No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

HERSIE WESSON, JR.,
***Petitioner*,**
v.

STATE OF OHIO,
***Respondent*.**

On Petition for a Writ of Certiorari to the Ninth District Court of Appeals of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Question #1: When a capital defendant can make a substantial threshold showing of intellectual disability, are the state courts constitutionally required to provide him the opportunity to be heard?

Question #2: Does a capital defendant have a constitutional right to have his state court counsel present his evidence of intellectual disability, which would per se exclude him from the death penalty?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

PETITION FOR A WRIT OF CERTIORARI

Hersie Wesson respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals for the Ninth District.

PARTIES TO THE PROCEEDINGS

Petitioner, Hersie Wesson, a death-sentenced Ohio prisoner, was the appellant in the Ohio Ninth District Court of Appeals.

Respondent, the State of Ohio, was the appellee in the Ohio Court of Appeals for the Ninth District.

OPINIONS BELOW

The opinion of the state court of appeals is reported at *State v. Wesson*, 2018-Ohio-834 (Ohio Ct. App. 9th Dist.) and is reproduced in the Appendix at __. The opinion of the trial court is reported at *State v. Wesson*, 2012-Ohio-4495 (Summit County, Sept. 28, 2012) and is reproduced in the Appendix at __. The decision of the Supreme Court of Ohio is reported at *State v. Wesson*, 153 Ohio St.3d 1433, 2018-Ohio-2639 (Ohio) and is reproduced in the Appendix at __.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on July 5, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

A. Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

B. Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

C. Fourteenth Amendment, which provides in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Hersie Wesson is on Ohio's death row despite his diagnosed intellectual disability. The State of Ohio has refused to address or consider his *Atkins* claim based on procedural grounds. Ohio will engage in cruel and unusual punishment, violating the Eighth Amendment and this Court's undisputed precedent. The state courts have an avenue to ignore Wesson's meritorious *Atkins* claim because Wesson had ineffective assistance of counsel during his trial and initial post-conviction proceedings. Due to post-conviction counsel's ineffectiveness, Ohio courts have dismissed Wesson's claim as untimely and successive. The state, however, cannot ignore the Constitution and refuse to hear a claim that would be a categorical exception to the death penalty.

Wesson waived his right to a jury on January 6, 2009, and was found guilty of Aggravated Murder, among other charges in the indictment, by a three-judge panel on January 23, 2009. After a mitigation hearing on March 6, 2009, the three-judge panel imposed a sentence of death plus 26 years. During that mitigation hearing, the

psychologist who evaluated Wesson determined he did not have an intellectual disability based only on his IQ score. Mit. Tr. 93-94.

Wesson's first post-conviction proceedings did not address the issue of his intellectual disability because his post-conviction counsel was ineffective. Once in federal habeas, represented by new counsel, Wesson was evaluated by an expert who specialized in intellectual disability. That expert diagnosed Wesson with an intellectual disability based on his IQ score, adaptive functioning impairments, and evidence that his limitations manifested before age 18. A second psychologist agreed with his findings. The psychologist who evaluated Wesson at trial also retracted his statement that Wesson was not intellectually disabled. He explained that he did not apply the Flynn Effect to Wesson's IQ score, which would have lowered it from 76 to 72, and he did not specialize in the area of intellectual disability.

To date, Wesson's performance on three measures of intelligence have been within one standard error of measurement of an IQ score of 70. Successor Post-Conviction Petition, Ex. 1, filed Dec. 11, 2015. His performance on the Wechsler Adult Intelligence Scale – Fourth Edition yielded a Full Scale Flynn Corrected IQ Score of 73 with a confidence interval 69 to 78. *Id.* at 12. His performance on that was consistent with his performance on the WAIS-III in 2008, which yielded a Full Scale Flynn Corrected IQ Score of 72 with a confidence interval of 68 to 77. *Id.*

Evaluation of Wesson's adaptive behavior revealed significant limitations. *Id.* at 9. Wesson struggled to successfully function in society. He never lived independently and instead relied on the women in his life or relatives to provide

stability. His employment was limited to unskilled manual labor jobs. He did not have a driver's license.

The onset of Wesson's deficiencies manifested before the age of 18. *Id.* at 12. Wesson was a poor student and was socially promoted from fifth grade to seventh grade. When he was 16 years old, his reading and vocabulary levels were seven to eight grades below the level he should have been functioning given his age. *Id.* Accordingly, the expert who evaluated Wesson determined that he had an intellectual disability within mild range, as it manifested before the age of 18. *Id.*

This evaluation and both psychologists' reports were presented in the federal district court as support for an unexhausted *Atkins* claim. Determining that Wesson's *Atkins* claim was potentially meritorious, the Northern District of Ohio directed Wesson to exhaust the claim in state court. The Ohio state courts, however, have refused to address Wesson's claim on the merits. Wesson's *Atkins* claim was properly presented in a successor post-conviction petition, yet both the trial court and court of appeals denied it on procedural grounds. The Ohio Supreme Court declined jurisdiction.

Wesson has an Eighth Amendment right to be free from cruel and unusual punishment, which the State of Ohio has ignored. Because he is intellectually disabled, he is categorically excluded from execution. Ohio may not ignore this diagnosis and violate the Constitution with his execution.

REASONS FOR GRANTING THE WRIT

Ohio courts are using procedural roadblocks to prevent a petitioner's intellectual disability claim from being heard on the merits. When a capital defendant has a claim of a per se bar to execution, that claim cannot simply be ignored by the courts.

The law is clear that individuals with intellectual disability may not be executed. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Brumfield v. Cain*, 576 U.S. __, 135 S. Ct. 2269 (2015). What is unclear is whether that constitutional protection will shield an intellectually disabled petitioner when ineffective counsel failed to properly raise his claim.

Hersie Wesson has been diagnosed with an intellectual disability and found by two experts to fit the qualifications of *Atkins*, yet the State of Ohio has refused to hear his claim.

I. This Court did not qualify its holding in *Atkins v. Virginia*, and the ban on executing the intellectually disabled should be treated no differently than the categorical ban on executing juveniles and the insane.

There is no qualifier to this Court's holding in *Atkins*: executions of intellectually disabled offenders are cruel and unusual punishments prohibited by the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 306, 122 S. Ct. 2242, 2244 (2002). It is a categorical exception to the death penalty because of the recognized diminished culpability of those offenders. *Id.* at 306, 317-18. "[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a[n] [intellectually disabled] offender." *Id.* at 321 (quoting *Ford v. Wainwright*, 477 U.S.

399, 405 (1986). That restriction is the Eighth Amendment's ban on cruel and unusual punishment.

State courts cannot circumvent the Eighth Amendment and impose a cruel and unusual punishment. Nor can a state court ignore a defendant's claim that the state is going to engage in such punitive measures. The state of Ohio is attempting to create a loophole to the Eighth Amendment's ban by faulting a defendant for his failure to alert the court in a timely manner that it is going to impose cruel and unusual punishment.

The categorical ban against executing an offender with an intellectual disability is determined by the clinical definition of the diagnosis. *Hall v. Florida*, 552 U.S. 701, 134 S. Ct. 1986, 1993, 1999 (2014). Three factors must be present: (1) significant subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) onset of these deficits before the age of 18. *Id.* at 1994. Significant subaverage intellectual functioning is measured by IQ score below 70, which must be read as a range, including the standard error of measurement of plus and minus five. *Id.* at 2001. "Intellectual disability is a condition, not a number." *Id.* (citing DSM-5 at 37).

The categorical ban against the execution of intellectually disabled offenders is parallel to the categorical ban against the execution of juvenile offenders. *Roper v. Simmons*, 543 U.S. 551 (2005). Both bans relied on similar objective indicia of consensus against the practice. *Id.* at 567. This Court's decision to prohibit the execution of offenders under the age of 18 relied heavily on *Atkins*. *See id.* Because "society draws the line for many purposes between childhood and adulthood" at the

age of 18, the categorical ban was defined by the defendant's age at the time the crime was committed. *Id.* at 574, 578.

The scenario of a state court refusing to address the age of a defendant is unequivocally unreasonable and fundamentally unfair. The same is true for a capital defendant's *Atkins* claim. *Atkins*, its progeny, and *Roper* rely on the same reasoning and principles, and coincide with the evolving standards of decency. The cases are explicit categorical exceptions to the death penalty. Just as a court cannot simply ignore a defendant's age, a state court cannot simply ignore a capital defendant's meritorious *Atkins* claim.

The Eighth Amendment also prohibits the execution of a prisoner who is insane. *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986). "Under *Ford*, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment . . . entitles him to an adjudication to determine his condition." *Panetti v. Quarterman*, 551 U.S. 930, 934 (2007). A "substantial threshold showing of insanity" includes a "fair hearing" in accord with fundamental fairness. *Id.* at 949. "This protection means a prisoner must be accorded an 'opportunity to be heard.'" *Id.* (quoting *Ford*, 477 U.S. at 424 (opinion concurring in part and concurring in judgment)).

The same must be true for a capital defendant with an *Atkins* claim. He must be afforded the opportunity to be heard. Wesson never received an *Atkins* hearing—not at trial, during his initial post-conviction proceedings, nor during his successor post-conviction proceedings. At trial, the psychologist who evaluated him concluded

he was not intellectually disabled based only on his IQ score. Mit Tr. 94-95. The psychologist did, however, identify several areas of significant deficits in adaptive functioning. Mit. Tr. 100,116-18, 123-24, 128. He also testified that Wesson's limitations manifested before the age of 18. Mit. Tr. 108-09, 128-29.

Wesson's post-conviction counsel also missed the mark. They failed to investigate Wesson's potential *Atkins* claim and failed to have him evaluated by an expert in intellectual disability. Once Wesson was represented by effective counsel, he was evaluated properly and diagnosed with an intellectual disability. Two psychologists determined Wesson's IQ, deficits in adaptive functioning, and the onset of these deficits occurred before the age of 18, sufficient to categorically exclude him from execution under *Atkins*. Successor Post-Conviction Petition, Exs. 1 and 2, filed Dec. 11, 2015. The original psychologist also retracted his statement from trial that Wesson was not intellectually disabled, that he should not have offered that opinion, and he did not apply the Flynn Effect or consider his IQ score as a range. Successor Post-Conviction Petition, Ex. 3, filed Dec. 11, 2015. The area of intellectual disability was not his area of expertise. *Id.*

Recognizing Wesson's "potentially meritorious *Atkins* claim," the federal district court directed Wesson to exhaust this claim in State court. *Wesson v. Jenkins*, N.D.Ohio No. 5:14 CV 2688, 2015 US Dist. LEXIS 157218 (Nov. 20, 2015). At the very least, Wesson has made a substantial threshold of an *Atkins* claim, yet the State courts have refused to grant him his right to a fair hearing. *Panetti*, 551 U.S. at 934.

Not only are Ohio courts refusing to grant him a hearing, they have refused to address the merits of Wesson's claims at all.

The State of Ohio has avoided the merits of Wesson's *Atkins* claim and instead relied on procedural roadblocks to refuse him the opportunity to be heard. Both the trial court and the Ninth District Court of Appeals determined Wesson's petition was untimely and successive. *State v. Wesson*, 2012-Ohio-4495, 2012 Ohio App. LEXIS 3929 (Summit County, Sept. 28, 2012); *State v. Wesson*, 2018-Ohio-834, 2018 Ohio App. LEXIS 877 (Ohio Ct. App. 9th Dist.). Both courts found that Wesson was not unavoidably prevented from raising the issue in a timely manner. *Id.* Neither addressed the merits of Wesson's *Atkins* claim. *Id.*

Wesson is entitled to an *Atkins* hearing and he is entitled to have the state courts address the merits of his claim. Because his claim is a categorical exception to a death sentence, turning a blind eye is violative of the Eighth Amendment.

II. It is inconsistent with the Constitution to hold an intellectually-disabled defendant at fault for his counsel's failure to present evidence of his intellectual disability.

A capital defendant has a Sixth Amendment right to have counsel enforce the Eighth Amendment's "substantial restriction" on the State's power to take his life. *Atkins*, 536 U.S. at 321, *Ford*, 477 U.S. at 405. "The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 8 (2012). It is "an obvious truth" that an individual "haled into court . . . cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

Wesson's right to be heard on his *Atkins* claim coincides with his right to counsel: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* "*Even the intelligent and educated layman* has small and sometimes no skill in the science of law." *Id.* at 345 (emphasis added). "He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Id.* If even an educated and intelligent defendant "requires the guiding hand of counsel at every step in the proceedings against him," then a defendant with an intellectual disability is even more reliant on the assistance of counsel. *Id.*

Post-conviction counsel is also essential, but their necessity is heightened when the defendant is intellectually-disabled. "While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Martinez*, 566 U.S. at 12. Without the assistance of "an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim . . . [these] claims . . . often require investigative work and an understanding of trial strategy." *Id.* at 11. Prisoners are simply unable to effectively litigate post-conviction claims due to their restrictions of freedom and resources.

Wesson was completely reliant on his attorneys at trial and in his initial post-conviction proceedings. Though it is readily apparent that effective state post-conviction counsel is essential to a capital defendant's defense, Ohio courts have not recognized *Martinez* as a constitutional right to post-conviction counsel. *Hodges v.*

Colson, 727 F.3d 517, 530-31 (6th Cir. 2013). The Sixth Circuit reads *Martinez* as an equitable, narrow exception to *Coleman v. Thompson*, 501 U.S. 722 (1991), where a petitioner may establish cause for a procedural default on a claim of ineffective assistance of *trial* counsel. *Id.*

Had Wesson's trial or post-conviction counsel been effective, he would not be on Ohio's death row, as he should be categorically excluded from the death penalty. A petitioner with an intellectual disability is unable to litigate this claim on his own. By nature of the diagnosis, he may not even be aware of his own limitations. He must rely on competent attorneys to recognize his constitutional rights and advocate any violations of them on his behalf.

A meritorious *Atkins* claim, like Wesson's, is not something that may be waived or procedurally defaulted, because it is a strict violation of the Eighth Amendment. Wesson's Sixth Amendment right to counsel required that his attorneys identify constitutional violations such as this one. The purpose of post-conviction proceedings is to identify issues outside the trial record that render a prisoner's sentence unconstitutional. An evaluation and diagnosis of intellectual disability is exactly that. That duty falls upon post-conviction counsel.

The state courts determined that Wesson failed to raise his *Atkins* claim in post-conviction in a timely manner. *State v. Wesson*, 2012-Ohio-4495, 2012 Ohio App. LEXIS 3929 (Summit County, Sept. 28, 2012); *State v. Wesson*, 2018-Ohio-834, 2018 Ohio App. LEXIS 877 (Ohio Ct. App. 9th Dist.). But it was post-conviction counsel who failed Wesson when they missed raising the issue in his initial post-conviction

petition. *See* Amend. to Successor Post-Conviction Petition, Exs. 25 and 26, filed Feb. 29, 2016 (postconviction counsel's affidavits that failure to retain intellectual disability expert was due to inexperience). It is because of this ineffectiveness that Wesson's *Atkins* claim was untimely, but the Ohio court refused to consider the cause for the untimeliness and dismissed Wesson's *Atkins* claim without addressing the merits. *Id.*

The stakes of capital cases are extraordinary. Death is different. *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976); *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan. J., concurring). A capital defendant must be able to rely on his counsel to identify claims of such significant importance that would per se exclude him for execution.

The Sixth Amendment mandates the *effective* assistance of counsel. "Mere appointment of competent counsel" is not enough. *United States v. Cronic*, 466 U.S. 648, 654, n. 11 (1984). "Assistance begins with the appointment of counsel, it does not end there." *Id.* Failing to raise a claim that per se excludes a capital defendant from execution is nothing short of ineffective. The Sixth and Eighth Amendments require the presentation of such evidence.

CONCLUSION

Wesson is categorically excluded from execution because of his diagnosed intellectual disability. He has a Sixth and Eighth Amendment right to have his *Atkins* claim addressed on the merits. Because he is per se excluded from a death sentence,

Ohio cannot ignore his claim on procedural grounds. Wesson respectfully requests that this Court grant a writ of certiorari to review the decision below.

Respectfully submitted,

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