IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellant,	)	CAPITAL CASE
	)	
v.	)	Case No.
	)	
OSCAR SMITH,	)	**EXECUTION DATE:**
	)	**April 21, 2022**
Appellee.	)	

Application for Permission to Appeal

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STATEMENT OF THE CASE

Oscar Smith applies for permission to appeal the April 14, 2022 decision of the Tennessee Court of Criminal Appeals, affirming the criminal court's denial of his petition for relief under the Post-Conviction Procedures Act, Tennessee Code Annotated § 40-30-117. *Smith v. State*, No. M2022-00455-CCA-R3-PD, 2022 WL 1115034 (Tenn. Crim. App. Apr. 14, 2022).

QUESTIONS PRESENTED FOR REVIEW

In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), and *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), this Court held that where a petitioner has had no prior opportunity to present a claim involving a fundamental right, due process requires that a petitioner must be granted a hearing on a motion to reopen under Tennessee Code Annotated § 40-30-117 if the petitioner presents a "colorable claim" of entitlement to relief.

Accordingly, the question presented is:

Whether, in a capital case where new scientific, DNA evidence of actual innocence could not have been obtained previously, the post-conviction court violated Mr. Smith's right to due process by denying his motion to reopen—without a hearing—based on application of the higher "clear and convincing evidence" standard.

STATEMENT OF FACTS

On March 30, 2022, Serological Research Institute (SERI) reported the presence of unknown DNA—*that does not match Mr. Smith*—on the handle of the murder weapon in this case. TR. at 150 (Ex. 4, SERI

Report). After 32 years of adamantly asserting his innocence, Oscar Smith finally has proof that someone else murdered his family. Three business days later, on April 4, 2022, Mr. Smith filed a Motion to Reopen Post-Conviction Proceedings pursuant to Tennessee Code Annotated § 40-30-117, and/or for Review under the Post-Conviction DNA Analysis Act of 2001, Tennessee Code Annotated §§ 40-30-301, *et seq*. ("DNA Act"), in the Criminal Court for Davidson County, Tennessee. TR. at 007 (Motion to Reopen Post-Conviction Proceedings and/or for Review Under the Post-Conviction DNA Analysis Act of 2001). On Monday, April 11, 2022—without a responsive pleading by the state and without a hearing or argument—the post-conviction court denied Mr. Smith's motion. TR. at 312 (Order Denying Motion to Reopen Post-Conviction Proceedings). Within hours of the court's order, Mr. Smith filed a motion for reconsideration, setting out the post-conviction court's factual and legal errors. TR. at 325 (Motion to Reconsider Denial of Motion to Reopen). The post-conviction court summarily denied the motion for reconsideration on April 12, 2022. TR. at 347 (Order Denying Motion to Reconsider).

Mr. Smith immediately filed a notice of appeal and requested expedited briefing on his DNA Act claim. *See, Smith v. State*, M2022-00455-CCA-R3-PD, Mot. to Req. Expedited Briefing (filed April 12, 2022). On April 13, 2022, Mr. Smith filed a Rule 28 application for permission to appeal from the post-conviction court's denial of his Motion to Reopen. *Smith v. State*, M2022-00460-CCA-R28-PD. Mr. Smith requested expedited briefing and oral argument pursuant to Tennessee Supreme Court Rule 28 § 10(B) in that matter. *Id*. The Court of Criminal Appeals issued a Rule 20 denial of both Mr. Smith's actions on April 14, 2022.

Smith v. State, No. M2022-00455-CCA-R3-PD, 2022 WL 1115034 (Tenn. Crim. App. Apr. 14, 2022).

REASONS FOR GRANTING THE APPLICATION

This Court exists to protect the due process rights of all litigants who come before it. The Court does so through its opinions and through its Rules—each of which are binding on the lower courts. Here, the lower courts have either eschewed or misunderstood both the Court's rules and binding precedent. This Court should grant review to insure that in this case, where heightened due process is required, Mr. Smith's actual innocence claim receives constitutionally adequate review. *Smith v. State*, 357 S.W.3d 322, 346 (Tenn. 2011) ("We have on numerous occasions recognized the heightened due process applicable in capital cases and the heightened reliability required and the gravity of the ultimate penalty in capital cases.") (collecting cases). Though the orders of the courts below do not give any justification for failing to follow this Court's binding precedent and Rules, their failure to adhere to *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001), and Rule 28, demonstrate the need for this Court to clarify the applicability of the "colorable claim" standard to cases involving issues of fundamental rights.

I. This Court has found that due process requires that a capital petitioner have "a fair opportunity to litigate" claims under Tennessee Code Annotated § 40-30-117.

In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), this Court held that Supreme Court Rule 28's "colorable claim" pleading standard applies to motions to reopen in cases involving fundamental constitutional rights. Mr. Howell moved to reopen post-conviction and, upon dismissal, argued on appeal—just as Mr. Smith does here—that the post-conviction court erred in dismissing his claim under the clear and convincing evidence standard. This Court agreed, finding that, when a petitioner has not had a prior opportunity to present the claim raised in the motion to reopen, dismissal without a hearing under the heightened "clear and convincing evidence" standard violated due process. *Id.* at 460–63

In *Howell*, this Court held that the due process concerns regarding the opportunity to raise a constitutional claim are implicated by claims involving fundamental rights: "If an excessively lengthy sentence implicates a fundamental right, . . . then certainly a death sentence would as well." *Id.* at 462–63. For that reason, this Court held that "[d]ue process requires he be given a fair opportunity to litigate this claim in order to protect this right." *Id.*

To be clear, *Howell* involved a motion to reopen based on the Supreme Court's new recognition of a constitutional right: the Eighth Amendment prohibition on the execution of intellectually disabled persons. *Howell*, at 465. Mr. Howell moved to reopen under Tennessee

Code Annotated § 40-30-117(a)(1), and this Court held that the fundamental right of due process required that his first opportunity to litigate his entitlement to relief must be meaningful:

> We have previously recognized that the State has no duty to enact post-conviction procedures and that the opportunity to collaterally attack constitutional violations occurring in the conviction process is not a fundamental right. The fundamental right of due process is, however, an over-arching issue that has been recognized as a concern in post-conviction proceedings. What exactly is required in order to comply with due process in any given situation is often a difficult question. We have recognized that due process requires a defendant have "an opportunity to be heard at a meaningful time and in a meaningful manner," Also, and perhaps most importantly, we recognize that due process "embodies the concept of fundamental fairness."

Howell v. State, 151 S.W.3d 450, 461 (Tenn. 2004) (cleaned up).

In *Van Tran*, this Court followed *Howell* and held that fundamental fairness requires that "the petitioner have a meaningful opportunity to raise his substantive constitutional claim." 66 S.W.3d at 823–24. The Court noted, "In previous cases where this Court has granted a postconviction hearing based upon due process grounds, the defendant was confronted with circumstances beyond his control that prevented him from asserting a claim." *Id*.

II. Due process requires that Section 40-30-117(b) pleadings be evaluated under the "colorable claim" standard set forth in Rule 28.

Howell and *Van Tran* dictate that, whereas here, a petitioner has never had a chance to present a claim, the pleading standard is dictated by Tenn. Sup. Ct. R. 28 § 6(B)(2): the claim must "colorable" to merit a hearing. Once a colorable claim has been established, a petitioner is entitled to a hearing where entitlement to relief must be established by clear and convincing evidence. *Howell*, 151 S.W.3d at 463; *Van Tran*, 66 S.W.3d at 823–24. The post-conviction court violated due process by applying the higher "clear and convincing evidence" standard to Mr. Smith's claims in contravention of *Howell*. Though Mr. Smith requested reconsideration citing the court's use of the wrong standard, the court's one-sentence denial did not explain its departure from this Court's binding precedent. *Compare* Motion to Reconsider Denial of Motion to Reopen (TR. at 325) *with* Order Denying Motion to Reconsider (TR. at 347). Despite Mr. Smith raising the issue, the Court of Criminal Appeals also did not address the standard in its Rule 20 Order. *Smith*, 2022 WL 1115034.

Without either court providing a rationale, Mr. Smith is unable to speculate why the lower courts did not follow this Court's precedent. But the post-conviction court's use of the wrong standard and the appellate court's tacit approval thereof indicates this Court should grant review to clarify that the due process concerns addressed in *Howell* are not limited to Section 40-30-117(a)(1) but also (a)(2) as well. What is clear is that the same due process concerns that undergird *Howell* and *Van Tran* apply

with the same force to motions raised pursuant to subsection (b)(2)—and therefore, those due process concerns are implicated in Mr. Smith's instant case.

There is no question that Mr. Smith has never had an opportunity to present this evidence. The post-conviction court determined that Mr. Smith could not have produced this evidence sooner. TR. at 312 (Order Denying Motion to Reopen Post-Conviction Proceedings). Equally, it is clear that this evidence is "new." Indeed, the technology that allowed for the separation of the DNA strands recovered from the awl just became available this year. TR. at 149 (Ex. 4, Seri Report). As the post-conviction court found, this application is not driven by a desire to unreasonably delay either the execution of his sentence or the administration of justice. TR. at 312 (Order Denying Motion to Reopen Post-Conviction Proceedings at 10). This is not a case where a last-minute claim has been brought based upon long-known facts or where a petitioner has slept on his rights. *See* *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (citing *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*); *Gildersleeve v. New Mexico Mining Co.*, 161 U.S. 573, 578 (1896)). Rather, Mr. Smith has steadfastly maintained his innocence and has been attempting to prove his innocence in Tennessee state courts for the better part of a year.

This is instead a case where the development of new law and new scientific testing and methodology have allowed Mr. Smith—who has been incarcerated for more than three decades—to obtain new and previously unavailable facts that prove his innocence. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (though the burden for proving such would be

high, assuming that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"); *see, e.g.*, *Aguirre-Jarquin v. State*, 202 So.3d 785 (Fla. 2016) (ordering new trial and vacating death sentence for capital petitioner where new DNA evidence showed profile of alternate perpetrator, supporting petitioner's trial theory and persistent protestations of innocence); *House v. Bell*, 547 U.S. 518, 540–41 (2006) (new DNA evidence excluding capital petitioner as source of semen found in murder victim was "of central importance" where identity was an issue and where the previous DNA evidence pointing to petitioner was the sole forensic evidence presented to the jury).

Further, Mr. Smith's proof establishes that he is "actually innocent" of murdering his family. *See* Tenn. Code Ann. § 40-30-117(a)(2). Unlike many other cases involving new DNA evidence, there has never been any question that this crime was committed by a single perpetrator. Indeed, in both opening and closing arguments, the prosecution argued that the crime was committed by one person. TR at 187 (Ex. 6 Transcript of Opening & Closing Statements at TT p. 4-8 (arguing that one perpetrator committed the murders alone); *id*. at TT p. 62-64 (arguing that "there is only one man" who committed the crime)). If the DNA on the murder weapon did not come from the victims or Mr. Smith, a reasonable person can be left with only one conclusion: that Mr. Smith did not commit these murders. If granted an evidentiary hearing, his proof is sufficient to "establish by clear and convincing evidence that [he] is entitled to have the conviction set aside or the sentence reduced," Tennessee Code Annotated § 40-30-117(a)(4), (b). But, at the pleading stage, it violates

due process to hold Mr. Smith to the "clear and convincing evidence" standard that would be applicable at an evidentiary hearing.

III. This Court should grant review to ensure that the lowers courts apply the Rule 28/*Howell* colorable claim standard to new scientific proof of actual innocence.

Like Mr. Howell and Mr. Van Tran, Mr. Smith has never had an opportunity to present this proof of his actual innocence—due to "circumstances beyond his control that prevented him from asserting a claim." *Van Tran*, 66 S.W.3d at 824 (citing *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001); *State v. Nix*, 40 S.W.3d 459 (Tenn. 2001); *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000); *Watkins v. State*, 903 S.W.2d 302 (Tenn. 1995); *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)). Mr. Smith had no prior opportunity to raise the claim he now raises, as the technology that allowed SERI to isolate the unknown perpetrator's DNA did not exist until earlier this year. TR. at 149 (Ex. 4 SERI report) (reflecting new technology not available until 2022); *see also* TR. at 312 (Order Denying Motion to Reopen Post-Conviction Proceedings at 9–10) (finding "no reason to believe the timing results from an attempt to 'unreasonably delay the execution of sentence or administration of justice'"). Mr. Smith also has the same fundamental right not to be executed as Mr. Howell had. That is, the same factors that caused this Court to find that the "clear and convincing evidence" standard violated due process in *Howell* and *Van Tran* are equally present here. The Court should grant review to clarify that the pleading requirements for Section 117(a)(2) are the same as for Section 117(a)(1).

CONCLUSION

Mr. Smith respectfully requests this Court accept his application for permission to appeal to allow him to brief this matter fully. If granted, Mr. Smith's appellate brief will show that this Court should reverse the judgment below, and remand for further proceedings, including an evidentiary hearing on Mr. Smith's claims under the Post-Conviction Procedures Act.

Respectfully submitted this 15th day of April, 2022.

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BY: /s/ *Amy D. Harwell*
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CERTIFICATE OF SERVICE

I, Amy D. Harwell, certify that a true and correct copy of the foregoing was served via email and the court's e-filing system to opposing counsel, Samantha Simpson, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202.

BY: /s/ *Amy D. Harwell*
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