AVOIDING *ATKINS*: HOW TENNESSEE IS ON THE VERGE OF UNCONSTITUTIONALLY EXECUTING AN INDIVIDUAL WITH INTELLECTUAL DISABILITIES

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If the state executes an intellectually disabled individual, but no one knows of the intellectual disability, has the state violated the constitution? The prospect of executing a human being that the law protects from such a fate simply because no one knows of an intellectual disability demonstrates the danger of invoking the ultimate punishment in the American criminal system.

That such an occurrence *could* occur ought to militate toward flexibility from courts in determining intellectual disability before anyone is put to death. Yet, the clock ticks toward this very outcome in Tennessee, not because no one *actually* knows of the individual's intellectual disability, but because no one *legally* knows. Despite the evolving legal standards for determining intellectual disability, no court has yet provided a hearing in which this individual could make the case that he is constitutionally ineligible for the death penalty. If his execution proceeds absent such a determination, the state runs the risk of flagrantly violating the standards of both the Tennessee Constitution and the United States Constitution, each of which have been interpreted to prohibit execution of individuals with intellectual disabilities.[2]

This essay provides a brief overview of the evolving standards at the intersection of intellectual disability and the death penalty, before using the Tennessee case of Pervis Payne to demonstrate the risk that a potentially unconstitutional execution proceeds. Payne's case is a labyrinth in which the doors to proving intellectual disability have remained closed at each turn. Though this case is unique, the danger is not – if Tennessee and other states do not close the hole in which Payne has fallen, where he has been denied even a hearing on his claim, then the prohibition on execution of the intellectually disabled, recognized under the federal constitution in *Atkins v. Virginia* in 2002, will be but a pyrrhic holding. The essay will close with potential ways to fill the hole for each of the three branches of government. As the Tennessee Supreme Court has acknowledged, the state has "no business executing persons who are intellectually disabled,"[3] a statement it repeated in Payne's own case.[4] Yet, without intervention, this is precisely what could happen if Payne's scheduled execution proceeds.[5]

I. Evolving Standards of Decency

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[1] FedEx Professor of Law & Associate Director, Benjamin L. Hooks Institute for Social Change, The University of Memphis. Thank you to Joia Erin Thornton at Just City in Memphis for helping me better understand the Payne case and to the many others working to ensure a hearing on intellectual disability. Thank you also to the editors at Law and Inequality, particularly Sam Brower, for working under compressed circumstances to bring this piece to publication. It is my sincerest hope that Pervis Payne and others in a similar procedural labyrinth that could lead to what everyone agrees would be an unconstitutional execution are provided an opportunity to present the merits of their claims of intellectual disability. Justice, decency, and the Constitution demand it.

[2] *See* Van Tran v. State, 66 S.W. 3d 790 (Tenn. 2001); Atkins v. Virginia, 536 U.S. 304 (2002).

[3] Keen v. State 398 S.W.3d 594, 613 (Tenn. 2012).

[4] Payne v. State, 493 S.W.3d 478, 486 (Tenn. 2016).

[5] Tennessee v. Payne, Nos. 87-04409 & 87-04410, Order, (Tenn. Sup. Ct. Feb. 24, 2020) (setting execution date). Available at: http://tncourts.gov/sites/default/files/docs/payne_pervis_t_order_setting_execution_filed_february_24_2020.pdf.

Since 1986, the law with regard to the execution of individuals with intellectual disabilities has evolved in three successive waves. In the first wave, the "sentencing wave," which lasted from approximately 1986 through 2002, many states (and the federal government) enacted prohibitions on sentencing such individuals to death. However, these prohibitions left open difficult questions that would be addressed in subsequent waves. While prohibitions on sentencing stopped new individuals with intellectual disabilities from being added to death row, it took a second wave – the "execution wave," which culminated with the *Atkins* decision in 2002 – to prohibit any execution of an individual with intellectual disability. From the "sentencing wave," individuals with intellectually disabilities were ineligible for the death penalty in most states; from the "execution wave," all executions of such individuals were deemed unconstitutional. However, states continued to struggle with defining which individuals qualified for this constitutional protection. Thus, in the third wave – the "evidentiary wave," unfolding after *Atkins* – courts confronted what proof would be required for a defendant to prove intellectual disability.

A. The Sentencing Wave

In June 1986, the execution of Jerome Bowden in Georgia triggered national outrage at the execution of individuals with intellectual disabilities.[6] Bowden, whose execution was briefly stayed amidst public protests over putting an individual determined to have an IQ of 65 to death, was executed on the grounds that despite his disability, Bowden understood the nature of his crime.[7] Within two years, Georgia prohibited such executions, and other states followed.[8]

In 1990, Tennessee enacted a statutory prohibition on sentencing such individuals to death, one of the earliest states to participate in the sentencing wave. In discussing the bill, state senators argued that "it's just not proper in a civilized society for the state to be in the business of executing…those who are mentally retarded" and "I just don't believe mentally retarded people ought to be electrocuted."[9] The statute stated: "Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death."[10] Proof of intellectual disability would be judged by three elements:

> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
> (2) Deficits in adaptive behavior; and

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[6] *See, e.g.*, Alan Judd, 30 Years Later, *Details of Disabled Man's Execution Still 'State Secrets'*, ATLANTA J. CONST. (Oct. 19, 2016.), https://www.ajc.com/blog/investigations/years-later-details-disabled-man-execution-still-state-secrets/GNtfMdTqyZrTpscahSaNZK/.

[7] Atkins, at 313, n8.

[8] Atkins, at 314.

[9] Van Tran v. State, 66 S.W.3d 790, 804-05 (Tenn. 2001) (citing Tenn. S., *Debate on H.B. 2107 on the Floor of the Senate,* 96th Gen. Assembly, 2nd Reg. Sess. (Apr. 12, 1990) (Tape S–106B) (Substituted for S.B. 1851)).

[10] 1990 Tenn. Laws Pub. Ch. 1038, enacting Tenn. Code Ann. 39-13-203(b). The statute was subsequently amended to replace the phrasing "mental retardation" with "intellectual disability." See 2010 Tenn. Laws Pub. Ch. 734. For the remainder of this essay, I will utilize the contemporary phrasing "intellectual disability" when describing the statute.

(3) The intellectual disability must have been manifested during the developmental period, or by eighteen (18) years of age.[11]

At least in Tennessee, the prohibition was forward looking – it did not provide an obvious mechanism for individuals already sentenced to death to claim intellectual disability in post-conviction proceedings. The statute did, however, provide a starting point for determining the proof that would need to be provided in such a proceeding: an IQ of 70 or below manifested prior to the age of 18.

B. The Execution Wave

The 1990 Tennessee statute was prompted as much by the outrage over the Bowden execution in George as by a 1989 Supreme Court decision.[12] In *Penry v. Lynaugh*, the Court considered, inter alia, whether the Eighth Amendment categorically prohibited the execution of individuals with intellectual disabilities.[13] Though Congress had recently prohibited such sentences, a fractured Court determined that there was no national consensus on the topic and there was therefore no constitutional prohibition.[14] The Court noted that only two states (Georgia and Maryland) had statutory prohibitions at the time,[15] though it acknowledged the possibility that growing public sentiment against the practice might manifest itself in further legislation.[16] That is precisely what happened in Tennessee.

While *Penry* answered the Eighth Amendment question in the negative, litigants continued challenging the execution of individuals with intellectual disabilities in state courts and pushed for reversal of *Penry* itself. That effort bore fruit in the early 2000s. In Tennessee, for example, defendant Heck Van Tran brought suit, arguing both that the state's sentencing ban allowed reopening of post-conviction proceedings for a determination of intellectual disability and that the execution of individuals with intellectual disability violated Article I, section 16 of the Tennessee Constitution.[17] Though the Tennessee Supreme Court rejected the argument that the intellectual disability statute could be applied retroactively, it held that execution of intellectually disabled individuals violated evolving standards of decency, was grossly disproportionate, and served no valid penological purpose, and therefore violated the state constitution.[18]

The court identified the "dramatic transformation" of the legislative landscape since *Penry*[19] as well as the judgments of numerous professional organizations as dictating its conclusion that "executing the mentally retarded is considered cruel and unusual punishment by numerous facets of contemporary society."[20] In addition, the court outlined the reasons why

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[11] Tenn. Code Ann. 39-13-203(a).

[12] Van Tran v. State, 66 S.W.3d 790, 804 (Tenn. 2001) ("The very timing of the [intellectual disability] statute's passage, less than a year after the *Penry* Court held that execution of the mentally retarded did not violate national standards of decency, suggests that the legislature intended to reject *Penry*.").

[13] 492 U.S. 302 (1989).

[14] Penry, 492 U.S. at 334-35.

[15] The Court also acknowledged that 14 other states prohibited the death penalty altogether.

[16] Penry, 492 U.S. at 334-35.

[17] Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001). Article I, sec. 16 of the Tennessee Constitution tracks precisely with the Eighth Amendment of the federal Constitution: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[18] Van Tran, 66 S.W.3d at 801-09.

[19] Van Tran, 66 S.W.3d at 802.

[20] Van Tran, 66 S.W.3d at 803-04.

execution would be improper in such cases, citing concerns about culpability and blameworthiness as well as the individual's diminished ability to assist in his own defense.[21] While the court's conclusions ran contrary to the *Penry* decision, the Tennessee court pointed out that the Supreme Court had recently granted certiorari to review *Penry*, in a case called *Atkins v. Virginia*.[22]

A year later, the U.S. Supreme Court confirmed the Tennessee court's suspicion in *Van Tran* that *Penry* would not last. In *Atkins*, the Court reversed its *Penry* conclusion on much the same grounds as Tennessee's *Van Tran* court had reached its holding that the execution of intellectually disabled individuals was unconstitutional.[23] Writing for the Court, Justice Stevens traced the history of legislative prohibitions on death sentences for the intellectually disabled and rejected that executions in such circumstances served the purposes of deterrence or retribution.[24] *Atkins* confirmed nationally what *Van Tran* had determined in Tennessee: the execution of individuals with intellectual disabilities was unconstitutional. The difficulty, acknowledged in *Atkins* itself, would be in determining who qualified as intellectually disabled.[25]

C. The Evidentiary Wave

In Tennessee, the intellectual disability statute provided the starting point for determining whether a defendant qualified as intellectually disabled: the IQ score.[26] However, with time, advocates convincingly argued that a fixed IQ threshold (in most cases, 70) would not definitively capture all the characteristics that militated against executing a person with diminished intellectual capacity. Specifically, courts began to confront cases in which defendants sought to introduce evidence of a "functional intelligence quotient" that would include not only an IQ score, but also expert testimony as to the individuals' functional disability.

The question reached the Tennessee Supreme Court in 2011 in *Coleman v. State*.[27] In *Coleman*, the court acknowledged the wide diversity of conditions that could lead to intellectual disability[28] and the need for broad evidentiary admissibility to avoid the prospect of unconstitutionally executing an individual intended to be protected by the constitutional prohibitions in *Van Tran* and *Atkins*.[29] The court concluded that trial courts considering intellectual disability "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."[30] Thus, *Coleman* clarified in 2011 that courts ought err on the side of admissibility in considering evidence of intellectual disability in this context.

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[21] Van Tran, 66 S.W.3d at 807-08 (citing with approval the dissent of Justice Brennan in *Penry*).
[22] Van Tran, 66 S.W.3d at 800.
[23] Atkins v. Virginia, 536 U.S. 304 (2002).
[24] Atkins, 536 U.S. at 314-21.
[25] Atkins, 536 U.S. at 317 ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.").
[26] See Tenn. Code Ann. 39-13-203(a).
[27] Coleman v. State, 341 S.W.3d 221 (Tenn. 2011).
[28] Coleman, 341 S.W.3d at 230-31.
[29] Coleman, 341 S.W.3d at 240-41 (citing Tennessee Court of Criminal Appeals cases expressing concern that a "bright-line cutoff" requirement raised the specter of the possible execution of intellectually disabled individuals).
[30] Coleman, 341 S.W.3d at 241.

As with *Atkins*, the Supreme Court quickly followed suit. In 2014, in *Hall v. Florida*, the Court evaluated Florida's evidentiary rules for proving intellectual disability, which foreclosed admission of evidence if defendants were shown to have an IQ score above 70.[31] Such a rigid rule, the Court concluded, created an "unacceptable risk that persons with intellectual disability will be executed" and was therefore unconstitutional.[32] The Court reiterated the concern from *Atkins* that defendants who were intellectually disabled were particularly vulnerable to "special risk of wrongful execution" due to greater potential for false confessions and diminished ability to serve as a compelling witness or aid to their lawyers.[33] Insisting that "intellectual disability is a condition, not a number," the Court held that when disability falls within a test score's margin of error, a defendant must constitutionally be able to present additional evidence of intellectual disability.[34]

Thus, in the course of 30 years following the execution of Jerome Bowden in Georgia, first the sentencing of intellectually disabled individuals to death became unlawful in many jurisdictions, then the execution of such individuals became unconstitutional. In addition, states like Tennessee and ultimately the U.S. Supreme Court determined that defendants wishing to make an argument of intellectual disability constitutionally must be given an opportunity to provide a broad range of evidence, particularly in close cases. Otherwise, the danger of an execution inconsistent with society's (and the Constitution's) understanding of appropriate punishment would persist. As standards of decency evolved, so had the law.

II. Payne's Labyrinth

Pervis Payne was sentenced to death in 1988 after being convicted of a gruesome double murder despite sustained claims of innocence.[35] At the time of his sentencing, there was neither a statutory nor a constitutional prohibition on the sentencing to death or execution of individuals with intellectual disabilities. However, even as the law shifted, Payne has not yet had an opportunity to raise the claim though he has adduced evidence to demonstrate that he meets the criteria of person that statutes like Tennessee's intellectual disability ban and cases like *Van Tran* and *Coleman* (in Tennessee) and *Atkins* and *Hall* (nationally) intended to deem ineligible for execution. That evidence has yet to be considered in court, the result being that in early 2020, the state set Payne to be executed on December 3,[36] though Governor Bill Lee granted a

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[31] Hall v. Florida, 572 U.S. 701 (2014).
[32] Hall, 572 U.S. at 704.
[33] Hall, 572 U.S. at 709 (citing *Atkins*).
[34] Hall, 572 U.S. at 723.
[35] Though Payne has maintained his innocence through the entire life of his case (*See* Steven Hale, *Tennessee Set to Execute Intellectually Disabled Black Man in Killing of White Woman Even Though Innocence Questions Persist*, THE APPEAL (Apr. 29, 2020), https://theappeal.org/tennessee-set-to-execute-intellectually-disabled-black-man-in-killing-of-white-woman-even-though-innocence-questions-persist/) this essay proceeds without considering Payne's guilt or innocence. Certainly if Payne is innocent, he should not be executed (*See, e.g.,* Alan W. Clarke, Eric Lambert, & Laurie Anne Whitt, *Executing the Innocent: The Next Step in the Marshall Hypothesis*, 26 N.Y.U. REV. L. & SOC. CHANGE 309 (2000) (attempting to empirically determine how many innocent individuals have likely been executed)); but even if he is guilty, his execution would be unconstitutional if he is intellectually disabled.
[36] Tennessee v. Payne, Nos. 87-04409 & 87-04410, Order, (Tenn. Sup. Ct. Feb. 24, 2020) (setting execution date). Available at: http://tncourts.gov/sites/default/files/docs/payne_pervis_t_order_setting_execution_filed_february_24_2020.pdf.

temporary reprieve amidst the COVID-19 pandemic.[37] At each stage in his post-conviction efforts, Payne has faced locked doors.

A. 1988-2001

For years following his conviction, Pervis Payne has pursued a variety of post-conviction relief, ranging from a challenge to the evidence utilized to support his sentence of death that went all the way to the U.S. Supreme Court in 1991[38] to still ongoing requests for DNA testing on various and newly-discovered pieces of evidence Payne hopes will support his claim of innocence.[39] At the time of his 1988 sentencing and through the passage of Tennessee's intellectual disability statute, there was no basis for bringing a claim that he was ineligible for the death penalty due to intellectual disability. During that period the law was not on his side; in *Penry*, the Supreme Court had explicitly held that execution of the intellectually disabled did not violate the Eighth Amendment.[40]

There may have been some glimmer of hope on the issue following Tennessee's 1990 enactment of a ban on the sentencing of intellectually disabled individuals to death. However, the statute was not retroactive on its face and provided no obvious mechanism for individuals to bring such a claim. The Tennessee Supreme Court did not face the issue directly until its *Van Tran* decision in 2001. There, the court relied on the "well-settled rule that statutes are to be applied prospectively in the absence of clear legislative intent to the contrary."[41] Though the court acknowledged some discussion in the legislative debates about the topic and concluded that the question of whether the statute could be applied to sentences issued prior to its enactment was close, it ultimately held that defendants could not bring a retroactive claim of intellectual disability to prevent execution under the intellectual disability statute.[42] Thus, from the time of his sentence through 2001, Payne had no grounds upon which to argue intellectual disability to obtain relief from his sentence.

B. 2001-2011

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[37] State of Tennessee, Office of the Governor, Newsroom, "Governor Lee Grants Temporary Reprieve for Pervis Payne," November 6, 2020. The Governor's statement, in full, read, "I am granting Pervis Payne a temporary reprieve from execution until April 9, 2021, due to the challenges and disruptions caused by the COVID-19 pandemic." Available at: https://www.tn.gov/governor/news/2020/11/6/gov--lee-grants-temporary-reprieve-for-pervis-payne.html.

[38] Payne v. Tennessee, 501 U.S. 808 (1991) (determining that victim impact evidence could be utilized in securing a death sentence). Somewhat ironically, Payne's case represented a reversal of a prior Supreme Court decision on the topic, *Booth v. Maryland*, 482 U.S. 496 (1987). Thus, his conviction was sustained only due to a shift in the Supreme Court's interpretation of the Eighth Amendment, yet he has not benefited from a separate shift in *Atkins*.

[39] See Payne v. State, 2007 WL 4258178 (Tenn. Ct. Crim. App. 2007) (denying DNA testing); Payne v. State, No. P-09954, 87-04408, 87-04409, & 87-04410, Order Granting in Part "Petition for Post-Conviction DNA Analysis (Tenn. Crim. Ct. (30th Judicial District, Division 1) Sept. 16, 2020) (granting DNA testing); Katherine Burgess, *Judge Grants DNA Testing in Pervis Payne's Tennessee Death Penalty Case*, THE COMMERCIAL APPEAL, Sept. 16, 2020. In full disclosure, I briefly represented Payne in his request for DNA testing in 2007. Though testing was denied in that case, testing was recently granted on newly-discovered items of evidence and is currently proceeding. Payne has also sought relief through a federal habeas corpus petition. Payne v. Bell, 418 F.3d 644 (6th Cir. 2005).

[40] See Penry, note X infra.

[41] Van Tran, 66 S.W.3d at 797-98 (citing State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

[42] Van Tran, 66 S.W.3d at 798-99.

While the *Van Tran* court ruled that Tennessee's intellectual disability statute did not provide for retroactive grounds for relief, it also declared the practice of execution of intellectually disabled individuals to run afoul of Tennessee's constitution. This new rule, the court held, broke new ground sufficient to justify retroactive application to criminal cases on collateral review.[43] Under Tennessee law, such retroactive application applied where the new rule enhanced "the integrity and reliability of the fact finding process of the trial."[44] The court determined that its conclusion regarding execution of the intellectually disabled did so and ordered the trial court to make a determination on Van Tran's claim.[45] The court identified the same standards found in the intellectual disability statute – including the requirement of a functional IQ of 70 or below[46] – as the standard for the trial court to apply.[47] While the court acknowledged that such a remand was procedurally unusual, it identified the alternative as unacceptable: "the only remaining alternative in this case would be that one potentially mentally retarded person may be executed before the issue is reviewed."[48]

Thus, *Van Tran* created a change in law that would allow any individuals sentenced to death – including those, like Payne, who were sentenced prior to the passage of the intellectual disability statute – to challenge their eligibility for the sentence based on intellectual disability. Under Tennessee law, such individuals faced a one-year statute of limitations to reopen post-conviction proceedings based on new and retroactive constitutional rights.[49] Theoretically, Payne had a year in which to seek to reopen his case, beginning December 4, 2001, the date of the *Van Tran* decision. He did not. However, an understanding of the evidence of Payne's intellectual disability explains why.

The evidence of Pervis Payne's intellectual disability rests primarily on a series of IQ tests administered over his lifetime. The raw scores on these tests are as follows:

Date	Payne's age	Score
1976	9	69
1987	20	78
1996	29	78
2010	43	74[50]

Thus, only on one of the administrations of these tests did Payne score below the threshold of 70 required for a determination of intellectual disability. The intellectual disability statute specifically identified 70 as a cut off score; the *Van Tran* court incorporated that definition into its holding in 2001 – thus, during the one-year limitations period following *Van Tran*'s new rule, Tennessee law appeared to set 70 as a rigid requirement for a determination of intellectual disability.[51] That appearance was confirmed in 2004, when the Tennessee Supreme Court held

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[43] Van Tran, 66 S.W.3d at 811.
[44] Van Tran, 66 S.W.3d at 811 (citing Meadows v. State, 849 S.W.2d at 755 and Tenn. Code Ann. 40-30-222).
[45] Van Tran, 66 S.W.3d at 811.
[46] Tenn. Code Ann. 39-13-203(a)(1).
[47] Van Tran, 66 S.W.3d at 812.
[48] Van Tran, 66 S.W.3d at 812.
[49] Payne v. State, 493 S.W.3d at 481, n3 (citing Tenn. Code Ann. 40-30117(a)(1)).
[50] Payne v. State, 493 S.W.3d at 482. Payne also presented evidence that due to the "Flynn effect," which required regular re-norming of IQ tests, the revised scores on his latter three tests would be 75.4, 72.4, and 73.7, respectively. *Id.*
[51] See In re: Payne, 722, Fed. Appx. 534, 537 (6th Cir. 2018) (discussing Payne's failure to seek relief following *Atkins* in a subsequent request to the Sixth Circuit for permission to file an additional habeas claim and noting that "Payne's failure to pursue such a claim is perhaps unsurprising because his I.Q. scores over several decades did not appear to demonstrate that he met the first factor for intellectual disability under Tennessee's statute.").

that a raw IQ test score above 70 may be sufficient, on its own, to disprove intellectual disability.[52]

It appears, therefore, that Payne's decision to focus his post-conviction efforts elsewhere, including on obtaining evidence that would support his claims of innocence (and thus invalidate his sentence in its entirety, whereas an intellectual disability claim could only commute the sentence to life imprisonment), was entirely justified. On the law as it existed from December 4, 2001 until December 4, 2002, the post-*Van Tram* statute of limitations, Payne could not have been adjudicated intellectually disabled.[53] If he had sought review during that one year period, he very likely would have been deemed fit for execution given the standards of the time. The law defining intellectual disability remained the same until *Coleman* in 2011.

C. 2011-present

In recognition of the inadequacy of fixed, rigid requirements for determining intellectual disability, the evidentiary wave of reform opened opportunities for broader evidence to be provided by individuals claiming to be ineligible for execution. In *Coleman*, the Tennessee Supreme Court focused on the "functional" in the statutory definition of intellectual disability, enabling expert testimony to support a claim of intellectual disability even where IQ scores were above 70. This was precisely the type of evidence Pervis Payne had available. The *Coleman* decision was issued April 11, 2011; on April 4, 2012 – within the one-year statute of limitations for filing a request for post-conviction relief due to a change in law, Payne filed a motion to reopen his case.

In support of his motion, Payne included an affidavit of Dr. Daniel J. Reschly of Vanderbilt who utilized Payne's history of testing and performed an independent evaluation of Payne's functional intelligence. In Dr. Reschly's clinical judgment, Payne's functional intelligence was clearly at or below 70 and Payne had "significant deficits in adaptive behavior due to substantial limitations in" conceptual and practical skills.[54] As these conditions were present before the age of 18, Dr. Reschly concluded that Payne met the statutory definition for intellectual disability.

However, during the pendency of Payne's request to reopen post-conviction relief, the Tennessee Supreme Court determined that its 2011 *Coleman* decision regarding the types of evidence defendants might rely on to prove intellectual disability was *not* a new rule that must be available to defendants retroactively.[55] Thus, unlike *Van Tran*, which opened a one-year statute of limitations (but could not help Payne because of the more limited evidentiary standard for intellectual disability), *Coleman*, a case that *could* have helped Payne, did not open a similar one-year window to seek relief. The door to his offering proof of intellectual disability was closed again.

Given this circumstance, Payne adjusted his litigation strategy, adding various other claims in an effort to figure some way to have his claim adjudicated on the merits. In response, the state did not argue the merits of Payne's claim of intellectual disability; rather, the state

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[52] Howell v. State, 151 S.W.3d 450 (Tenn. 2004).

[53] See Payne v. State, 2014 WL 5502365, *21 (Tenn. Ct. Crim. App. 2014 (MacMullen, J., concurring in part, dissenting in part) ("Prior to *Coleman*, courts did not permit the consideration of evidence other than raw IQ scores to determine a defendant's functional IQ. As a result, any attempt by the Petitioner to seek relief would have been future.").

[54] Payne v. State, 493 S.W.3d at 481-82.

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

argued that the various avenues through which Payne sought to have his claim heard were procedurally inappropriate. All of Payne's claims were rejected at the trial court and also by the Tennessee Court of Criminal Appeals, albeit over a dissent.[56]

Simultaneous to the renewed post-conviction effort, Payne also pursued a declaratory judgment action in the state's chancery court, arguing for a declaration that he qualified as an individual with an intellectual disability. This effort was similarly dismissed, not on the grounds that Payne was *not disabled*, but because the state argued that the chancery court lacked subject matter jurisdiction and that the suit was barred by the doctrine of sovereign immunity.[57]

Ultimately, the Tennessee Supreme Court heard the post-conviction case in 2016 and systematically rejected each of Payne's arguments. Payne sought to use the state's error coram nobis statute[58] as a mechanism to reopen his case; the court instructed that coram nobis was available only in extraordinary situations in which there is new evidence that alters material facts of the case, not in Payne's case, where the basis of the claim was a change in law.[59] Payne argued for reversals of prior court conclusions (1) that the intellectual disability statute did not itself provide a retroactive cause of action (which the court had held in *Van Tran*), and (2) that *Coleman* did not provide a new constitutional rule that gave individuals an opportunity to reopen cases (which the court had held in *Keen v. State*), but the court affirmed its prior decisions on these points.[60] On the latter point, the Tennessee court expressly rejected the holdings in two federal habeas corpus cases from Tennessee that ordered trial courts to consider evidence of intellectual disability following *Coleman*,[61] concluding curtly that those federal cases were not binding as the question was one of state law.[62] At the court's request, Payne also argued that the U.S. Supreme Court's decision in *Hall v. Florida* (invalidating the rigid 70 IQ cut off for intellectual disability) could provide grounds for relief. Again, the Tennessee Supreme Court rejected Payne's argument, concluding that while *Hall* might have laid out a substantive standard for determining intellectual disability, it was silent as to what procedural mechanism individuals might utilize and it certainly did not create a new one.[63] In the end, Payne had knocked on numerous doors in his quest to have his evidence of intellectual disability considered by a court – *any* court – but was turned away every time.

The Tennessee Supreme Court was cognizant of Payne's quandary. In its *Payne* opinion, it reiterated a commitment "to the principle that Tennessee has no business executing persons who are intellectually disabled."[64] However, rather than providing a sense of how that fate might be avoided, the court punted the problem to Tennessee's state legislature: "We encourage the General Assembly to consider whether another appropriate procedure should be enacted to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed."[65]

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[56] Payne v. State, 2014 WL 5502365 (Tenn. Ct. Crim. App. 2014). Judge MacMullen concurred in part and dissented in part and would have ordered an evidentiary hearing. Id., at *17.
[57] Payne v. Carpenter, 2016 WL 4142485 (Tenn. Ct. App. 2016).
[58] Tenn. Code Ann. 40-26-105(b).
[59] Payne v. State, 493 S.W.3d at 484-86.
[60] Payne v. State, 493 S.W. 3d at 488 ("Consistently with our decision in *Van Tran*, we hold that the intellectual disability statute does not create an independent collateral cause of action for raising a claim of intellectual disability and ineligibility to be executed."); at 492 ("[W]e decline to overrule our decision in *Keen*.").
[61] See Black v. Bell, 664 F.3d 81 (6th Cir. 2011); Van Tran v. Colson, 764 F.3d 594 (6th Cir. 2014).
[62] Payne v. State, 493 S.W.3d at 492.
[63] Payne v. State, 493 S.W.3d at 490-91.
[64] Payne v. State, 493 S.W.3d at 486 (citing Keen v. State, 398 S.W.3d at 613).
[65] Payne v. State, 493 S.W.3d at 492

Pervis Payne is still awaiting such an action, even as his execution date nears. After losing the 2016 case at the Tennessee Supreme Court, he sought permission from the Sixth Circuit Court of Appeals to file a new habeas corpus action in which he could challenge his sentence on the basis of intellectual disability.[66] Though he had lost in state court on the ground that his request was based on a change in law rather than a change in facts, his request for permission was rejected by the federal appeals court on the ground that Payne failed to show that the change in evidence allowed to demonstrate intellectual disability constituted changes in law that can be applied retroactively.[67] At every step, courts have denied Payne the opportunity to present evidence of intellectual disability even as the state has never rebutted his claim on its merits.

Having thus been locked out of presenting his case due to procedural labyrinths of the courts, Payne's fate now may depend on the legislative and executive branches of government. Recently, a state representative promised to take up the task in the next legislative session; due to Payne's temporary reprieve, it is possible that the legislature will pass such legislation before a new execution date is set.[68] In addition, the governor retains the ability to commute Payne's sentence. Yet, if no action is taken, Tennessee faces the prospect of moving forward with a potentially unconstitutional execution, implementing the ultimate penalty without bothering to determine the merits of Payne's intellectual disability claim.

III. Preventing the Perfect Storm

From 1977, when Tennessee adopted its current capital punishment scheme,[69] through 2017, only 192 Tennessee defendants were sentenced to death of the 2,514 individuals convicted of first degree murder (and thus eligible for such a sentence).[70] Among those 192, 106 had their death sentences vacated or reversed, leaving only 86 individuals on Tennessee's death row as of 2017.[71] Looking at this data, with the sentence rarely invoked and often vacated, two Tennessee practitioners referred to the system as a "capricious lottery" based on characteristics other than the reprehensibility of the defendant's crime.[72] Their analysis demonstrated factors that predicted when a sentence of death was more likely, such as the date of trial (1980s), the county in which the crime was committed (Shelby County), the race and socioeconomic status of the defendant (African American and poor, being served by an appointed defense lawyer), and the race of the victim (White). Even aside from the issue of intellectual disability, Pervis Payne's case represents a perfect storm of these factors.[73]

However, until recently, actual execution even among those on Tennessee's death row was rare. From 1977 through 2017, only six individuals were put to death.[74] Since 2018,

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[66] In re: Payne, 722 Fed, Appx. 534 (6th Cir. 2018).
[67] *Id.*, at 538.
[68] *Id.* See also Tenn. Gen. Assembly, HB 0001, filed for introduction 11/4/2020 (http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0001)
[69] Bradley A. Maclean & H.E. Miller Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J. LAW & POLICY 85, 87 (2018)
[70] *Id.* at 132.
[71] *Id.*
[72] *Id.* at 90.
[73] Joia Erin Thornton, *Pervis Payne the Color of Capital Punishment in the South*, MLK50: JUSTICE THROUGH JOURNALISM (Aug. 26, 2020), https://mlk50.com/2020/08/26/pervis-payne-and-the-color-of-capital-punishment-in-the-south/.
[74] *Tennessee's Death Penalty Lottery*, *supra* note 65, at 132-33.

however, only Texas has executed more individuals than Tennessee's seven.[75] The increased instances of execution increases the potential for an unconstitutional execution such as the one potentially facing Pervis Payne. If action is not taken by either Tennessee courts, legislators, or the governor, Payne and other defendants may be executed before even having an opportunity to argue that they are ineligible due to intellectual disability.

A. Governor

The most direct mechanism through which Tennessee can avoid performing an unconstitutional execution lies in the hands of the governor. Under the Tennessee constitution, the governor "shall have power to grant reprieves and pardons, after conviction."[76] This power includes the power to commute a sentence, including commuting a death sentence to life imprisonment.[77] That power has been codified by statute as well.[78] The governor's discretion on these matters is broad, "exclusive of all other departments of the state,"[79] and "limited only by the language of the Constitution."[80] Pervis Payne has filed a request for clemency based not only on his claims of innocence, but also on his unadjudicated claim of intellectual disability.[81]

There is no doubt that Tennessee Governor Bill Lee has the authority to commute Payne's sentence. However, this path to avoiding a potentially unconstitutional execution lies entirely in the discretion of the governor. To date, Governor Lee has only commuted one death sentence;[82] instead, he has overseen the state's increase in executions. While Governor Lee did grant Payne a temporary reprieve amidst the COVID-19 pandemic, thus canceling a December 2020 execution date and enabling the General Assembly the opportunity to consider legislation that would give Payne an opportunity for a hearing, he could more forcefully refuse to move forward with Payne's execution (even after the reprieve expires in April 2021) until there has been a hearing to determine intellectual disability. Until such determination is made, the danger of unconstitutionally executing an individual with intellectual disability remains.

B. Legislature

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[75] *Death Penalty Information Center, Executions by State and Year*, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year (last visited Nov. 5, 2020).

[76] Tenn. Const., Art. 3, section 6.

[77] See Carroll v. Raney, 953 S.W.2d 657 (Tenn. 1997); Tenn. Att. General Opp. 11-31 (Apr. 11, 2011).

[78] See Tenn. Code Ann. 40-27-105 ("Upon application for a pardon by a person sentenced to capital punishment, if the governor is of the opinion that the facts and circumstances adduced are not sufficient to warrant a total pardon, the governor may commute the punishment of death to imprisonment for life in the penitentiary"). See also Tenn. Code Ann. 40-27-106.

[79] State v. Dalton, 72 S.W. 456 (1903).

[80] Lemay v. State, 29 S.W.3d 483, 485 (Tenn. 2000).

[81] Katherine Burgess, *Pervis Payne's Attorneys Call on Gov. Lee for Mercy: 'You are the solution to the problem"*,THE COMMERCIAL APPEAL (OCT. 5, 2020), https://www.commercialappeal.com/story/news/crime/2020/10/05/pervis-payne-attorneys-ask-gov-bill-lee-clemency/3590962001/.

[82] *American Bar Association Capital Clemency Resource Initiative Clearinghouse, State Information: Tennessee*, https://www.capitalclemency.org/state-clemency-information/tennessee-2/ (last visited Nov. 5, 2020) (noting five denials and one reprieve (Harold Wayne Nichols) by Governor Lee).

While the governor has the authority to commute Payne's sentence, a commutation would not solve the structural problem evidenced by Payne's case. On the question of intellectual disability, Payne may not be alone in the labyrinth in which he finds himself – the way out is to allow him a forum in which he can present evidence of intellectual disability and have his claim adjudicated. Though Tennessee law prohibits sentencing individuals with intellectual disabilities to death,[83] the statute does not provide a mechanism for those already sentenced to challenge their eligibility for capital punishment.[84] The Tennessee Supreme Court has encouraged the General Assembly to fill this gap,[85] but the legislature has yet to take action.

Tennessee does allow for post-conviction relief allowing for a challenge to a sentence based on "violation of any right guaranteed by the state or federal constitution, including a right not recognized as existing at the time of trial or sentencing."[86] However, such relief is bound by a statute of limitations to prompt timely adjudication of claims.[87] As described above, though cases found that execution of individuals with intellectual disability violated the state constitution (*Van Tran* in 2001) and federal constitution (*Atkins* in 2002), Payne did not seek post-conviction relief within the statute of limitations due to the existing standard at the time that would likely have found him ineligible to be have intellectual disabilities due to his IQ scores above 70. However, Payne *did* seek relief within a year of the change in Tennessee law that expanded the definition of intellectually disabled. That effort failed in 2016.[88]

State Representative G.A. Hardaway declared his intention to file a bill to provide a procedural mechanism for individuals like Payne to reopen their cases to obtain a determination of intellectual disability.[89] The proposed statute is fairly simple: it amends the state's intellectual disability statute, Section 39-13-203, to provide "a defendant who has been sentenced to the death penalty prior to the effective date of this act and whose conviction is final on direct review" the ability to "petition the trial court for a determination of whether the defendant is intellectually disabled."[90] The proposed statute also removes the reference to an I.Q. of 70, instead defining intellectual disability as "a disability characterized by significant limitations in both intellectual functioning and adaptive behavior, including many everyday social and practical skills."[91] Such a bill would directly solve the problem presented in Payne's case, though it is unclear whether such a statute will become law. Another legislative option could be to adjust the post-conviction statute of limitations (40-30-102) to account for changes not only in interpretation of the constitution, but also in evidentiary standards. The latter option would override a Tennessee Supreme Court decision[92] that determined that the evidentiary wave of death penalty reform in Tennessee (i.e., the allowance of broader evidence to show disability beyond IQ scores below 70) did *not* create a change in law sufficient to merit a new opportunity

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[83] Tenn. Code Ann. 39-13-203.
[84] See Van Tran, 66 S.W.3d at 798-99 (determining that state's intellectual disability statute did *not* apply retroactively).
[85] Payne v. State, 493 S.W.3d at 492.
[86] Tenn. Rules of Post-Conviction Procedure, Rule 28, sec. 9(b).
[87] See Tenn. Code Ann. 40-30-102.
[88] Payne v. State, 493 S.W.3d 478 (Tenn. 2016).
[89] Travis Loller, *Tennessee Death Row Inmate Claims Intellectual Disability*, ASSOCIATED PRESS (Sept. 14, 2020), https://apnews.com/article/nashville-executions-us-supreme-court-tennessee-courts-0fb5bc994fcb9f0d5d28f5d503d47e70.
[90] See also Tenn. Gen. Assembly, HB 0001, filed for introduction 11/4/2020 (http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0001)
[91] *Id*.
[92] Keen v. State, 398 S.W.3d 594 (Tenn. 2012).

for post-conviction relief. Neither of these statutes would be particularly complicated, though each would likely need to define chronological, evidentiary, and procedural parameters to function effectively.

C. Courts

While the state legislature *could* solve the problem facing Pervis Payne with a statute, it was the courts that created the problem in the first place. By strictly interpreting both the intellectual disability statute[93] and the effect of the 2011 change in evidentiary standards for intellectual disability,[94] the Tennessee Supreme Court (despite claims that the state had "no business" executing intellectually disabled individuals) increased the chances that an individual would be put to death without even a hearing on a claim of intellectual disability. When given the opportunity to reverse itself in Payne's own case, the Court refused.

A map for a solution was provided in the partial concurrence of Judge Camille McMullen of the Tennessee Court of Criminal Appeals in Payne's case. Considering the due process elements of Payne's claim, Judge McMullen favored an approach that balanced the need to ensure that post-conviction claims were made in a timely manner against the magnitude and gravity of the situation facing the defendant.[95] Judge McMullen thus sought flexibility under somewhat unusual circumstances and a mechanism for actually delivering what her colleagues and the judges of the Tennessee Supreme Court, all of whom disagreed with her, seemed to agree was needed: a hearing on Pervis Payne's claim of intellectual disability. Though it has been foreclosed in Payne's case, following Judge McMullen's course would avoid the peril now facing Tennessee and the fate now facing Pervis Payne.

Animating Judge McMullen's conclusion were two other cases applying the evidentiary standards adopted in 2011 in *Coleman* in the context of federal habeas corpus challenges to the death penalty in Tennessee. In *Black v. Bell*, the Sixth Circuit Court of Appeals remanded a defendant's habeas corpus claim for a review of its consistency with *Atkins*'s prohibition on execution of intellectually disabled individuals.[96] Specifically, the court ordered application of the *Coleman* standard for determining disability.[97] The Sixth Circuit reached a similar conclusion in a 2014 federal habeas corpus case, concluding that the defendant was entitled to adjudication of a claim of intellectual disability under the state's *Coleman* standard even though there had been a previous hearing on the question using the previous standard.[98] In the 2014 case, the Sixth Circuit noted that the best mechanism for proper consideration of the question of intellectual disability using the proper standard would be a hearing in a state post-conviction court (as opposed to a federal habeas corpus proceeding).[99] This is precisely what Judge McMullen sought to accomplish, arguing that "at the very least, an argument can be made that

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[93] See Van Tran, 66 S.W.3d at 798-99.
[94] See Keen v. State, 398 S.W.3d 594 (Tenn. 2012) (interpreting Coleman v. State, 341 S.W.3d 221 (Tenn. 2011).
[95] Payne v. State, 2014 WL 5502365, *22 (Tenn. Ct. Crim. App. 2014) (McMullen, concurring) ("Rather, the magnitude and gravity of the penalty of death persuades me that the important values which justify limits on untimely petitions are outweighed by the Petitioner's interest in having a court evaluate evidence that may show that he is ineligible for the death penalty" (citations and internal quotations omitted)).
[96] Black v. Bell, 664 F.3d 81, 101 (6th Cir. 2011).
[97] *Id.*
[98] Van Tran v. Colson, 764 F.3d 594, 619-20 (6th Cir. 2014).
[99] *Id.* at 620.

judicial economy necessitates a hearing based on the federal courts' repeated retroactive application of *Coleman* to Tennessee's implementation of the rule in *Atkins*."[100]

Theoretically, Pervis Payne might also seek another round of habeas relief on grounds similar to those in these other two cases; however, Payne's previous attempt to obtain permission to file a new habeas action was rejected.[101] To pursue this course and obtain a determination using the *Coleman* standard for intellectual disability, Payne would need to convince the appeals court that permission to file a new habeas claim is now appropriate. However, as Judge McMullen stated, such action ought not be required for Payne or for future defendants facing similar circumstances. *Atkins* dictates that Payne cannot be executed if he is intellectually disabled. Tennessee lawmakers and courts have come to the same conclusion. All that is missing is an answer to the question: is Pervis Payne intellectually disabled? If no other body does so, Tennessee courts can, and should, provide a forum to answer it.

IV. Conclusion

Since the Supreme Court's holding in *Atkins*, approximately 7% of death row defendants nationwide have sought review of the constitutionality of their death sentences.[102] A significant number of those defendants have been successful.[103] Such cases represent the most vital reason for considering all of the evidence and making a determination of intellectual disability before it is too late. There are individuals with intellectual disabilities on death row; executing them is unconstitutional. Many have seen their sentences altered in the wake of *Atkins*, but at least one has been denied the opportunity to even present evidence. The state continues to dither, relying on a procedural labyrinth rather than any substantive rebuttal of Payne's intellectual disability claims. However, closing the doors on Pervis Payne and refusing to find out whether or not he is truly eligible for execution does not transform a potentially unconstitutional act into a permissible one.

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[100] Payne v. State, 2014 WL 5502365, *21 (Tenn. Ct. Crim. App. 2014) (McMullen, concurring).
[101] In re: Payne, 722 Fed. Appx. 534 (6th Cir. 2018).
[102] Blume, et al, A Tale of Two (and Possibly Three) Atkins, 23 William and Mary Bill of Rights Journal 393, 396-97 (2014).
[103] Id. The article uses a variety of statistical methods to determine the "success rate" of *Atkins* claims. The authors ultimately identified 44%. Id, at 397, n.23.