to this claim. Additionally, this court finds petitioner has previously been afforded an opportunity to litigate his claims relating to the introduction of 404(b)

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[2] In *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012), the Tennessee Supreme Court held Tenn. Code Ann.§ 40-30-117(a)(2) is not applicable to claims of actual innocence of the death penalty; therefore, petitioners cannot rely on § 40-30-117(a)(2) in an attempt to reopen post conviction proceedings where it was argued petitioner is actually innocent of the death penalty due to his intellectual disability.

evidence; thus, he was not denied equal protection or due process as it relates these claims. Moreover, this court agrees with the State's assertion *State v. Jones* did not create a new constitutional right. Thus, this court finds petitioners claims are without merit and declines to further address them in this order.

As it relates to his claims of intellectual disability, petitioner avers *Hall v. Florida*, 572 U.S. _ 134 S. Ct. 1986; 188 L. Ed. 2d 1007 (2014), created a new rule of constitutional law which is retroactively applicable to his case. Petitioner argues *Hall* answers for the first time the question of how intellectual disability must be defined under the Eighth Amendment. Specifically, he asserts *Hall* defines the first prong of the intellectual disability definition, subaverage intellectual functioning, as a range of IQ falling between 65 and 75 when adjusted for the standard error of measurement. He further argues *Hall* holds, when making an intellectual disability determination; a trial court must take a "holistic" approach considering a petitioner's IQ scores along with adaptive deficits which may indicate a petitioner's IQ is actually lower than his raw IQ score indicates. Petitioner contends *Hall*, unlike *Atkins*, ties the Eighth Amendment prohibition against cruel and unusual punishment to the views and standards of medical professionals which he argues places a new obligation on the states and creates a new constitutional right to defendants. He argues by adopting the definition utilized by the medical community the Supreme Court has removed from the states the ability to define which defendants will be considered intellectually disabled. Thus, he argues the current Tennessee statute, with its requirement

of a seventy or below IQ independent of adaptive deficits, is invalidated by the *Hall* decision.

Petitioner further asserts by requiring consideration of the standard error of measurement when assessing IQ scores and emphasizing the interplay between IQ and adaptive deficits, the Court in *Hall* relaxed the standard of proof required to establish intellectual disability, essentially creating a new constitutional right to capital defendants. He contends he is intellectually disabled within the definitions provided by *Hall* and is thus entitled to application of the new constitutional standard established by the Court. He asserts retroactive application of this new rule is warranted due to the fact such application would enhance the integrity and reliability of the fact finding process as it relates to his eligibility for the death penalty. *See Van Tran v. State*, 66 S.W.3d 790, 911 (Tenn. 1999). Additionally, petitioner argues the new test for intellectual disability set out in *Hall* creates a new "watershed" rule of criminal procedure warranting retroactive application. *See Bush v. State*, 428 S.W.3d 1 (Tenn. 2014). Finally, petitioner asserts his claim was properly filed within one of year of the *Hall* decision; and, thus, should be considered timely.

The State asserts petitioner fails to meet the statutory requirements of both section (a)(l) and section (a)(2) of Tenn. Code Ann. §40-30-117, governing the reopening of post conviction proceedings. In response to petitioner's argument *Hall v. Florida* created a new constitutional right which should be retroactively applied to petitioner's case, the State argues, rather than creating a new constitutional right, the Supreme Court in *Hall*

simply addressed the Florida Supreme Court's application of the Florida statute. The State asserts *Hall* found the Florida Supreme Court's application of the Florida statute in a manner which created a bright line cut off for IQ scores violated the constitutional protections under the Eight and Fourteenth Amendments. The State argues Tennessee courts have already addressed the issue raised in *Hall* and determined there is no bright line cut off for IQ scores under the Tennessee statute and argues Tennessee Courts have further established such scores must be considered in conjunction with deficits in adaptive behaviors. The State asserts this interpretation of the Tennessee statute was first established in 2001 in the Court's opinion in *Van Tran v. State*, 66 S.W.3d 790, 809 (Tenn. 2001). Thus, the State argues, even if petitioner's claims were meritorious, petitioner has railed to raise such claims within the one year statute of limitations established by Tenn. Code Ann. §40-30-117.

REOPENING POST CONVICTON PROCEEDINGS

Tenn. Code Ann. §40-30-117 governs the reopening of post conviction proceedings. Petitioner relies on sections (a)(l) and (a)(2) which provides:

> (a) A petitioner may file a motion in the trial court to reopen the first postconviction petition only if the following applies:
>
> (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.

As previously discussed, the appellate courts have previously rejected petitioner's claims under part (a)(2) of the statute. Thus, the only issue remaining for this court is whether the United States Supreme Court's decision in *Hall v. Florida* created a new constitutional right which did not exist at the time of petitioner's trial and which requires retroactive application to petitioner's case. A brief review of the development of the law in Tennessee relating to intellectual disability in the capital litigation context is necessary in order to properly evaluate petitioner's claims.

INTELLECTUAL DISABILITY IN TENNESSEE DEATH PENALTY JURISPRUDENCE

Tenn. Code Ann. §39-13-203

Tennessee Code Annotated §39-13-203 precludes a defendant who is intellectually disabled[3] at the time of committing first degree murder from being sentenced to death. *See* Tenn. Code Ann. §39-13-203. The statute defines intellectual disability *as:* (1) significantly sub-average general intellectual functioning as evidenced by an IQ of seventy (70) or below; with (2) deficits in adaptive behavior; and (3) manifestation of symptoms prior to the age of eighteen (18). Tenn. Code Ann. §39-13-203(a). All three prongs of this definition must be satisfied to establish intellectual disability. A defendant relying on the statute as a bar to execution bears the burden of demonstrating, by a preponderance of the evidence, that he meets the statutory definition of intellectually disabled at the time of the commission of the offense for which the defendant is seeking a sentence of death. Tenn. Code Ann. §39-13-203(c).

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[3] In 2010 the statute was amended and the term "mental retardation" was replaced with the terms "intellectually disabled" or "intellectual disability." As the Tennessee Supreme Court noted in *Coleman v. State*, 341 S.W.3d 221, 226 (Tenn. 2011), "the terms '"intellectual disability"' and '"mental retardation"' refer to the same population in number, kind, type, and duration of disability. Thus, the terms are interchangeable." However, the Court noted the preferred term is now "intellectual disability." Some of the cases use the outdate terminology; "mental retardation." When discussing these cases, the court has used the language of the case.

The statute states, "the determination of whether the defendant is intellectually disabled at the time of the offense of first degree murder shall be made by the court." Tenn. Code Ann. § 39-13-203(c).

Significantly Sub-average General Intellectual Functioning

Atkins, Van Tran, and Howell

Following the legislature's enactment of Tenn. Code Ann. §39-13-203, the Tennessee Supreme Court found the Eighth Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution prohibits the execution of the mentally retarded. *Heck Van Tran v. State of Tennessee*, 66 S.W.3d 790, 809 (Tenn. 2001). In so holding, the court found the execution of mentally retarded individuals violates evolving standards of decency; is grossly disproportionate; and, fails to achieve legitimate penelogical objectives for punishment. *Id*. The Court in *Van Tran* instructed trial court's reviewing claims of mental retardation to apply the applicable criteria set forth by Tenn. Code Ann. § 39-13-203. *Id*.

In the year that followed, the United States Supreme Court held that the execution of mentally retarded individuals is prohibited by the United States Constitution. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (Tenn. 2002). The Court found that mentally retarded individuals, "who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes." 536 U.S. at 341, 122 S.Ct. at 2244. However, the Court found that "because of their disabilities in areas of reasoning, judgment, and control of their impulses" such persons "do not act with the level of moral culpability that characterizes

the most serious adult criminal conduct." *Id*. The Court in *Atkins* acknowledged that there is some disagreement in the clinical community about which offenders should in fact be considered mentally retarded. 536 U.S at 347-48. However, the Court found that generally the most widely accepted definitions of mental retardation included certain common components: significantly subaverage intellectual functioning accompanied by related limitations in two or more adaptive skills areas, and manifestation of the condition before the age of 18. *See Atkins*, 536 U.S. 348, 122 S.Ct. 2250 (quoting both the American Association of Mental Retardation and American Psychiatric Association definition of mental retardation). The Court left it to the State's to develop appropriate definitions, statutes, and/or procedures for enforcing the constitutional prohibition. *Id*.

In decisions following the 2001 *Van Tran* decision, and the United States Supreme Court decision in *Atkins*, trial courts have received additional guidance from the Tennessee Appellate Courts regarding how to appropriately evaluate the statutory criteria. In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Tennessee Supreme Court answered the question of whether or not the Tennessee statute should be interpreted as requiring a "bright line" rule for determining IQ. In *Howell*, the defendant argued that statute's inclusion of an IQ score of seventy as an absolute cutoff score is contrary to the customary practice and methods of diagnosis utilized by mental health professionals in determining if a person is in fact mentally retarded. The Court held that the language of the statute was

"perfectly clear and unambiguous." 151 S.W.3d at 458. Thus, to be considered mentally retarded, the Court held that the statute required a defendant must have an IQ of seventy (70) or below. *Id*. In 2011 the Tennessee Supreme Court revisited the holdings in *Van Tran* and *Howell*.

Coleman v. State

341S.W.3d 22l (Tenn. 2011)

In *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011), the Tennessee Supreme Court further explained the application of the *Atkins* standard under Tennessee law. In *Coleman*, the Court found Tennessee Code Annotated *§* 39-13-203 neither provides clear direction regarding how an individual's IQ should be determined nor specifies any particular test or testing method which should be utilized. *Coleman*, 341 S.W.221, 241 (citing *Howell v. State*, 151 S.W.3d at 459. The Tennessee Supreme Court in *Coleman* acknowledged *Howell* correctly interpreted the Tennessee statute in holding, "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range but must be expressed specifically." *Coleman*, 341 S.W.3d at 242. However, the court in *Coleman* found the lower state courts had misinterpreted *Howell* by extending its reasoning too far. As the Tennessee Supreme Court explained,

> following *Howell v. State,* some trial courts and the Court of Criminal Appeals have construed our holding that Tenn. Code Ann. §39-13-203(a)(l) provided a "clear and objective guideline" for determining whether a criminal defendant is a person with

> intellectual disability to have established 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.

Id. at 240.

The Court specifically found section (a)(l) of the statute requires a "functional intelligence quotient score of seventy (70) or below" and does not require a "functional intelligence quotient *test score* of seventy (70) or below." *Id*. (emphasis in original). The Court concluded as a result, "the trial court 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." *Id*. at 241. The Court noted the statute's purpose is for the courts to arrive at the defendant's true functional I.Q. score. *Id*. The Court held, because the statute does not specify how a criminal defendant's functional I.Q. should be determined, experts may utilize and the court may consider relevant and reliable practices, methods, standards and data. *Id*. The Court noted

> if the trial court determines that professionals who assess a person's IQ 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 IQ, 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 242.

Allowing for the consideration of these factors was also found by the Court to be "consistent with current clinical practice," which may "require information from multiple sources." *Id*. at 244, Moreover, the Court noted recent practice in the Tennessee courts

> reflect[s] 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. test scores. More importantly, they also reflect 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.

"In formulating an opinion regarding a criminal defendant's I.Q. at the time of the offense, experts may bring to bear and utilize reliable practices, methods, standards, and data that are relevant in their particular fields." *Id*. at 242. As the Tennessee Supreme Court explained in *Coleman*, allowing

defendants to *present* evidence regarding the Flynn Effect and the SEM is not enough. Tennessee courts must also *consider* this evidence in assessing a defendant's ultimate functional I.Q. *Coleman*, 341 S.W.3d at 241-42. (emphasis added); See also *Black v. Bell*, 664 F3d *81* (61h Cir. 2011). Following the *Coleman* decision the United States Supreme Court had the opportunity to evaluate the Florida Supreme Court's application of its intellectual disability statute. It is this opinion the petitioner now relies upon to support his claims.

Hall v. Florida

134 S. Ct. 1986; 188 L. Ed. 2d 1007

Like the Tennessee Supreme Court in *Coleman*, the Florida appellate courts recently evaluated the application of the Florida statute governing intellectual disability in the capital litigation context. The Florida statute is similar to the Tennessee statute. However, unlike the Tennessee Supreme Court, the Florida Supreme Court interpreted the statue narrowly precluding the evaluation of a raw IQ test scores standard error of measurement and preempting a petitioner's ability to introduce evidence relating to adaptive deficits which might indicate intellectual disability despite a test score above seventy. The Supreme Court held such an interpretation violated the constitutional principles established in *Atkins.*

The Supreme Court found Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. The Court held this rigid rule creates an unacceptable risk that

persons with intellectual disability will be executed, and thus is unconstitutional. In addition to limiting the evidence of adaptive deficits where raw tests scores exceeded seventy the Florida courts refused to consider the standard error of measurement when evaluating IQ scores. The Supreme Court concluded Florida "goes against the unanimous professional consensus" and simply does not provide adequate constitutional protections for intellectual disabled defendants. *Hall*, 134 S. Ct. at 2000; 188 L. Ed. 2d at 1025.

FINDINGS

This court does not find *Hall* created a new constitutional right which did not exist at the time of petitioner's trial. Rather, *Hall* held the Florida Supreme Court's application of the Florida statute governing intellectual disability claims relating to capital litigation is unconstitutional. The Court's opinion specifically applied the principles established in *Atkins* to the Florida Supreme Court's interpretation of the Florida statute. The Florida Supreme Court refused to consider the standard error of measurement when evaluating raw IQ scores and demanded an IQ score of seventy or below before considering a defendant's adaptive deficits. The Court in Hall found such application could not meet the constitutional standard established in *Atkins.* The Court did not create a new right or guiding principle with regard to the application of intellectual disability conclusions in the capital litigation context; rather, the court merely explained and enforced the principles established years before in *Atkins.* Thus, this court does not find petitioner is entitled to relief under Tenn. Code Ann. §40-30-117(a)(l). Moreover,

this court notes unlike the Florida Supreme Court, the Tennessee Supreme Court has specifically held the statute's requirement a defendant demonstrate he has an IQ of seventy or below does not preclude consideration of the standard error of measurement and has further held IQ tests must be considered in conjunction with deficits in adaptive behavior which may indicate defendant's IQ is actually lower than the raw test data suggests. This interpretation of the Tennessee statute was fully explored in *Coleman*, a decision released two years prior to the filing of petitioner's motion to reopen; but, relied upon the analysis of the Court in *Van Tran*, which was decided in 2001. Therefore, this court finds petitioner is not entitled to relief based upon this claim.

CONCLUSION

This court finds petitioner is not entitled to relief under either part (a)(l) or part (a)(2) of Tenn. Code Ann. §40-30-117. *Hall v. Florida* did not create a new constitutional right which did not exist at the time of petitioner's trial and which now requires retroactive application to petitioner's case. Moreover, the Tennessee Supreme Court has previously rejected claims that new IQ testing qualifies as new scientific evidence for purposes of a motion to reopen post conviction. Finally, this court does not find petitioner's due process or equal protection rights were violated by the Tennessee Supreme Court's decision in *State v. Jones*.

It is so ordered, this the 24 of March, 2015.

/s/ Paula Skahan
Judge, Paula Skahan

Shelby County Criminal
Court
Division I