NO. 13-5086

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL WAYNE HOWELL
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. In proceedings under *Atkins v. Virginia*, 536 U.S. 304 (2002), does the Sixth Amendment require a state to prove the absence of mental retardation (intellectual disability) beyond a reasonable doubt to a jury, because death is not within the permissible range of sentences for a person who is intellectually disabled?

2. Does it violate the Eighth Amendment and *Atkins* for a state court to determine a petitioner's I.Q. without appropriately applying scientifically reliable standards for the assessment of intellectual functioning such as the Standard Error of Measurement ("SEM") of I.Q. tests or the "Flynn Effect," a recognized phenomenon requiring downward adjustment of raw I.Q. scores to reflect the petitioner's actual I.Q.?

3. Do the Eighth Amendment and *Atkins* allow a state to use standards for assessing adaptive deficits that contravene scientifically accepted clinical practice and that focus on an individual's abilities rather than his actual deficits, when such deficits satisfy standards for intellectual disability?

4. Does it violate due process and/or equal protection under the Fourteenth Amendment for a state supreme court to require consideration of SEM and the Flynn Effect in some *Atkins* cases but to refuse their consideration to the petitioner?

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The opinion of the Tennessee Supreme Court holding that the petitioner had presented a colorable claim for relief in his petition to reopen post-conviction proceedings and remanding for an evidentiary hearing on the issue of intellectual disability (A. 18-35) is reported as *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004). The opinion of the Tennessee Court of Criminal Appeals affirming the denial of post-conviction relief on remand (A. 3-17) is unreported, but may be found at *Howell v. State*, No. W2009–02426–CCA–R3–PD, 2011 WL 2420378 (Tenn. Crim. App. June 14, 2011). The order of the Tennessee Supreme Court denying permission to appeal (A. 2) is unreported. The order of the Tennessee Supreme Court denying rehearing (A. 1) is unreported.

STATEMENT OF JURISDICTION

The order of the Tennessee Supreme Court denying rehearing was filed on January 29, 2013. (A. 1.) Justice Kagan granted an extension of time until June 28, 2013, within which to file a petition for a writ of certiorari. *Howell v. Tennessee*, No. 12A887 (Apr. 12, 2013). The jurisdiction of this Court in invoked pursuant to 28 U.S.C. § 1257. (Pet. 1.)

STATUTORY PROVISION INVOLVED

Tenn. Code Ann. § 39–13–203(a) defines "intellectual disability" for purposes of ineligibility for the death penalty as follows:

(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

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

STATEMENT OF THE CASE

Michael Wayne Howell ("Howell") was convicted of first degree felony murder for the 1987 shooting death of Alvin Kennedy. *See State v. Howell*, 868 S.W.2d 238, 243-44 (Tenn. 1993). He was sentenced to death on the strength of the aggravating circumstances that he had previously been convicted of one or more violent felonies and that he had committed the murder during the course of another felony. *Id.* at 243. On direct appeal, the Tennessee Supreme Court invalidated the felony murder aggravator on state-law grounds, but found the error to be harmless beyond a reasonable doubt. *Id.* at 244, 259-62.

Howell filed a petition for post-conviction relief in which he pressed claims of ineffective assistance of counsel and unconstitutional denial of the right to present mitigating evidence. *Howell v. State*, No. 02C01–9706–CR–00200, 1997 WL 746438, at *1 (Tenn. Crim. App. Dec. 3, 1997). The post-conviction court denied relief, and the Tennessee Court of Criminal Appeals affirmed. *Id.* at *1, 12.

On December 3, 2002, Howell filed a motion to reopen his petition for post-conviction relief. (A. 19.) He asserted that he was intellectually disabled and hence ineligible for the death penalty. (*Id.*) The post-conviction court denied the motion

without hearing, finding that Howell had failed to make a prima facie showing of intellectual disability. (A. 18.) The Tennessee Supreme Court reversed, concluding that Howell's motion set out a colorable claim, thus entitling him to an evidentiary hearing. (A. 18-19.) In so doing, the court noted that Tennessee's intellectual disability statute "makes no reference to a standard error of measurement in the test scores nor consideration of any range of scores above the score of seventy. Therefore, we decline to 'read in' such provisions, as the petitioner would have us to do, in order to extend the coverage of the statute." (A. 23.)

In connection with this appeal, Howell contended that he was entitled to a jury trial on the question of intellectual disability under the auspices of *Apprendi v. New Jersey*, 430 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). (A. 28-29.) The Tennessee Supreme Court disagreed, ruling in part:

> Further, the lack of mental retardation does not operate as "the functional equivalent of an element of a greater offense" that subjects the defendant to a greater penalty and which must be proved by the State beyond a reasonable doubt. Both *Apprendi* and *Ring* dealt with cases in which the court made factual findings to increase the defendant's sentence beyond what was available based solely upon the jury's verdict. In fact, *Apprendi* carefully distinguished between facts used to enhance a sentence and those used to lessen a sentence . . . .
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> . . .
>
> Tennessee's capital sentencing procedure is just such a scheme as discussed by the Court in *Apprendi*. Under this procedure, mental retardation works to reduce the maximum possible sentence, based upon the jury's verdict, from death to life imprisonment. Therefore, it is not an element of the offense and is not required to be proven by the State nor found by a jury.

(A. 29-30 (citations omitted).) Howell filed a petition for a writ of certiorari, including as his second question presented the Sixth Amendment jury demand claim. *Howell v. Tennessee*, No. 04-8701, cert. pet. at i (U.S. Feb. 14, 2005). This Court denied certiorari. *Howell*, 73 USLW 3620 (Apr. 18, 2005).

On remand, Howell presented the following results from intelligence testing:

> • During his elementary school education, petitioner was given the LorgeThorndike Test of Intelligence and received a score of 77;
>
> • In 1980, while incarcerated in Wyoming, petitioner was given the Army's Beta Gamma Screening Test for Intelligence and received a score of 82;
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> • In 1988, Dr. King administered the WAIS–R and petitioner received a score of 78;
>
> • Also, in 1988, Dr. Murphy administered the WAIS and petitioner received a score of 91;
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> • In 2002, Dr. Grant administered the WAIS–III; the Stanford–Binet IV; and the CTONI. Petitioner received a score of 73 on the WAIS–III and a score of 62 on the Stanford–Binet IV. On the CTONI, petitioner received a nonverbal I.Q. score of 67, a pictorial nonverbal I.Q. score of 70, and a geometric nonverbal score of 68;
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> • In 2005, Dr. Hutson administered the WAIS and petitioner received a score of 66.

(A. 14.) Weighing these scores, the post-conviction court was unable to conclude that Howell had shown by a preponderance of the evidence that he met the statutory threshold of having a functional intelligence quotient of 70 or below. (*See id.* (discussing the trial court's weighing process).)

The post-conviction court additionally found that Howell had failed to demonstrate deficits in two or more areas of adaptive behavior. (A. 16.) The court

found one: deficits in academic functioning. (*Id.*) But it "rejected the results of the standardized tests and the opinions of Petitioner's experts as they related to the claims of additional deficits, finding that the testing was done retroactively and was contradicted by Petitioner's conduct." (*Id.*) In particular, Howell presented no evidence from those who had known him during his childhood and early adolescence and who could testify concerning his day-to-day functioning during that developmental period. (*Id.*) Contrary to his expert's testimony of deficits in the area of work, the record reflected "a rather extensive job history" and "[n]o proof was presented that Petitioner was inept, incompetent, or repeatedly terminated from employment." (*Id.*) Moreover, Howell's communications showed an ability to "understand abstract concepts, devise a strategy to aid in his defense, and communicate his opinion and offer input regarding his defense." (*Id.*) Finally, Howell's three-state crime spree did not represent the sort of simple or reflexive offense that might be expected from one laboring under an intellectual disability. (A. 16-17.)

Howell appealed. While the case was pending decision before the state's intermediate appellate court, the Tennessee Supreme Court announced its decision in *Coleman v. State*, 341 S.W.3d 221 (Tenn. 2011). Distinguishing Howell's case, the court noted:

> if the trial court determines that professionals who assess a person's I.Q. customarily consider a particular test's standard error of measurement, the Flynn Effect, the practice effect, or other factors affecting the accuracy, reliability, or fairness of the instrument or instruments used to assess or measure the defendant's I.Q., an expert

> should be permitted to base his or her assessment of the defendant's "functional intelligence quotient" on a consideration of those factors.

Coleman, 341 S.W.3d at 237-38, 242 n.55. Consistent with the plain language of Tenn. Code Ann. § 39–13–203(a)(1) as interpreted in *Howell*, however, "an expert's opinion regarding a criminal defendant's I.Q. cannot be expressed within a range (i.e., that the defendant's I.Q. falls somewhere between 65 to 75) but must be expressed specifically (i.e., that the defendant's I.Q. is 75 or is "seventy (70) or below" or is above 70)." *Coleman*, 341 S.W.3d at 242.

Applying the mandates of *Coleman* to this case, the Tennessee Court of Criminal Appeals ruled that the post-conviction court had committed no error in declining to consider the standard error of measurement to adjust Howell's scores. (A. 13.) Only one expert had opined concerning Howell's I.Q. after application of the standard error of measurement, and that expert had expressed his opinion within a range as forbidden by *Coleman*. (*Id.*) Further, the post-conviction court did not err in refusing to adjust scores in accordance with the "Flynn Effect" because the record contained evidence that doing so did not accord with generally accepted practices. (*Id.*) The Court of Criminal Appeals otherwise found that the evidence did not preponderate against the post-conviction court's findings that Howell had failed to prove significantly subaverage general intellectual functioning as evidenced by an I.Q. of 70 or below, or that he had at least two deficits in adaptive behavior. (A. 14-17.)

Howell applied for permission to appeal to the Tennessee Supreme Court. (*See* A. 2.) His application was held pending the court's decision in *Keen v. State*,

398 S.W.3d 594 (Tenn. 2012). In *Keen*, the Tennessee Supreme Court held that *Coleman* "was not a constitutional ruling" and, in a footnote, it disavowed the view that *Coleman* was an "elucidation of the *Atkins* standard under Tennessee law." *Keen*, 398 S.W.3d at 609 & n.13 (critiquing *Black v. Bell*, 664 F.3d 81, 92, 96, 101 (6th Cir. 2011)). Following the *Keen* decision, the court denied Howell's application for permission to appeal. (A. 2.) It subsequently denied his petition for rehearing. (A. 1.)

Howell now petitions for a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Determination of Intellectual Disability By A Trial Court Judge Does Not Conflict With The *Apprendi* Line of Cases.

Howell first maintains that he was entitled to a jury trial on the question of intellectual disability, with the burden of proof concomitantly placed on the State. (Pet. 14-17.) The Court has already denied certiorari on this question, and has done so in this very case—a factor which certainly counsels against grant of the writ. In order to induce a departure from this viewpoint, Howell chiefly relies on the recent holding in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). He asserts that *Alleyne* stands for the proposition that the absence of intellectual disability constitutes an element of "capital murder" and requires Tennessee to recognize and define that offense as the elements of first-degree murder (Tenn. Code Ann. § 39-13-202) plus the absence of an intellectual disability and an aggravating circumstance. (*See* Pet. 14, 16.) Howell's argument is misguided.

The Tennessee Supreme Court determined that the lack of intellectual disability is not an element of the offense and is not required to be proven by the State nor found by a jury. (A. 30.) Because "a State's highest court is the final judicial arbiter of the meaning of state statutes," this Court has stated that "[w]hen a state court has made its own definitive determination as to the operating incidence, . . . [w]e give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975) (citing *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965)). The Tennessee Supreme

Court's interpretation of the first-degree murder statute is objectively reasonable. The offense of first-degree murder is defined by Tenn. Code Ann. § 39-13-202(a) as (1) a premeditated and intentional killing, (2) a felony murder, or (3) a killing by throwing, placing, or discharging a destructive device or bomb. There are three possible punishments for the offense: life imprisonment, life imprisonment without the possibility of parole, and death. Tenn. Code Ann. § 39-13-202(c). The death penalty may only be imposed upon a jury's finding of at least one aggravating circumstance that outweighs mitigating circumstances. Tenn. Code Ann. § 39-13-204. Under this scheme, the death penalty is a punishment for the underlying offense of first-degree murder, not an independent offense.

Moreover, the Tennessee Supreme Court's opinion does conflict with this Court's opinion in *Alleyne*. Based upon the reasoning in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court in *Alleyne* held that the federal Constitution's Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to "any fact that increases the mandatory minimum" sentence for a crime. *Alleyne*, 133 S. Ct. at 2155. The Court determined that because "brandishing" a firearm increases the mandatory minimum sentence under 28 U.S.C. § 924(c)(1)(A), it is "an 'element' that must be submitted to the jury" and not found by the judge. *Id.* at 2160. Unlike a finding of "brandishing" in *Alleyne*, the absence of intellectual disability is not a fact that triggers a mandatory minimum, thus altering the prescribed range of sentences to which a defendant is exposed. As the Fourth Circuit observed in *Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005), a

finding of intellectual disability does not increase the penalty for the crime beyond that authorized by the jury's verdict alone. *See also In re Johnson*, 334 F.3d 403, 405 (Va. 2003) ("[T]he absence of mental retardation is not an element of the offense any more than sanity is an element of the offense."). Because the absence of intellectual disability does not increase the mandatory minimum sentence for the offense of first-degree murder under Tennessee law, see Tenn. Code Ann. § 39-13-204(i), *Alleyne* does not require a different result in Howell's case.

Furthermore, under Tennessee law, a judge rather than a jury determines the issue of intellectual disability. Tenn. Code Ann. § 39-13-203(d). As the Tennessee Supreme Court noted in this case, Tennessee's position "is in line with an ever-growing number of courts to have considered the issue and held likewise." (A. 30 (citing, inter alia, *In re Johnson*, 334 F.3d 403 (5th Cir. 2003); *Russell v. State*, 849 So. 2d 95 (Miss. 2003); *State v. Flores*, 93 P.3d 1264 (N.M. 2004); *Head v. Hill*, 587 S.W.2d 613 (Ga. 2003); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002)). Indeed, Howell identifies no decision of another state court of last resort or federal court of appeals that holds to the contrary. Accordingly, no writ should issue as to this question.

II. The State Courts' Intellectual Disability Determination Does Not Conflict With *Atkins*.

Howell next contends that, in adjudicating his intellectual disability claim, the state courts failed to adhere to "reliable standards of practice" in conflict with *Atkins v. Virginia*, 536 U.S. 304 (2002). (Pet. 18.) He points primarily to a conflict in the state courts concerning consideration of the standard error of measurement.

(Pet. 20-22.) That "conflict" no doubt exists,[1] but it is not a conflict as to any important question of federal law, for *Atkins* did not enshrine any particular clinical standard. While *Atkins* did refer to clinical definitions of mental retardation, noting an IQ of "approximately 70" at one point, stating that a range of 70 to 75 "is typically considered the cutoff IQ score" in another footnote, and later mentioning "a known IQ less than 70," *Atkins*, 536 U.S. at 308 n.3, 309 n.5, 316, "it did not dictate that the approach and the analysis of the State inquiry *must* track" the

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[1] No consistency currently exists among the States with regard to the cut-off line for mental retardation and the application of any standard error of measurement. Like Texas, several States (Alabama, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, and Wyoming) have not yet enacted legislation that codifies the *Atkins* decision. Two state legislatures have adopted a statutory scheme that integrates the standard error of measurement in their mental retardation inquiry. *See* ARIZ.REV.STAT. § 13-703.02(C); ILL. COMP. STAT., ch. 725, § 5/114-15(d). One State, however, established a statutory scheme that places a rebuttable presumption of retardation *below* the standard accepted by professional organizations. *See* ARK.CODE ANN. § 5-4-618(a)(2) ("There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below."). Many States have responded to *Atkins* by adopting a statutory standard that does not include an exact numerical reference point for the mental retardation threshold, though often referring to the same two-standard-deviation threshold as the Texas civil statute. *See* CAL.PENAL CODE § 1376(a); COLO.REV.STAT. § 18-1.3-1101, *et seq.;* CONN. GEN. STAT § 53a-46a (h); FLA. STAT. § 921.137; GA.CODE ANN. § 17-7-131(a)(3); IND.CODE § 35-36-9-2; KAN. STAT. ANN. § 21-4623(b)(3); LA.CODE CRIM. Proc. Art. 905.5.1(H)(1); MO.REV.STAT. § 565.030.6; NEV.REV.STAT. 174.098(7); N.Y.CRIM. PROC. LAW § 400.27(12)(e); UTAH CODE ANN. § 77-15a-102; VA.CODE ANN. § 19.2-264.3:1.1(A) The federal government's death penalty statute prohibited the execution of retarded offenders well before *Atkins,* but does not specify a standard by which to gauge mental retardation. *See* 18 U.S.C. § 3596(c) (1994). Some state courts that, like Texas, face legislative silence on mental retardation standards, view 70 as the mental retardation cut-off, serving either as a bright-line or rebuttable demarcation. *See State v. Lott,* 779 N.E.2d 1011, 1014 (Ohio 2002), *cert. dismissed,* 538 U.S. 1010 (2003); *Murphy v. State,* 54 P.3d 556, 568 (Okla.Crim.App.2002). Others refuse to place a numerical value on the upper limit of retardation absent express legislative authorization. *See Franklin v. Maynard,* 588 S.E.2d 604, 605 (S.C.2003). In short, no firm consensus exists as to whether *Atkins'* protections extend to those offenders whose IQ scores fall between 70 and 75.

Briseno v. Dretke, No. L-05-08, 2007 WL 998743, at *10 n.8 (S.D. Tex. Mar. 29, 2007).

approach of any professional association. *Clark v. Quarterman,* 457 F.3d 441, 445 (5th Cir. 2006). Rather, the Court explicitly left to the individual states "the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." *Atkins*, 536 U.S. at 317. Thus, *Atkins* contemplates some measure of variance in state procedure. And, in particular, the choice whether to consider the I.Q. score that a defendant actually obtains versus a score band around an unobservable "true score" at a stated confidence level on the imperfect assumption that the variation in test scores in a reference group can be projected on the performance of a particular individual represents a poor candidate for constitutionalization. Indeed, because the "[l]aws enacted by the Nation's legislatures provide the clearest and most reliable objective evidence of contemporary values," the fact that some states specify no numerical value, those that do specify differing values, some create presumptions while others create bright line rules, and some account for the standard error of measurement while others do not is a potent indicator that the probability distribution around a test score is not a matter of Eighth Amendment concern. *See Roper v. Simmons,* 125 S. Ct. 1183, 1207 (2005) (internal quotation marks omitted).

Howell fares even more poorly with his invocation of the rather controversial Flynn Effect. (Pet. 23-25.) The propriety of adjusting I.Q. scores for this phenomenon was litigated at the post-conviction hearing. As the Court of Criminal Appeals observed, the record contains the following statement from a 2008 article entitled "Adjusting IQ Scores for the Flynn Effect: Consistent with the Standard of

Practice?" in the Professional Psychology, Research and Practice Journal:

> [t]he current accepted convention does not support subtracting IQ points in the way that it departs from the requirements of the test manual. (Evaluators must also be aware that there is not agreed upon method for how diagnostic conclusions should be influenced by the Flynn effect.) Psychologists cannot conclude that adjusting scores is a generally accepted practice of evaluations for special education, parental rights determination, disability or any other purpose.

(A. 11.) In light of this evidence, Howell's contention that the failure to apply the Flynn Effect "is arbitrary and capricious" such that this Court's intervention is warranted rings hollow. (Pet. 24.)

On the merits, the question of Howell's intellectual functioning presents the sort of case-specific, fact-bound determination that is ill-suited for certiorari review. In effect, Howell asks the Court to do what the state courts have already done: sift through the evidence of his I.Q. scores and supporting expert testimony, assign weight to them, and determine whether he proved by a preponderance of evidence that his functional intelligence quotient is 70 or below. That process would not benefit other litigants and, in all likelihood, would not benefit Howell himself. Simply put, the bulk of Howell's IQ scores are above the statutory threshold—some well above it—and those that are not were obtained only after he had been convicted and sentenced. (*See* A. 14.) The state courts committed no constitutional error in concluding that this showing failed to establish intellectual disability.

Similar obstacles confront Howell's claim that he suffers from deficits in adaptive behavior. He maintains that, "[r]ather than relying on standards of clinical practice for assessing the existence of adaptive deficits," the Court of

Criminal Appeals applied "made up" and "exceedingly subjective" criteria. (Pet. 27.) This is simply not the case. The criteria by which Tennessee courts customarily inform the statutory definition of adaptive deficits are drawn from the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. *See Van Tran v. State*, 66 S.W.3d 790, 795-96 (Tenn. 2001). The subjective criteria to which Howell refers are *evidentiary factors* that the trial court "may focus upon" in weighing the proof to determine whether the criteria are satisfied. (*See* A. 15.) The use of such permissive evidentiary factors cannot violate a constitutional norm. In reality, Howell claims that the state courts were obliged to accept his experts' opinions because they conducted tests. (*See* Pet. 28.) That is a mere quarrel over credibility. The post-conviction court declined to accredit Howell's experts because their assessments were conducted years (or decades) after the fact, were unsupported by lay accounts of his day-to-day functioning during the developmental period, and were not consistent with his known behaviors. (*See* A. 16.) A credibility determination of that nature is poorly suited to appellate review. Accordingly, no writ should issue as to this question.

III. Howell's Equal Protection Claim Is Insubstantial.

Howell lastly argues that, because the Tennessee Supreme Court declined to return his case to the post-conviction court for a second evidentiary hearing pursuant to the dictates of *Coleman*, he has been deprived of the equal protection of the laws. (Pet. 30-33.) Quite apart from the fact that the Court of Criminal Appeals applied *Coleman* to Howell's case (A. 13)—and quite apart from the fact that

Coleman would do nothing to alter his failure to show deficits in adaptive behavior—this argument lacks merit. "[T]he petitioner's argument here comes down to a contention that [state] law was misapplied." *Beck v. Washington*, 369 U.S. 541, 554 (1962). *Coleman* was not a constitutional ruling, federal or otherwise. *Keen*, 398 S.W.3d at 609 & n.13. This Court has "said time and again that the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck*, 369 U.S. at 554-55 (internal quotation marks, alterations, and citation omitted). Accordingly, no writ should issue as to this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, postage prepaid, to: Paul R. Bottei, Assistant Federal Public Defender, 801 Broadway, Suite 200, Nashville, Tennessee 37203 on the 3rd day of October , 2013.

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