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

PERVIS TYRONE PAYNE v. STATE OF TENNESSEE

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

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

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

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

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

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

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

OPINION

In 1988, the Petitioner, Pervis Tyrone Payne, was convicted of two counts of first degree murder and one count of assault with intent to commit first degree murder. He was sentenced to death for the first degree murder convictions and thirty years for the assault conviction. The Petitioner's convictions and sentences were affirmed by the Tennessee Supreme Court on direct appeal. See State v. Payne, 791 S.W.2d 10 (Tenn. 1990), aff'd by, 501 U.S. 808 (1991). The Petitioner subsequently filed a petition for writ of error coram nobis claiming that he is intellectually disabled and, therefore, ineligible for the death

penalty. He also sought relief pursuant to the intellectual disability provisions in Tennessee Code Annotated section 39-13-203. The trial court denied the petition, and the Petitioner appealed.

TRIAL PROCEEDINGS

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

> Charisse Christopher was 28 years old, divorced, and lived in Hiwassee Apartments, in Millington, Tennessee, with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. The building in which she lived contained four units, two downstairs and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christophers. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartments were separated by a narrow hallway. Each of the upstairs apartments had back doors in the kitchen that led to an open porch overlooking the back yard. In the center of the porch was a metal stairway leading to the ground. There was also an inside stairway leading to the ground floor hallway and front entrance to the four-unit building.
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> Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag, containing clothing, etc., for his weekend stay, in the hallway, near the entrance to the Thomas apartment. With the bag were three cans of Colt 45 malt liquor.
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> Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher apartment above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and

that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 p.m. and immediately dispatched a squad car to the Hiwassee Apartments. Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C. E. Owen, of the Millington Police Department, was the first officer to arrive at the Hiwassee Apartments. He was alone in a squad car when the disturbance call was assigned to Officers Beck and Brawell. Owen was only two minutes away from the Hiwassee Apartments so he decided to back them up. He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the stairs and out the front door of the building. He was carrying the overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant." Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running west on Biloxi Street. Owen pursued him but Defendant outdistanced him and disappeared into another apartment complex.

Owen called for help on his walkie-talkie and Officer Boyd responded. By that time Owen had decided Defendant was not hurt and the blood was not his own -- he was running too fast. Owen told Boyd that "there's something wrong at that apartment." They returned to 4516 Biloxi. Nancy Wilson had a master key and let them in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor -- everywhere. The three bodies were on the floor of the kitchen. Boyd discovered that the boy was still breathing and called for an ambulance and reported their findings to the chief of police and the detective division. A Medic Ambulance arrived, quickly confirmed that Charisse and Lacie were dead, and departed with Nicholas. He was taken to Le Bonheur Children's Hospital in Memphis and was on the operating table there from 6:00 p.m. until 1:00 a.m., Sunday, 28 June. In addition to multiple lacerations, several stab wounds had gone completely

through his body from front to back. One of those was in the middle of his abdomen. The surgeon, Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfusion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. He was in intensive care for a period and had two other operations before he left the hospital, but he survived.

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

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

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

Hiwassee Apartments, a blue shirt and other shirts.

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

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut. And this hand, a dark-colored hand with a gold watch, kept trying to shut that back door." It was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived. She did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.

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

Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the inside stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer before proceeding to his friend Sharon Nathaniel's to await the arrival of Bobby Thomas. He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt that was longer than his shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment and after saying he was "coming in" and "eased the door on back," he described what he saw and his first actions as follows:

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

He described how he pulled the knife out of her neck, almost vomited, then kneeled down by the baby girl, had the feeling she was already dead; said the little boy was on his knees crying, he told him not to cry he was going to get help. His explanation of the blood on his shirt, pants, tennis shoes, body,

etc., was that when he pulled the knife out of her neck, "she reached up and grab me and hold me, like she was wanting me to help her . . .", that in walking and kneeling on the bloody floor and touching the two babies he got blood all over his clothes. He said he went to the kitchen sink, probably twice, to get water to drink when he thought he was going to vomit, but he denied that he went into the bathroom at any time or used the bathroom lavatory to wash up, as Nancy Wilson testified she heard someone do after the violence subsided.

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

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

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

Defendant presented five character witnesses who testified that Defendant's reputation for truth and veracity was good. Ruth Wakefield Bell testified that she had known Defendant all of his life. She was age 40 and lived in the same block on Biloxi as the Hiwassee Apartments, across the street. She said that on the Saturday afternoon of the murders, Defendant knocked on her door, identified himself and she looked out her bedroom window and saw him, but she did not let him in -- she was upset with her boyfriend and did not want to see or "entertain" anyone. She denied that she was afraid to let him in -- or that there was anything unusual about his appearance. She estimated that it was about twenty minutes after he knocked on her door that she saw police cars and an ambulance across the street. Defendant testified that he knocked on her door just before he decided to go

to Sharon Nathaniels and went in the Hiwassee Apartments to pick up his bag and beer.

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

> At sentencing the State presented only two witnesses, Mary Zvolanek, Charisse's mother and Detective Sammy Wilson of the Millington Police Department. Mrs. Zvolanek testified very briefly about how her grandson, Nicholas, cried for his mother and sister and could not understand what had happened. Detective Wilson was one of two detectives that conducted the investigation of these crimes. He testified at the guilt phase of the trial and was recalled at the sentencing phase to identify a videotape that he had made of the crime scene. He did so and the tape was played for the jury, over objection.
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> Defendant presented the testimony of four witnesses at the sentencing phase of the trial, his mother and father, Bobbie Thomas, and Dr. John T. Hutson.
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> Bobbie Thomas testified that she joined Defendant's father's church and became acquainted with Defendant; that she had a troubled marriage, was abused by her husband and it had a bad effect upon her three children; that Defendant was a very caring person and the time and attention he had devoted to her children had "got them back to their old self." She said she did not drink or use drugs and neither did Defendant; that it was inconsistent with Defendant's character to have committed these crimes.
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> Dr. Hutson is a clinical psychologist, who specializes in criminal court evaluation work. He gave Defendant the Wechsler Adult Intelligence Scale (WAIS) revised version. Defendant's scores were Verbal IQ 78, Performance IQ 82, with a variance of plus or minus 3 on the Verbal and plus or minus 4 on the Performance. He testified that the norm closer to 110; that historically the mental retardation score was 75, but "retardation" is not commonly used anymore. He preferred mentally handicapped. He also gave Defendant the Minnesota Multiphasic Personality Inventory (MMPI). That test consists of 566 questions that tests a number of different things, that give insight into personality functioning, responses to stress and physical performance. Various "scales" measure lying or faking, hypochondria, depression, hysteria, psychopathic deviance, sexuality, paranoia, cyclothymia, schizophrenia and

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

Id. at 17.

POST-CONVICTION PROCEEDINGS

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

In September 2006, the Petitioner filed a motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001. The post-conviction court denied the motion, and this court affirmed the denial on appeal. See Pervis Payne v. State, No. W2007-01096-CCA-R3-PD, 2007 WL 4258178 (Tenn. Crim. App. Dec. 5, 2007), perm. app. denied (Tenn. Apr. 14, 2008).

INTELLECTUAL DISABILITY PROCEEDINGS

On April 4, 2012, the Petitioner filed a motion to reopen post-conviction proceedings

in which he alleged that he is intellectually disabled and, therefore, ineligible for the death penalty. He argued that the Tennessee Supreme Court's decision in Coleman v. State, 341 S.W.3d 221, (Tenn. 2011), established a new constitutional right that was not recognized at the time of his trial. He also argued that he has new scientific evidence that he is intellectually disabled and, thus, actually innocent of capital murder and the death penalty.

The Petitioner attached to his motion the March 20, 2012 affidavit of Dr. Daniel Reschly, a professor of education and psychology at Vanderbilt University. According to Dr. Reschly, the Petitioner was administered the Otis-Lennon Test of Mental Ability, a group-administered I.Q. test, in March of 1976 when the Petitioner was nine years old and received an I.Q. score of 69. In 1987, the Petitioner was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and received a full-scale I.Q. score of 78. In 1996, he was administered the WAIS-R and received a full-scale I.Q. score of 78. In 2010, he was administered the fourth edition of the Wechsler Adult Intelligence Scale (WAIS-IV) and received a full-scale I.Q. score of 74. Dr. Reschly applied the Flynn Effect to adjust the Petitioner's I.Q. scores. He stated that the Petitioner's adjusted I.Q. scores were 75.4, 72.4, and 73.7. He further stated that based upon his clinical judgment and consideration of the Flynn Effect, estimation of error in the test, practice effect, and cultural differences, the Petitioner's "functional intelligence clearly is at or below 70." Dr. Reschly concluded that the Petitioner has significant deficits in adaptive behavior due to substantial limitations in the conceptual skills and practical skills domains. He further concluded that the Petitioner's functional intelligence and significant deficits in adaptive behavior were present prior to the age of eighteen. Dr. Reschly opined that the Petitioner is intellectually disabled.

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

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

to establish a sufficient basis to justify tolling of the limitation period.

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

ANALYSIS

The Petitioner contends that the post-conviction court erred in denying his petition for writ of error coram nobis in which he claimed that he is intellectually disabled and, therefore, ineligible for the death penalty. He also contends that he should be allowed to directly invoke the provisions of Tennessee Code Annotated section 39-13-203 to establish that he is intellectually disabled.

A. Intellectual Disability and the Death Penalty

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

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

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligent quotient (I.Q.) of seventy (70) or below;
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> (2) Deficits in adaptive behavior; and
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> (3) The intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a). All three prongs must be satisfied to establish intellectual disability.

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

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

The supreme court noted that section 39-13-203(a)(1) differs with clinical practice in one material respect. Id. at 247. In diagnosing intellectual disability, clinicians generally report their conclusions regarding an individual's I.Q. within a range, and section 39-13-201(a)(1) requires more definite testimony. Id. As a result, "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is 'seventy (70) or below' or is above 70)." Id. at 242.

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

> if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

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

Following Coleman, the Tennessee Supreme Court released its opinion in Keen v. State, 398 S.W.3d 594 (Tenn. 2012), addressing the issue of whether a capital petitioner may allege intellectual disability as a basis for reopening post-conviction proceedings. The petitioner in Keen sought to reopen post-conviction proceedings on the ground that he possessed new scientific evidence of actual innocence. Keen, 398 S.W.3d at 598. The evidence consisted of a newly-obtained I.Q. score of 67, which the petitioner claimed established that he was intellectually disabled and, therefore, "actually innocent" of the death penalty. Id. The petitioner also asserted that Coleman established a new rule of constitutional criminal law that required retroactive application. Id. at 599. The Tennessee Supreme Court rejected both of the bases upon which the petitioner sought to reopen post-conviction proceedings. The court specifically held that Coleman addressed the interpretation and application of Tennessee Code Annotated section 39-13-203 and was not a constitutional ruling. Id. at 609. The court further held that "a claim alleging ineligibility for the death penalty does not qualify as an actual innocence claim." Id. at 613. While remaining "committed to the principle that Tennessee has no business executing persons who are intellectually disabled," the court held that the petitioner failed to meet the requirements for reopening post-conviction proceedings. Id.

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

> Regrettably, several courts misconstrued our holding in Howell that Tenn. Code Ann. § 39-13-203(a)(1) established a "bright line rule" for determining intellectual disability. They understood this language to mean that courts could consider *only* raw I.Q. scores. Accordingly, these courts tended to disregard any evidence suggesting that raw scores could paint an inaccurate picture of a defendant's actual intellectual functioning. This was an inaccurate

> reading of Howell, in which we took pains to say that the trial court should "giv[e] full and fair consideration to all tests administered to the petitioner" and should "fully analyz[e] and consider[] all evidence presented" concerning the petitioner's I.Q.

Id. at 603 (citations omitted) (emphasis in original). The petitioner requested that the court remand his case for a new hearing on the issue of intellectual disability, just as the court had done in Coleman and in Smith v. State. See Smith v. State, 357 S.W.3d 322, 354-55 (Tenn. 2011); Coleman, 341 S.W.3d at 252-53. The court in Keen, however, rejected the petitioner's contention noting that Coleman and Smith took advantage of the one-year window for reopening their petitions following the recognition of the constitutional prohibition against executing intellectually disabled defendants in Van Tran and Atkins. Keen, 398 S.W.3d at 613. The petitioner in Keen failed to avail himself of that opportunity. Id.

II. WRIT OF ERROR CORAM NOBIS

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

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

Our supreme court has stated the stand of review as "whether a reasonable basis exists for concluding that had the evidence been presented at trial, the result of the proceedings might have been different." State v. Vazques, 221 S.W.3d 514, 525-28 (Tenn. 2007) (citation omitted).

Unlike the grounds for reopening a post-conviction petition, the grounds for seeking a petition for writ of error coram nobis are not limited to specific categories. Harris v. State, 102 S.W.3d 587, 592 (Tenn. 2003). Coram nobis claims may be based upon any "newly

discovered evidence relating to matters litigated at the trial" so long as the petitioner establishes that he or she was "without fault" in failing to present the evidence at the proper time. Id. Coram nobis claims are "singularly fact-intensive," are not easily resolved on the face of the petition, and often require a hearing. Id. at 592-93. The decision to grant or deny coram nobis relief rests within the sound discretion of the trial court. Vazques, 221 S.W.3d at 527-28.

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

Coram nobis claims are subject to a one-year statute of limitations. T.C.A. § 27-7-103. The statute of limitations is computed "from the date the judgment of the trial court becomes final, either thirty days after its entry in the trial court if no post-trial motions are filed or upon entry of an order disposing of a timely filed, post-trial motion." Harris v. State, 301 S.W.3d 141, 144 (Tenn. 2010). The issue of whether a claim is barred by an applicable statute of limitations is a question of law, which this court reviews de novo. See id. We must construe the coram nobis statute of limitations "consistent with the longstanding rule that persons seeking relief under the writ must exercise due diligence in presenting the claim." Id.

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

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

opportunity to rebut the defense. Accordingly, the State has not waived the statute of limitations defense.

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

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

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

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

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

The State asserts that the Petitioner should have sought relief by filing a motion to reopen his post-conviction petition following the Tennessee Supreme Court's decision in Van Tran in 2001 or the United States Supreme Court's decision in Atkins in 2002. See

T.C.A. § 40-30-117(a)(1) (providing for a motion to reopen post-conviction proceedings if filed within one year of a "final ruling of an appellate court establishing a constitutional right that was not existing at the time of trial, if retrospective application of that right is required"). The Petitioner contends that Dr. Reschly's report is "newly available" evidence or evidence that did not become available for presentation until after the trial concluded. While the Petitioner acknowledges that his intellectual disability existed before trial, he argues that circumstances beyond his control prevented him from presenting such evidence. He submits that his intellectual disability first became available for presentation following our supreme court's opinion in Coleman.

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

Courts have applied this narrow exception where previously unavailable evidence became available following a change in factual circumstances. See, e.g., Taylor, 171 S.W.2d at 405 (applying the exception when at the time of trial, one witness was hospitalized and one witness was working outside the state and they later became available to testify); Misty Jane Brunelle v. State, No. E2010-00662-CCA-R3-PC, 2011 WL 2436545, at *10 (Tenn. Crim. App., at Knoxville, June 16, 2011), perm. app. denied (Tenn. Oct. 18, 2011) (noting that the petitioner should have sought coram nobis relief when a DCS report that was known to the petitioner but sealed at the time of trial later became available). Many of these cases involve testimony of a co-defendant or a witness who previously refused to testify by asserting the constitutional privilege against self-incrimination. See, e.g., David G. Housler, Jr., 2013 WL 5232344, at *44; United States v. Guillette, 404 F. Supp. 1360, 1372-74 (D. Conn. 1975); Brantley v. State, 912 So. 2d 342, 343 (Fla. App. 2005); State v. Williams, 246 So.2d 4, 6 (La. 1971); Commonwealth v. Brown, 431 A.2d 343, 344 (Pa. Super. Ct. 1981); State v. Gerdes, 258 N.W.2d 839, 843 (S.D. 1977).

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

The Petitioner argues that following Howell and prior to Coleman, courts only could

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

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

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

> For example, in Cribbs v. State, both the State and Mr. Cribbs presented evidence that his raw I.Q. test scores did not accurately reflect his actual I.Q. On behalf of the State, Dr. Wyatt Nichols stated that Mr. Cribbs's intellectual level was actually higher than the I.Q. test score of 73 and was "[m]ore like the mid to high 80s." Cribbs v. State, 2009 WL 1905454, at *22, 32. Dr. Pamela Auble, appearing for Mr. Cribbs, stated in her initial report that his I.Q. was between 71 and 84. Cribbs v. State, 2009 WL 1905454, at *17. However, Dr. Auble later revised her opinion based on information obtained after her first report and concluded that Mr. Cribbs's I.Q. was below seventy. Cribbs v. State, 2009 WL 1905454, at *17. Based on all the evidence, the trial court concluded that the I.Q. test that produced the score of 73 was the most reliable. The trial court found that Dr. Auble's explanation for the change in her opinion was not credible and that Dr. Nichols's testimony was persuasive. Cribbs v. State, 2009 WL 1905454, at *32.
>
> The consideration of I.Q. test scores in Cribbs v. State is but one example of cases in which the State has argued and presented evidence that scores on I.Q. tests should not be considered on their face value. See also State v. Strode, 232 S.W.3d at 5 (the State presented evidence challenging the

> score on the basis that the defendant had been malingering); Smith v. State, 2010 WL 3638033, at *30 (the State presented evidence that the defendant's I.Q. test score should be discounted because of malingering); Van Tran v. State, 2006 WL 3327828, at 4-6 (the State argued that the Vietnamese-born defendant's low I.Q. test score reflected cultural and linguistic bias).

Id. The Tennessee Supreme Court concluded that these cases reflected "the parties' and the courts' existing awareness that, as a practical matter, a criminal defendant's 'functional intelligence quotient' cannot be ascertained based only on raw I.Q. scores." Id. The court further concluded that the cases also reflected "the parties' conclusion that Tenn. Code Ann. § 39-13-203(a) does not prevent them from presenting relevant and competent evidence, other than the defendant's raw I.Q. test scores, either to prove or to disprove that the defendant's 'functional intelligence quotient' when the crime was committed was 'seventy (70) or below.'" Id. at 247-48.

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

Contrary to the petitioner's claims, the information in Dr. Reschly's affidavit was available for presentation prior to Coleman. Nothing prevented the Petitioner from filing a motion to reopen post-conviction proceedings within one year of Van Tran or Atkins and presenting relevant and competent evidence, other than his raw I.Q. test scores, to prove that his "functional intelligence quotient" when the crime was committed was "seventy (70) or below."

Almost ten years after the one-year statute of limitations for filing a motion to reopen expired, the Petitioner filed his petition claiming intellectual disability. The information upon which Dr. Reschly relied in his affidavit was available to the Petitioner during the one year following Van Tran or Atkins. Nothing prevented Dr. Reschly from administering I.Q. testing and adjusting the test scores during the one year following Van Tran or Atkins. The

new testing in 2010 is merely cumulative to the evidence previously available to the Petitioner. See Wlodarz, 361 S.W.3d at 499 (noting that newly discovered evidence that is merely cumulative does not warrant the issuance of a writ). Because the Petitioner's claim could have been litigated in a motion to reopen filed within one year of Van Tran or Atkins, the grounds are not "later-arising," justifying the tolling of the one-year statute of limitations. See Tenn. Code Ann. § 40-26-105(b) (confining coram nobis relief to "matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding" and requiring the defendant to show that he was without fault in failing to present the evidence at the proper time).

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

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

C. Intellectual Disability Statute

The Petitioner asserts that the intellectual disability provisions in Tennessee Code Annotated section 39-13-203 provide an independent cause of action allowing him to challenge his eligibility for the death penalty. In construing a statute, we must ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. State v. Strode, 232 S.W.3d 1, 9 (Tenn. 2007). We must give the words in the statute their natural and ordinary meaning in light of their statutory context. Keen, 398 S.W.3d at 610. We must avoid any "forced or subtle

construction that would limit or extend the meaning of the language." Id. (citation omitted). "If the statutory language is clear and unambiguous, we apply the statute's plain language in its normal and accepted use." Id.

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

CONCLUSION

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

_____
ALAN E. GLENN, JUDGE