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CRIMINAL PROCEDURE—CAPITAL PUNISHMENT—MOTIONS TO REOPEN PETITIONS FOR POST-CONVICTION RELIEF

Keen v. State, 398 S.W.3d 594 (Tenn. 2012).

JACOB SPANGLER*

I. INTRODUCTION

In 1990, defendant David Keen pleaded guilty to charges of first-degree murder, murder in perpetration of rape, and aggravated rape.[1] The jury at the defendant's sentencing hearing sentenced him to death for the first-degree murder.[2] The defendant filed a petition

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1. Keen v. State, 398 S.W.3d 594, 598 (Tenn. 2012). The defendant had previously confessed to throwing the victim's body into a river and had given "conflicting statements regarding the rape and murder." *Id.* at 597.

2. *Id.* at 598. The case was automatically appealed to the Tennessee Supreme Court, which remanded it for a new sentencing hearing "because of errors in the trial court's instructions to the jury." *Id.* (citing State v. Keen, 926 S.W.2d 727, 729–31, 735–36 (Tenn. 1994)). However, the new jury also delivered a death sentence, which the Court of Criminal Appeals and the Tennessee Supreme Court affirmed. *Id.*

for post-conviction relief in 2001, which the post-conviction court denied in 2004 following the hearing.[3] The Tennessee Court of Criminal Appeals affirmed the ruling of the post-conviction court, and the Tennessee Supreme Court declined to review.[4]

In 2010, the defendant filed a motion to reopen his post-conviction proceedings on the grounds that he was "actually innocent" of the offense of first-degree murder in accordance with section 40-30-117(a)(2) of the Tennessee Code Annotated.[5] The defendant had scored within the "intellectually disabled" range on a functional intelligence test, and he presented this score as the "new scientific evidence" required by the statute.[6] The defendant asserted that the test score placed him within the class of persons designated "intellectually disabled" by section 39-13-203(a) of the Tennessee Code Annotated,[7] and that he was therefore ineligible for the death penalty under section 39-13-203(b).[8] The trial court denied the motion, holding that the defendant's argument for death penalty ineligibility was not included within the actual innocence described in section 40-30-117(a)(2).[9] The defendant appealed the judgment, raising "an additional claim that he was entitled to reopen his post-conviction petition based on a new 'constitutional right.'"[10] The Tennessee Court of Criminal Appeals affirmed the decision of the trial court.[11] On certiorari to the Tennessee Supreme Court, *held*, affirmed.[12] The defendant does not have a new constitutional right to reopen his petition because no such right was announced in *Coleman*

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3. *Id.* at 598.

4. *Id.* (citing Keen v. State, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, at *53 (Tenn. Crim. App. June 5, 2006), *perm. app. denied* (Tenn. Oct. 30, 2006)).

5. *Id.* This statute provides that a petitioner may move to reopen his or her post-conviction proceedings if "[t]he 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 . . . ." TENN. CODE ANN. § 40-30-117(a)(2) (2011).

6. *Keen*, 398 S.W.3d at 598–99.

7. In addition to "[d]eficits in adaptive behavior" and the requirement that the "disability must have been manifested . . . by eighteen (18) years of age," the statute requires that the petitioner prove "[s]ignificantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below." TENN. CODE ANN. § 39-13-203(a) (2010). The defendant's latest score was a 67, and he had previously scored a number of sub-average scores throughout his lifetime. *Keen*, 398 S.W.3d at 598 n.3.

8. *Keen*, 398 S.W.3d at 598.

9. *Id.* at 599.

10. *Id.*

11. *Id.*

12. *Id.* at 613.

v. State,[13] and his test score does not constitute "new scientific evidence" of actual innocence because ineligibility for the death penalty is not actual innocence.[14]

II. ACTUAL INNOCENCE AND MOTIONS TO REOPEN POST-CONVICTION PROCEEDINGS

The Tennessee statute governing motions to reopen post-conviction proceedings requires petitioners to prove that their claims fall into one of three categories before the proceedings can be reopened.[15] The first category requires a finding that "[t]he claim . . . 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 . . . ."[16] In *Coleman*, the court granted the petitioner permission to reopen his post-conviction proceedings in accordance with this statute because the lower court had incorrectly disregarded additional evidence supporting the petitioner's intellectual disability claim.[17] The defendant in the present case asserted that the holding in *Coleman* announced a new constitutional right that should be applied retroactively.[18] The defendant therefore contended that he had a constitutional right to reopen his proceedings under *Coleman*.[19]

The second possible ground for reopening a post-conviction proceeding is if "[t]he claim . . . is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense . . . for which the petitioner was convicted."[20] The execution of intellectually disabled persons is barred by both a Tennessee statute[21] and the state constitution.[22] Noting this prohibition, the defendant argued that his low test score—which may support a finding of intellectual disability—constitutes "new scientific evidence" as required by the statute.[23] Furthermore, he argued that

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13. 341 S.W.3d 221 (Tenn. 2011).
14. *Keen*, 398 S.W.3d at 613.
15. *See* TENN. CODE ANN. § 40-30-117(a) (2011).
16. *Id.* § 40-30-117(a)(1).
17. *Coleman*, 341 S.W.3d at 253.
18. *Keen*, 398 S.W.3d at 599.
19. *Id.* at 608.
20. TENN. CODE ANN. § 40-30-117(a)(2).
21. *Id.* § 39-13-203(b).
22. *See* Van Tran v. State, 66 S.W.3d 790, 792 (Tenn. 2001) (holding that the execution of intellectually disabled persons violated the "cruel and unusual punishments" clause of TENN. CONST. art. I, § 16).
23. *Keen*, 398 S.W.3d at 608.

his alleged ineligibility for the death penalty constitutes actual innocence of the offense for the purposes of the statute.[24] The Tennessee Supreme Court faced two issues of first impression: whether *Coleman* announced a new constitutional rule,[25] which should apply retroactively; and whether a claim of death penalty ineligibility due to intellectual disability qualifies as a claim of actual innocence under Tennessee's reopening statute.[26]

A. The Development of Ineligibility Due to Intellectual Disability

The prohibition on executing intellectually disabled individuals is a relatively new development in the law; Georgia was the first state to outlaw the practice in 1986.[27] The federal government soon followed suit, enacting the Anti-Drug Abuse Act of 1988.[28] The United States Supreme Court then upheld the practice the following year in *Penry v. Lynaugh*.[29] The Court overruled its holding in *Penry* three years later, however, in the landmark case of *Atkins v. Virginia*.[30]

In *Atkins*, the petitioner was sentenced to death for his convictions of abduction, armed robbery, and capital murder.[31] He appealed his death sentence, arguing that he was intellectually disabled and thus his execution would violate the Eighth Amendment's prohibition of "cruel and unusual punishments."[32] The Court held that because persons with intellectual disabilities "have diminished capacities to understand and process information, to abstract from mistakes and learn from experience . . . to control impulses, and to understand others' reactions," their intellectual disabilities "diminish their personal culpability."[33] Because of this reduced culpability, imposing the death penalty upon intellectually disabled defendants would not "measurably further the goal[s]" of either retribution or deterrence, the two "social purposes served by

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24. *Id.* at 610.

25. *Id.* at 608.

26. *Id.* at 610.

27. Brooke Amos, Atkins v. Virginia*: Analyzing the Correct Standard and Examination Practices to Use when Determining Mental Retardation*, 14 J. GENDER RACE & JUST. 469, 469 (2011).

28. Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 871 (2012).

29. 492 U.S. 302 (1989), *overruled by* Atkins v. Virginia, 536 U.S. 304 (2002).

30. *Atkins*, 536 U.S. at 321.

31. *Id.* at 307.

32. *See id.* at 310–11 (drawing from U.S. CONST. amend. VIII).

33. *Atkins*, 536 U.S. at 318.

the death penalty."[34] The Court held that, absent these justifications, the practice was "excessive" and violated the United States Constitution.[35]

The history of Tennessee's prohibition on executing intellectually disabled defendants follows a similar pattern, albeit some years prior. The state passed its prohibitive statute in 1990.[36] However, the Tennessee Supreme Court did not consider the practice's constitutional implications until more than a decade later in *Van Tran v. State*.[37]

The defendant in *Van Tran* was convicted of three counts of felony murder.[38] After exhausting his appeals and petition for post-conviction relief, he moved to reopen based on section 40-30-117 of the Tennessee Code Annotated.[39] He argued that section 39-13-203, combined with his low I.Q. test score, afforded him a claim of actual innocence.[40] The court rejected this argument, holding that the statute did not warrant retroactive application.[41] It agreed, though, that a stronger argument might lie in the practice's constitutional status.[42] Interested in deciding this question, the court assigned both parties to address whether the execution of intellectually disabled individuals violated the Cruel and Unusual Punishments Clause of the Eighth Amendment to the federal Constitution and article 1, § 16 of the Tennessee Constitution.[43] The court held that these constitutional provisions did prohibit the execution of intellectually disabled individuals.[44] Furthermore, the court found that this holding announced a new constitutional rule that must be applied retroactively.[45] Accordingly, the defendant could reopen his post-conviction proceedings under the first prong of the statute.[46]

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34. *Id.* at 318–20.

35. *Id.* at 321.

36. TENN. CODE ANN. § 39-13-203 (2010).

37. 66 S.W.3d 790 (Tenn. 2001).

38. *Id.* at 792.

39. *Id.* at 794. At the time of the defendant's motion, the statute was located at section 40-30-217 of the Tennessee Code Annotated. *See id.*

40. *See Van Tran*, 66 S.W.3d at 797.

41. *Id.* at 798.

42. *See id.* at 794.

43. *Id.*

44. *Id.* at 792.

45. *Id.* at 811. To determine whether the rule was "new," the court considered whether the rule "breaks new ground or imposes a new obligation on the States or the Federal government," the standard established by the United States Supreme Court. *Id.* at 810 (citing Teague v. Lane, 489 U.S. 288, 301 (1989)). The *Van Tran* court also supported its holding of retroactive application by applying the ruling in *Penry v. Lynaugh*, in which the Supreme Court held that a constitutional rule

B. *From* Van Tran *to* Coleman

The first case to apply the rule from *Van Tran* came three years later in *Howell v. State*.[47] The defendant in *Howell* was sentenced to death for his conviction of felony murder.[48] After exhausting his appeals, he moved to reopen his post-conviction proceedings, offering his low I.Q. test scores as evidence of an intellectual disability.[49] The defendant argued that he was intellectually disabled and thus could not be executed under the new rule announced in *Van Tran*.[50] However, his I.Q. test scores had a somewhat wide range, and some barely exceeded the threshold of seventy provided in Tennessee Code Annotated section 39-13-203(a)(1).[51] The defendant contended that "[t]he definition of [intellectual disability] applied to capital defendants ha[d] been interpreted too rigidly by the lower courts."[52] According to the defendant, courts should not apply the seventy mark strictly as a "bright-line rule," but instead should adopt a more flexible standard to accommodate for fluctuations in test scores and definitions of intellectual disability.[53] He supported his argument with an affidavit from his diagnosing psychologist, opining that "an I.Q. score is generally thought to involve an error of measurement of approximately five points."[54]

The court agreed with the defendant in part, holding that "[intellectual disability] is a difficult condition to accurately define."[55] Definitions of intellectual disability continue to evolve, and serious disagreement exists amongst experts and courts as to where the line should fall.[56] Yet despite the somewhat amorphous boundaries of intellectual disabilities, the court found "the language

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prohibiting the execution of intellectually disabled individuals would be a new rule. *Id.* (citing Penry v. Lynaugh, 492 U.S. 302, 329 (1989), *overruled by* Atkins v. Virginia, 536 U.S. 304 (2002)).

46. *See id.* After the trial on Van Tran's alleged intellectual disability, his death sentence was upheld, causing some commentators to question the efficacy of the Supreme Court's holding in *Atkins*. *See, e.g.*, Penny J. White, *Treated Differently in Life but Not in Death: The Execution of the Mentally Disabled After* Atkins v. Virginia, 76 TENN. L. REV. 685, 711 (2009).

47. Howell v. State, 151 S.W.3d 450 (Tenn. 2004).

48. *Id.* at 453.

49. *Id.* at 453–54.

50. *Id.* at 453.

51. *Id.* at 453, 454 n.2.

52. *Id.* at 456.

53. *Id.*

54. *Id.* at 453.

55. *Id.* at 457.

56. *Id.*

of the statute perfectly clear and unambiguous."[57] The Tennessee legislature had set the rigid boundary for I.Q. at seventy; it "ma[de] no reference to a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy."[58] Accordingly, the court held that the legislature intended to construct a bright-line rule when it enacted the statute.[59] However, the court permitted the defendant to reopen his post-conviction proceedings for an evidentiary hearing on the issue of his alleged intellectual disability, in part because of his unique position as the first defendant in the state to apply the constitutional holding of *Van Tran*.[60]

The court clarified its *Howell* holding some years later in *Coleman v. State*.[61] Some lower Tennessee courts had interpreted *Howell* as stating that when examining the evidence presented for a claim of intellectual disability, courts could only consider raw test scores.[62] *Coleman* rejected that interpretation—while courts should certainly consider test scores as evidence for or against a claim of intellectual disability, they also should review other relevant evidence.[63] The bright-line rule from *Howell* still applies to test scores, but test scores alone are not the full extent of the evidence.[64] Courts are permitted and encouraged to consider expert testimony, obscuring variables such as the Flynn effect and the practice effect, and other relevant evidence along with raw test scores.[65] The court supported its explanation of the rule in *Howell* by noting that the statute defining intellectual disability "does not even employ the words 'test' or 'score.'"[66] Accordingly, the defendant could reopen his proceedings on the issue of his alleged intellectual disability[67] because the trial court erroneously disregarded all evidence apart from the defendant's raw test score under its interpretation of *Howell*.[68]

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57. *Id.* at 458.
58. *Id.*
59. *Id.*
60. *Id.* at 467.
61. 341 S.W.3d 221 (Tenn. 2011).
62. *Id.* at 241.
63. *Id.*
64. *Id.* at 241–42
65. *Id.*
66. *Id.* at 241.
67. *Id.* at 258.
68. *Id.* at 250–53.

C. The Development of the "Actual Innocence" Exception

The Tennessee statute governing motions to reopen habeas petitions allows a petitioner to move to reopen if "[t]he 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."[69] The term "actual innocence" refers to a certain judge-made exception to procedural bars on habeas petitions that arose in the common law.[70]

The actual innocence exception stemmed from the "abuse of the writ" doctrine.[71] Earlier in American jurisprudence, capital offenders sentenced to death could file petitions for habeas corpus with little restrictions, and no procedural bar prevented untimely or repetitive petitions.[72] This led death row inmates to abuse the habeas system because they essentially lacked any incentive to stop filing successive petitions.[73] To remedy the problem of repetitive, untimely, and meritless habeas petitions, the judiciary developed the abuse of the writ doctrine.[74] The doctrine "requires the dismissal of a petition which successively repeats claims previously decided on the merits, or abusively asserts a new ground unjustifiably omitted from a prior petition."[75]

From this framework, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[76] Like the abuse of the writ doctrine, this lengthy act served to greatly restrict capital offenders' access to habeas petitions.[77] The provisions of the AEDPA include a one-year statute of limitations for inmates to file habeas petitions, subject to a number of narrowly defined exceptions.[78] The rather strict limitations applied by the AEDPA have been the subject of much controversy among commentators,[79] but the courts

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69. TENN. CODE ANN. § 40-30-117(a)(2) (2011).

70. Erika M. Lopes-McLeman, Lee v. Lampert*: The Ninth Circuit Finds No Actual Innocence Exception to the AEDPA'S One-Year Statute of Limitations on an Original Habeas Petition*, 7 SETON HALL CIRCUIT REV. 399, 399 (2011).

71. Michael J. Berwanger, *Death Is Different: Actual Innocence and Categorical Exclusion Claims Under the Antiterrorism and Effective Death Penalty Act*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 307, 312–13 (2012).

72. *Id.* at 312.

73. *Id.*

74. *Id.*

75. *Id.* at 312–13.

76. *Id.* at 313.

77. *Id.* at 309–10.

78. 28 U.S.C. § 2244(d)(1) (1996).

79. *See, e.g.*, Jonathan Aminoff, *Something Very Wrong Is Taking Place Tonight: The Diminishing Impact of the Actual Innocence Exception on Eligibility for*

have carved out a fairness exception to these limitations.[80] Although "the Court's standards for 'actual innocence' claims were established prior to the passage of AEDPA,"[81] the exception's interaction with AEDPA's statute of limitations is helpful in understanding how the exception operates. Essentially, actual innocence functions to overcome procedural bars, such as statutes of limitations or bars on successive petitions, given certain extraordinary circumstances.[82]

Actual innocence comprises two distinct categories: factual or substantive innocence and legal or "gateway" innocence.[83] "The essence of a substantive innocence claim is that the petitioner claims he did not commit the crime he was convicted of."[84] A claim of substantive innocence is closer to the traditional meaning of innocence—the petitioner asserts that he did not commit the offense.[85] One example of new scientific evidence supporting a claim of substantive innocence is newfound exonerating DNA evidence proving that the petitioner did not commit the crime.[86] Legal innocence claims, however, "are based not on [the petitioner's] innocence, but rather on [the] contention that [a constitutional violation] . . . denied [him] the full panoply of protections afforded to criminal defendants by the Constitution."[87] A petitioner making a legal innocence claim does not assert that she did not commit the offense, but rather that some circumstance in the law, be it an egregious error at the trial level or a violation of constitutional rights, prevents the petitioner from deserving her sentence.[88] In this way, a petitioner who claims legal innocence does not claim innocence of the crime, but innocence of the sentence.[89] Thus, a defendant who is ineligible for the death penalty because he is a juvenile or intellectually disabled offender can claim innocence of the death penalty through a claim of actual innocence.[90]

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the Death Penalty, 46 CRIM. L. BULL. 86, 108–09 (2010).

80. Berwanger, *supra* note 71, at 309.

81. *Id.* at 310.

82. *Id.* at 311.

83. *Id.* at 314–15.

84. *Id.* at 314.

85. *See* Schlup v. Delo, 513 U.S. 298, 314 (1995); Herrera v. Collins, 506 U.S. 390, 416–17 (1993).

86. *Herrera*, 506 U.S. at 400.

87. Berwanger, *supra* note 71, at 314 (quoting *Schlup*, 513 U.S. at 314).

88. *Id.*, at 314–15.

89. *Id.* at 315.

90. *Id.*

The Supreme Court's decision in *Sawyer v. Whitley*[91] "is illustrative of the traditional understanding of claiming legal innocence of the death penalty."[92] The defendant in *Sawyer* was convicted of capital murder and sentenced to death.[93] He subsequently filed a petition for federal habeas relief, which was denied.[94] In his second habeas petition, the defendant asserted that certain constitutional errors had occurred at the trial level, rendering him actually innocent of the death penalty.[95] Normally, the "abuse of the writ" doctrine would bar such a successive petition.[96] Although the *Sawyer* Court rejected the defendant's argument for actual innocence and denied his habeas petition,[97] it determined the proper standard for actual innocence of the death penalty in the process.[98] The Court held "that the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty."[99] To prove actual innocence, a petitioner must prove that "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[100]

III. *COLEMAN* DOES NOT ANNOUNCE A NEW CONSTITUTIONAL RIGHT, AND *KEEN'S* EVIDENCE DOES NOT SUPPORT A FINDING OF ACTUAL INNOCENCE

In *Keen v. State*, the Tennessee Supreme Court, in a 4-1 decision, held that (1) *Coleman v. State* did not announce a new constitutional right to present evidence relevant to intellectual disability that requires retroactive application,[101] and (2) the defendant's evidence did not support a finding of actual innocence in order to reopen his

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91. 505 U.S. 333 (1992).

92. Berwanger, *supra* note 71, at 315.

93. *Sawyer*, 505 U.S. at 336–37.

94. *Id.* at 337.

95. *Id.* The defendant claimed that the police failed to produce exculpatory evidence—evidence challenging a prosecution witness's credibility and a child witness's statements that Sawyer had tried to prevent an accomplice from setting fire to the victim—in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). He also claimed that his trial counsel's failure to introduce mental health records as mitigating evidence in his trial's sentencing phase constituted ineffective assistance of counsel. *Sawyer*, 505 U.S. at 347–48.

96. *Sawyer*, 505 U.S. at 338.

97. *Id.* at 335–36.

98. *Id.* at 347–49.

99. *Id.* at 347.

100. *Id.* at 336.

101. Keen v. State, 398 S.W.3d 594, 608–09 (Tenn. 2012).

habeas petition under the reopening statute.[102] The court based its decision on three grounds: (1) *Coleman* did not announce any constitutional rule, so by extension it cannot announce a new constitutional rule that requires retroactive application; (2) as used in the reopening statute, "actual innocence" refers to innocence of the offense, rather than mere ineligibility; and (3) the defendant's evidence did not support a finding of innocence of the offense.[103]

A. Coleman *Does Not Announce a New Constitutional Right*

The court began by looking to the defendant's second claim: that *Coleman* announced a new constitutional right to have his evidence supporting intellectual disability heard.[104] After reviewing its previous decisions on motions to reopen under a claim of intellectual disability in *Van Tran*, *Howell*, *Coleman*, and *Smith*, the court found that only *Van Tran* announced any constitutional rule.[105] It reasoned that *Howell* was not a constitutional ruling, but merely the court's first opportunity to apply the new rule from *Van Tran*.[106] *Coleman* was a clarification of the holding in *Howell* and an interpretation of section 39-13-203 of the Tennessee Code Annotated,[107] and *Smith* was an application of *Coleman*.[108] Because *Coleman* did not announce any constitutional rule, the *Keen* court did not reach the questions of whether the rule was new or required retroactive application.[109] The court concluded that the issue in *Coleman* was the application of a constitutional rule announced a decade earlier in *Van Tran*, not a new constitutional question.[110]

The effect of this ruling on the defendant's case is a procedural bar to his claim. Tennessee's reopening statute only allows claims based on "new constitutional rights" to be filed within one year of the constitutional ruling.[111] Since *Coleman* did not announce any new constitutional right, it follows that the timing of the defendant's motion in relation to *Coleman* is irrelevant. What matters is the

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102. *Id.* at 612–13 (citing TENN. CODE ANN. § 40-30-117(a)(2) (2011)).
103. *Id.* at 608–13.
104. *Id.* at 608–09.
105. *Id.* at 600–06.
106. *Id.* at 602–03.
107. *Id.* at 603; *see also* TENN. CODE ANN. § 39-13-203(a)(1) (2010).
108. *Keen*, 398 S.W.3d at 606.
109. *Id.* at 613.
110. *Id.* at 608.
111. "The motion must be filed within one (1) year of the ruling . . . establishing a constitutional right that was not recognized as existing at the time of trial . . . ." TENN. CODE ANN. § 40-30-117(a)(1) (2011).

motion's timing in relation to the new constitutional ruling, namely that announced in *Van Tran*, which was decided nearly twelve years prior. The court even hinted that the defendant might have committed this blurring of the two earlier cases intentionally.[112] In any event, the defendant's argument from *Coleman* fails.[113]

B. Keen's *New Evidence Does Not Support a Finding of Actual Innocence*

After disposing of the defendant's *Coleman* argument, the court turned to his original claim: that the his low I.Q. test score constituted "new scientific evidence" suggesting that he is "actually innocent of the offense."[114] The court's decision rested upon its interpretation of the words "actually innocent of the offense" as they are used in the reopening statute.[115] If the court applied a more literal construction of "actually innocent of the offense," that is, a substantive innocence construction, then the defendant's evidence would have to be of the sort that would show that he never committed the crime.[116] However, if the court favored the more expansive definition of actual innocence that has developed over the years—legal innocence—then the evidence must merely show that the defendant was ineligible for the death penalty.[117]

The majority first noted that "[o]n their faces, the words 'actually' and 'innocent' appear clear enough."[118] However, it then briefly considered the more expansive approach of legal innocence.[119] The majority recalled *Sawyer v. Whitley*, in which the Supreme Court "determine[d] whether an inmate is 'innocent of death.'"[120] It then considered the AEDPA, enacted four years after the decision in *Sawyer*, which used the language "guilty of the underlying offense."[121] As the majority noted, a number of federal courts have chosen to apply the stricter, more literal notion of actual innocence

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112. *See Keen*, 398 S.W.3d at 609 ("Mr. Keen cannot piggyback *Coleman* on top of *Van Tran* in order to reopen the one-year statutory window for a constitutional rule that was articulated over a decade ago.").

113. *Id.* at 608–09.

114. *Id.* at 609–10.

115. *Id.* at 610 (citing TENN. CODE ANN. § 40-30-117(a)(2) (2011)).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 610–11.

120. *Id.* at 610 (citing Sawyer v. Whitley, 505 U.S. 333, 336, 340–41, 343–47 (1992)).

121. *Id.* (citing 28 U.S.C. § 2244 (1996)).

to the AEDPA.[122] Similar to the AEDPA, the reopening statute mentions innocence "of the offense" as grounds to reopen post-conviction proceedings.[123] Accordingly, the majority applied the same reasoning as the Tennessee statute,[124] and implied that had the Tennessee legislature favored the more expansive definition of actual innocence, it would have made that wish explicit in the statute.[125]

In response, Keen raised a counterargument to the court's interpretation of actual innocence.[126] Even under the court's stricter notion of actual innocence, the defendant asserted that he was actually innocent of the offense of "capital murder."[127] The majority disposed of this argument quickly by noting that "in Tennessee, there is no separate offense known as 'capital murder.'"[128] There is merely first-degree murder,[129] and individuals convicted of first-degree murder can be sentenced to death in the presence of one or more aggravating factors listed in section 39-13-204 of the Tennessee Code Annotated.[130] This statutory scheme does not create a separate offense of capital murder in Tennessee, so the defendant's argument fails.

In his dissenting opinion, Chief Justice Gary R. Wade took issue with the majority's holding on the defendant's second argument.[131] The dissent first noted that the Tennessee Supreme Court "has held that post-conviction petitioners must be given a meaningful opportunity to present claims of intellectual disability."[132] The dissent's central argument, though, attacked the majority's construction of actual innocence as it is used in the statute.[133] According to the dissent, "the term 'offense' . . . should be interpreted to encompass the offense of murder resulting in a sentence of

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122. *Id.* at 610–11 (citing Henderson v. Thaler, 626 F.3d 773, 779–81 (5th Cir. 2010); *In re* Webster, 605 F.3d 256, 257–58 (5th Cir. 2010); *In re* Dean, 341 F.3d 1247, 1248–49 (11th Cir. 2003); Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997)).

123. *Id.* at 611.

124. *Id.* at 612.

125. *Id.* at 611 (quoting *In re* Webster, 605 F.3d at 258–59).

126. *Id.* at 612.

127. *Id.*

128. *Id.*

129. *See* TENN. CODE ANN. § 39-13-202 (2010).

130. *See id.* § 39-13-204(i).

131. *Keen*, 398 S.W.3d at 613–23 (Wade, C.J., dissenting).

132. *Id.* at 616.

133. *Id.* at 618–23.

death."[134] It appears that the dissent adopted an approach similar to the defendant's "capital murder" counterargument.

To reach his conclusion of a separate offense that results in capital punishment, the Chief Justice first considered the term "offense" and recalled that courts have historically defined distinct offenses in terms of their elements.[135] "[I]dentifying the elements of an offense requires an assessment of the facts that are necessary to impose a particular punishment."[136] According to the dissent, courts should view each fact necessary to warrant a particular punishment as an element of the offense.[137] Since separate offenses are defined and differentiated from one another on the basis of their varying lists of elements, it follows that any two offenses that feature differing lists of necessary elements should be viewed as two separate offenses.[138] The dissent pointed to two relatively recent United States Supreme Court cases as supporting this view.[139] In *Sattazahn v. Pennsylvania*, the Court held that "the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'"[140]

Applying this view to Tennessee's statutory scheme, the first-degree murder statute does not list a separate offense as "capital murder" or "murder plus one or more aggravating circumstances."[141] However, for a defendant to be eligible for capital punishment, a jury must not only convict the defendant of first-degree murder, but must also find one or more of the seventeen listed aggravating circumstances in the following section of the statute.[142] Under the dissent's view, these aggravating circumstances should be understood as elements of a separate offense of first-degree murder resulting in capital punishment, despite the statutory language's failure to read as such.[143]

Chief Justice Wade then turned to the majority's discussion of federal courts' interpretations of the AEDPA.[144] While the majority

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134. *Id.* at 619.

135. *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466 (2000) (Thomas, J., concurring)).

136. *Id.* at 619.

137. *Id.*

138. *Id.*

139. *Id.* at 619–20 (citing Sattazahn v. Pennsylvania, 537 U.S. 101, 111–12 (2003); Ring v. Arizona, 536 U.S. 584, 609 (2002)).

140. *Id.* at 620 (quoting *Sattazahn*, 537 U.S. at 111).

141. *See* TENN. CODE ANN. § 39-13-202 (2010).

142. *See id.* § 39-13-204(i).

143. *Keen*, 398 S.W.3d at 621 (Wade, C.J., dissenting).

144. *Id.* at 621–23.

cited a number of cases that agreed with its interpretation of actual innocence under the AEDPA, the dissent brought forth several others that supported its position.[145] It also distinguished two of the authorities that the majority cited, claiming that because neither of these cases involved an element that must be proven at sentencing, they "provide little guidance as to whether the term 'offense' properly encompasses all elements of the offense at issue."[146] These theses led the Chief Justice to conclude that regardless of how the statutory scheme is organized, the offense for which the defendant was convicted was essentially some form of capital murder, which is separate from mere first-degree murder.[147] Accordingly, the defendant's evidence would seem to suggest actual innocence of the offense of capital murder, and thus his evidence should be heard.

IV. CONSEQUENCES OF *KEEN V. STATE*

The Tennessee Supreme Court's decision in *Keen v. State* reflects the state's interest in finality of judgments and efficient process of capital cases. If there were no final, unaltered limitation on motions for post-conviction relief, death row inmates would be incentivized to file endless habeas petitions and courts would have no grounds on which to dispose of them at an early stage. Procedural bars on untimely or successive and abusive motions reduce the amount of meritless claims. Also, if a court can identify a motion as untimely or successive, it can easily dismiss it without the burden of lengthy and expensive trial and appellate processes. This has the potential to greatly reduce the amount of cases progressing through the court system and allow courts to devote more time and resources to newer, timelier claims.

Yet the unique power of the death penalty remains significant. "[D]eath is a different kind of punishment from any other."[148] A death sentence is profoundly distinct in its "severity and finality," thus "equitable principles [need] to prevail over strict statutory reading."[149] Arguably, to fully accomplish the protections afforded by

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145. *Id.* at 621 (citing Lee v. Lampert, 653 F.3d 929, 932 (9th Cir. 2011) (en banc); Sandoval v. Jones, 447 F. App'x 1, 4–5 (10th Cir. 2011); San Martin v. McNeil, 633 F.3d 1257, 1267–68 (11th Cir. 2011); Turner v. Romanowski, 409 F. App'x 922, 926 (6th Cir. 2011)).

146. *Id.* at 621–22.

147. *Id.* at 622.

148. Berwanger, *supra* note 71, at 307 (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 181–88 (1976))).

149. *Id.* at 336.

the Eighth Amendment, the procedural bars on challenges to death sentences should be minimal.

Keen v. State effectively defines actual innocence just as Tennessee's reopening statute uses it. While courts have historically defined the term in two markedly different ways, Tennessee appears to have finally determined which position it favors. The Tennessee Supreme Court adopted the stricter notion of actual innocence, or factual innocence, which will bar petitioners from filing successive or untimely motions under section 40-30-117(a)(2) unless they have "new scientific evidence" that would potentially exonerate them of the crime.[150] Evidence of ineligibility for the death penalty, however, is now insufficient to justify a reopening of post-conviction proceedings.

This could potentially increase the number executions of intellectually disabled defendants. If a capital offender truly is intellectually disabled, the federal and state constitutions protect him from the death penalty.[151] Limiting petitioners' avenues for relief necessarily inheres a risk of wrongful sentences. Under the court's ruling, a truly intellectually disabled defendant cannot bring newfound, previously unavailable evidence of her disability after she has exhausted her motion for post-conviction relief and appeals. This holding could result in more death sentences for the intellectually disabled. Neither the majority nor the dissent takes this threat lightly, but the dissent seems more concerned about this grave possibility.

While the majority notes the differing views on "actual innocence" and even mentions *Sawyer v. Whitley*,[152] it fails to weigh these authorities properly. The opinion points to a number of authorities supporting its position, but never distinguishes any of the cases cited by the dissent. Moreover, its discussion of the AEDPA is similarly one-sided. The federal circuit courts are split on how to interpret the "actual innocence" provision of the AEDPA,[153] but the majority fails to mention any cases from courts on the opposing side of the divide. It thus remains wholly unclear whether the majority even has responses to the counterarguments offered by the circuits adopting the more expansive definition of actual innocence. Accordingly, the court's choice of definition appears somewhat arbitrary.

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150. TENN. CODE ANN. § 40-30-117(a)(2) (2011).

151. Atkins v. Virginia, 536 U.S. 304 (2002); Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001).

152. *Keen*, 398 S.W.3d at 610.

153. Berwanger, *supra* note 71, at 323–31.

Yet even if the court had given proper weight to its opposing authorities, *Sawyer* in particular, its final ruling on the defendant's case would likely remain unchanged. The standard announced in *Sawyer* for determining whether a petitioner is innocent of the death penalty is that "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[154] Given Tennessee's statutory requirement of an I.Q. of seventy or below and the defendant's varying scores, coupled with scientific evidence suggesting the imprecise nature of these numbers, it is likely that a reasonable juror could find the defendant's I.Q. to fall just above the seventy mark, rendering him eligible for the death penalty.

The defendant's counterargument and the dissent's position, however, cannot be disposed of so easily. The dissent in particular raises a compelling argument for why courts should consider capital murder an entirely separate offense from mere first-degree murder. Simple first-degree murder in the absence of aggravating factors cannot warrant a death sentence, but first-degree murder in the presence of one or more aggravating factors makes a defendant eligible for the death penalty. If the aggravating factors are necessary components of a death sentence, what substantive difference is there between aggravating factors and elements of an offense? It is true that no separate offense of capital murder exists in Tennessee, but the majority's rejection of the argument based on this fact alone seemingly elevates form over substance. While the language of the statute does not literally separate regular first-degree murder from capital first-degree murder, the requirement of aggravating factors for eligibility for a death sentence presupposes that such a distinction exists. It can almost be said that "having an I.Q. of seventy or higher" is an element of capital murder in Tennessee. In the absence of this condition, a defendant cannot be sentenced to death.

V. CONCLUSION

The decision in *Keen v. State* represents the state's interest in finality of judgments and efficiency of process in capital cases. The Tennessee Supreme Court correctly ruled that its prior decision in *Coleman v. State* did not announce any new constitutional rule, as that decision dealt with a constitutional rule announced a decade earlier in *Van Tran v. State*. However, the court failed to fully realize the logical resemblance between two separate first-degree murder

154. Sawyer v. Whitley, 505 U.S. 333, 333 (1992).

offenses and Tennessee's own statutory scheme. While the statute nominally does not recognize a distinction between offenses, the logic underlying the statute implies one. The defendant may very well have been deprived of a right to reopen his petition under the state's reopening statute, and if so, it is similarly possible that he has been deprived of his constitutional right to exemption from the death penalty. While the state's interests in finality and efficiency are certainly valid, courts must carefully balance this interest with—if not prioritize it behind—the guarantee of its citizens' constitutional protections.