

NO. 18-6252

IN THE SUPREME COURT OF THE UNITED STATES

HERSIE WESSON, JR.

*Petitioner*

-vs-

THE STATE OF OHIO

*Respondent*

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

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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## **CAPITAL CASE**

### **QUESTIONS PRESENTED**

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?
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?

## **LIST OF PARTIES**

The Petitioner is Hersie Wesson, Jr., an inmate at the Chillicothe Correctional Institution in Chillicothe, Ohio. Mr. Wesson is a capital prisoner, but no actual execution date has been set due to Mr. Wesson's filing of a petition for habeas corpus in the United States District Court for the Northern District of Ohio; that action has been stayed.

The Respondent is the State of Ohio.

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## COUNTERSTATEMENT

Mr. Wesson is on Ohio's death row because in 2008 he stabbed 81-year-old Emil Varhola to death and beat and stabbed Mr. Varhola's 77-year-old wife, Mary Varhola—both of whom had helped Mr. Wesson by giving him money or hiring him to do odd jobs—because Mr. Wesson wanted the Varholas' gun so that Mr. Wesson could shoot his girlfriend. Mrs. Varhola survived to identify Mr. Wesson, who a three-judge panel convicted of aggravated murder with death penalty specifications, and other felonies.

Mr. Wesson's trial took place after this Court decided in *Atkins v. Virginia*, 536 U.S. 304 (2002), that execution of a mentally retarded individual constitutes cruel and unusual punishment, and after the Ohio Supreme Court established in *State v. Lott*, 97 Ohio St.3d 303 (Ohio 2002), ¶12, that there is a rebuttable presumption that a defendant is not mentally retarded if his IQ is above 70. During the mitigation phase of his trial, Mr. Wesson's counsel presented evidence of Mr. Wesson's family background and formative years, his multiple traumatic head injuries, and expert testimony that Mr. Wesson had a full-scale IQ of 76.

In Mr. Wesson's direct appeal, the Ohio Supreme Court reversed one of the capital murder convictions, but affirmed the remaining convictions, the imposition of capital punishment for the affirmed capital murder conviction, and the imposition of consecutive terms of imprisonment for Mr. Wesson's noncapital offenses. See *State v. Wesson*, 137 Ohio St.3d 309 (Ohio 2013). This Court denied certiorari in Case No. 2009-0739. Mr. Wesson also filed a petition to the Ohio

Supreme Court to reopen his direct appeal on the grounds of ineffective assistance of appellate counsel; the Ohio Supreme Court denied the petition.

Mr. Wesson also filed a petition for postconviction relief in the trial court under Ohio Rev. Code §2953.21; in nine of Mr. Wesson's 11 claims for relief, he alleged he was denied effective assistance of trial counsel. After the trial court denied his petition, Ohio's Ninth District Court of Appeals affirmed—see *State v. Wesson*, No. 25874, 2012 WL 4480109 (Ohio App. 9th Sept. 28, 2012)—and the Ohio Supreme Court declined to accept jurisdiction. See *State v. Wesson*, 140 Ohio St.3d 1438 (Ohio 2014).

Mr. Wesson then filed a petition for habeas corpus in the United States District Court for the Northern District of Ohio, in *Wesson v. Jenkins*, N.D. Ohio No. 5:14-cv-2688. By then, as is reflected in Mr. Wesson's Petition to this Court, new counsel for Mr. Wesson had him evaluated by an additional expert, who opined that Mr. Wesson is intellectually disabled; so, Mr. Wesson presented a claim under *Atkins* to the District Court. Since the *Atkins* claim was unexhausted, the District Court stayed the habeas proceeding pending Mr. Wesson's exhaustion of the new claim.

Mr. Wesson then filed a second, successive petition for postconviction relief in the trial court under Ohio Rev. Code §2953.21, raising the *Atkins* issue and other claims. The trial court denied Mr. Wesson's petition because Ohio Rev. Code §2953.23 bars consideration of untimely and/or successive postconviction relief petitions unless certain criteria that are not at issue here are met; Mr. Wesson did

not meet them. Ohio's Ninth District Court of Appeals affirmed, finding that the trial court had applied the appropriate state-law standard when it determined that it lacked jurisdiction over Mr. Wesson's petition. See *State v. Wesson*, No. 28412, 2018 WL 1189383 (Ohio App. 9th March 7, 2018). Mr. Wesson did not challenge the constitutionality of Ohio's postconviction statutes at that time.

The Ohio Supreme Court again declined jurisdiction in *State v. Wesson*, 153 Ohio St.3d 1433 (Ohio 2018). Rather than return to the District Court to continue litigating his habeas petition, Mr. Wesson now brings his case directly to this Court.

### **REASONS FOR DENYING THE WRIT**

Mr. Wesson wants this Court to judicially legislate an exception to Ohio's postconviction procedures and to force Ohio's courts to hear a claim that the state's neutral procedural rules foreclose. In so doing, Mr. Wesson has not accounted for this Court's Supremacy Clause jurisprudence.

There is no dispute that under the Supremacy Clause, Ohio's state courts have concurrent jurisdiction with the Federal courts to enforce Federal law "according to their regular modes of procedure." *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 367 (1990). Generally, a state court may not deny a Federal right when the parties and the controversy are properly before it, unless a "valid excuse" exists. See *Howlett* at 369. It is not a "valid excuse" for a state court to refuse to hear a Federal claim because of disagreement with the policy concerns

that underlie it, or because of discrimination against Federal claims. See *Howlett* at 371; see also *Haywood v. Drown*, 556 U.S. 729, 736, 739 (2009).

However, there is a “valid excuse” when a state court “refuses jurisdiction because of a neutral state rule regarding the administration of the courts[; then,] we must act with utmost caution before deciding that it is obligated to entertain the claim.” *Howlett*, 496 U.S. at 372. This Court has permitted states to apply their own neutral procedural rules, unless those rules have been preempted by Federal law. See *Howlett* at id.; *Haywood*, 556 U.S. at 735-736. In addition, this Court has stated that it does not have authority to interpret a state statute differently than does the state’s highest court. See *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

In *Haywood*, for example, this Court found that a New York statute prohibiting that state’s courts from hearing prisoners’ civil rights claims against corrections officers under 42 U.S.C. §1983—and only their claims against corrections officers—did not constitute a nondiscriminatory, neutral procedural rule. See *Haywood*, 556 U.S. at 740-741. Similarly, the Ninth Circuit found that California’s state habeas petition time limitations did not constitute an adequate and independent state ground—a “valid excuse” under the Supremacy Clause—for refusing to exercise jurisdiction because those time limitations were vague and arbitrarily enforced. See *Morales v. California*, 85 F.3d 1387, 1390-1392 (9th Cir. 1996); see also the discussions of adequate and independent state procedural grounds in habeas actions in *Davila v. Davis*, 137 S.Ct. 2058, 2062 (2017); *Martinez v. Ryan*, 566 U.S. 1 (2012); and *Coleman v. Thompson*, 501 U.S. 722 (1991).

Whether Mr. Wesson's *Atkins* claim is procedurally defaulted for habeas purposes is not a question for this Court.

However, what Mr. Wesson portrays to this Court as “procedural roadblocks” are the neutral procedural rules of the State of Ohio. Ohio codified its postconviction relief structure in Ohio Rev. Code sections 2953.21 through 2953.25. Ohio Rev. Code §2953.21 permits a death-row inmate such as Mr. Wesson to file a petition claiming that (among other things) he suffered a denial or infringement of his rights under either the Ohio Constitution or the United States Constitution that creates a reasonable probability of a different verdict. See Ohio Rev. Code §2953.21(A)(1)(a). At the time Mr. Wesson filed his first postconviction petition, the statute required that postconviction petitions be filed within 180 days after the filing of the transcript in the inmate's direct appeal; the deadline has since been enlarged to 365 days. See Ohio Rev. Code §2953.21(A)(2).

By its plain language, Ohio Rev. Code §2953.23 states that a trial court “may not entertain” an untimely or a successive postconviction relief petition. See Ohio Rev. Code §2953.23(A). The statute contains two exceptions. One applies where DNA evidence demonstrates the inmate's actual innocence. See Ohio Rev. Code §2953.23(A)(2). The other applies where the inmate demonstrates both of the following: 1) that in the time since his first petition or his time ran out, either he was unavoidably prevented from discovering the relevant facts, or this Court or the Ohio Supreme Court recognized a new Federal or State constitutional right that applies retroactively to the inmate's case, *and* 2) that he can show by clear and

convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty or found him eligible for the death penalty. See Ohio Rev. Code §2953.23(A)(1).

These statutes do not discriminate against Federal claims; rather, by their plain language, they operate equally upon claims arising under the Ohio Constitution, which the Ohio Supreme Court has held to be a “document of independent force.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 41-42, 616 N.E.2d 163 (Ohio 1993). The restrictions of Ohio Rev. Code §2953.23 on untimely or successive petitions are not vague, and Mr. Wesson has not claimed that they have been arbitrarily enforced.

Therefore, the State of Ohio has had a valid excuse to refuse jurisdiction to hear Mr. Wesson’s successive postconviction relief petition, because that petition fell squarely within a neutral state rule regarding the administration of the courts. This is not the case, then, where the Supremacy Clause would permit this Court to decide that Ohio is obligated to entertain Mr. Wesson’s claim. See *Howlett*, 496 U.S. at 372.

Mr. Wesson’s citation to *Panetti v. Quarterman*, 551 U.S. 930 (2007) is inapposite. In *Quarterman*, this Court determined that the state of Texas’ procedures for determining whether a death-row inmate, who was not insane when he was convicted, were constitutionally insufficient to determine whether the inmate had since lost his sanity and was therefore ineligible for execution. See

*Quarterman*, 551 U.S. at 948, 952. The case is distinguishable on its facts from the case at bar.

### CONCLUSION

For the above-stated reasons, the State of Ohio respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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