No. 18-7809

In the Supreme Court of the United States

JAMES WERE,

Petitioner,

v.

OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Must a state supreme court reopen a direct appeal where the request for relief asks for relief which, by state law, should be directed first to a lower court?

2. Does any reference to race in discussing IQ testing automatically make invalid the state court's determination that the defendant was not intellectually disabled?

LIST OF PARTIES

The Petitioner is James Were, an inmate at the Ohio State Penitentiary. Were is a capital prisoner, but has no currently scheduled execution.

The Respondent is the State of Ohio, represented by court-appointed Special Scioto County Prosecutor Mark E. Piepmeier of the Hamilton County Prosecutors Office, and a court-appointed Special Assistant Scioto County Prosecutor from the Ohio Attorney General's Office.

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INTRODUCTION

Petitioner James Were was one of several inmate-leaders of the 11-day prison riot in April 1993 at Ohio's maximum security prison, the Southern Ohio Correctional Institution, which resulted in the deaths of several inmates and a corrections officer. Audio recordings taken during the riot proved Were was one of the inmates involved in ordering the murder of the corrections officer.

Following Were's state direct and postconviction appeals, Were began his federal habeas appeals only to be granted permission to return to state court to file a successive petition for postconviction relief. Were's first mention of *Buck v. Davis*, __ U.S. __, 137 S.Ct. 759, 776 (2017), or *Pena-Rodriguez v. Colorado*, __ U.S. __,137 S.Ct. 855 (2017), was one sentence in his memorandum in support of jurisdiction in his appeal to the Ohio Supreme Court on the denial of his successive postconviction petition. The Ohio Supreme Court summarily declined jurisdiction and dismissed his appeal.

During the pendency of the appeal from the denial of that successive postconviction petition, Were filed with the Ohio Supreme Court a motion to reopen his direct appeal. In Ohio, a motion to reopen a direct appeal can only be used to raise an issue of ineffective assistance of appellate counsel. However, Were did not raise such a claim; rather he sought to litigate claims of trial court and prosecutorial error wherein he alleged the his race was improperly considered in relation to the determination that he was not intellectually disabled. Specifically, he alleged the trial court violated his constitutional rights in determining that he was not intellectually disabled because the trial court considered his race in finding the

IQ tests he took in the 1960s were culturally-biased against minorities such as Were, and that the prosecutors asked his mental health experts during his mitigation hearing about the racial bias of the 1960s era IQ tests. The Ohio Supreme Court summarily denied Were's motion to reopen his direct appeal.

Were now asks this Court to force the Ohio Supreme Court to reopen his direct appeal to permit briefing on a subject for which the Ohio Supreme Court does not have original jurisdiction to hear, or in the alternative, to reverse his conviction and order Ohio to retry him for the third time.

This Court should not order the Ohio Supreme Court to reopen a direct appeal in violation of Ohio rules to consider a matter for which it does not have original jurisdiction. Nor should this Court take Were's suggestion to invalidate a trial court's determination that he failed to establish he was intellectually disabled in light of the findings that the IQ tests which Were was given in the 1960s were culturally-biased against minorities such as Were.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Ohio Rule of Appellate Procedure Rule 26(B) provides in relevant part:

> **(B) Application for reopening.**
>
> (1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.
>
> (2) An application for reopening shall contain all of the following:
>
> * * *

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

* * *

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

* * *

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

Ohio Supreme Court Rule 11.06 provides in relevant part:

(A) General. An appellant in a death-penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time.

(B) Requirements. An application for reopening shall contain all of the following:

* * *

(2) A showing of good cause for untimely filing if the application is filed more than ninety days after entry of the judgment of the Supreme Court;

(3) One or more propositions of law or arguments in support of propositions of law that previously were not considered on the merits in the case or that were considered on an incomplete record because of the claimed ineffective representation of appellate counsel;

(4) An affidavit stating the basis for the claim that appellate counsel's representation was ineffective with respect to the propositions of law or arguments raised pursuant to S.Ct.Prac.R. 11.06(B)(3) and the manner in which the claimed deficiency prejudicially affected the outcome of the appeal, which affidavit may include citations to applicable authorities and references to the record;

(5) If the application is filed more than ninety days after the issuance of the mandate of the Supreme Court, any relevant parts of the record available to the applicant;

* * *

(E) Grounds for granting application. An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

* * *

(I) Supreme Court decision. If the Supreme Court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the Supreme Court shall vacate its prior judgment and enter the appropriate judgment. If the Supreme Court does not so find, it shall issue an order confirming its prior judgment.

COUNTERSTATEMENT

A. James Were, a high-ranking member of the Muslim prison gang, helped orchestrate the murder of Officer Robert Vallandingham during the 11-day prison riot.

In early 1993, three organized inmate gangs operated within the Southern Ohio Correctional Institution, Ohio's maximum security prison and the former home of death row: the Muslims, the Aryan Brotherhood, and the Black Gangster Disciples. *State v. Were*, 118 Ohio St. 3d 448 (2008). James Were (also known as Namir) was among the higher ranking Muslims. *Id.*

As the takeover began, a group of masked inmates entered the cellblock where Officer Vallandingham was stationed. *Id.* at 449. Vallandingham had locked himself into the officer's bathroom near the front of the cellblock. *Id.* Several inmates, including Were, beat the door down and removed Vallandingham from the bathroom. *Id.*

A standoff resulted with the three competing inmate gang factions forming a working alliance against the prison administration. Hostages and ranges were divided between the gangs, with each controlling a portion of the cell block. *Id.* at 448.

State authorities set up phone communications with the riot leaders on the second day of the riot. *Id.* at 449. In an effort to monitor hostage movements and placement, authorities were able to place several hidden microphones in the floor of the cell block, and the recordings became known as the tunnel tapes. *Id.*

On April 14, a media spokesperson for the Department of Corrections made an ill-advised remark that the inmate threats were standard negotiation tactics. *Id.*

On the morning of April 15, the inmate leaders again discussed killing a hostage. On the tunnel tape Were describes himself as a hardliner, saying: "We give a certain time. If [the power's] not on in a certain time, that's when a body goes out." Were even volunteered to do the killing himself. *Id.* at 449-450.

Inmates testified seeing Were and another inmate remove Vallandingham from the cell in which he was being held and move him to the showers. *Id.* at 450. One inmate testified that he witnessed Were supervising the murder. *Id.* After Vallandingham was killed, his body was taken to the recreation yard to be retrieved by a SWAT team. *Id.*

Two days later, Were and other riot leaders again discussed the progress of negotiations. *Id.* Were stated that the hardliners should control the negotiations and said: "If everybody can recall when we first started to see improvement in here, when we sent an officer out there, that is when we started to get to see some improvement. * * * When that officer went out there, that body went out there, that is when they began to see that we is serious, because all along they said that we are not serious * * * ." *Id.*

A short time later, on the same tape, Were continued: "I am putting it just like this * * * now if we have to throw another body, it will let people know the hardliners will put their foot down and * * * do what we have to, no, I don't want to kill another guard, do you know why, 'cause what I think, I don't give a damn you understand if some of the hostages die slow, or die at all, if I have to die, or we have to die, so I feel then if I cut off a man's fingers, I will cut the man's hand off and go

out there and say now, I am going to let you know we ain't interested in killing your hostages, they'll die slow, since you all want to play games. We is for real about what we is about, man. They don't give a damn about us, they only show us that they give a damn about these hostages spy." *Id.* at 450-451.

Were continued: "I don't give a damn if it has to be on national TV, for them to see me personally, cut one of them dudes hands off and give it to them and spit it out of my mouth for them to know how serious I am about what we believe in. I don't care nothing about no electric chair, I don't care about no other case, I care about what the people and only about the people in here, we got what they want and they got what we want. * * *. [I]f you don't put a hardliner on, or we don't stand firm and work together, we are not going to achieve what we are trying to achieve." *Id.* at 451.

The inmates maintained control of L-Block until their surrender on April 21, 1993, ending the longest and one of the deadliest prison riots in this country's history.

B. Were's conviction and sentence have been upheld by the State Courts.

Were was tried, convicted of aggravated murder, and sentenced to death in 1995, but the Ohio Supreme Court reversed his conviction because Were had been denied a fair trial when the trial court failed to hold a competency hearing. *Id.* at 448 (citing *State v. Were*, 94 Ohio St. 3d 173, 176-177 (2002)).

Were was again tried, convicted of aggravated murder, and sentenced to death in 2003. *Id.* Were's conviction and sentence were upheld by both the Ohio

Court of Appeals and the Ohio Supreme Court. *Id.* (citing *State v. Were*, No. C-030485, 2005-Ohio-376, 2005 Ohio App. LEXIS 348 (Ohio Ct. App. Feb. 4, 2005)); *State v. Were*, No. C-030485, 2006-Ohio-3511, 2006 Ohio App. LEXIS 3468 (Ohio Ct. App. July 7, 2006). The Ohio Supreme Court specifically addressed Were's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), finding that Were had not established he suffered from subaverage intelligence under prong one of the *Atkins* test, nor did he establish he had significant limitations in adaptive functioning under prong two of the *Atkins* test. *Were*, 118 Ohio St. 3d at 475-477. The Ohio Supreme Court further found no merit in Were's claim that the trial court erred in determining the IQ tests he took in the 1960s were racially biased. *Id.* at 476-477. This Court then denied certiorari. *Were v. Ohio*, 555 U.S. 1036 (2008).

While Were's case was pending direct appeal, he properly filed with the Court of Appeals an application to reopen his direct appeal pursuant to Ohio App. R. Proc. 26. The Court of Appeals denied the application, and the Ohio Supreme Court affirmed. *State v. Were*, 120 Ohio St. 3d 85 (2008) (citing *State v. Were*, No. C-030485 (Ohio Ct. App. June 20, 2007)).

Were also unsuccessfully pursued postconviction relief. *State v. Were*, No. C-080697, 2009-Ohio-4494, 2009 Ohio App. LEXIS 3825 (Ohio Ct. App. Sept. 2, 2009); *State v. Were*, 124 Ohio St. 3d 1443 (2010) (Table).

In January 2011, following completion of his state court actions, Were filed a petition for a writ of habeas corpus with the United States District Court for the Southern District of Ohio. On March 30, 2012, the District Court dismissed several

habeas claims on the basis of procedural default. Opinion, *Were v. Bobby*, S.D. Ohio No. 1:10-cv-698, ECF.45, PAGEID#:578-674, (Mar. 30, 2012). Were amended his federal habeas petition in 2013 and again in 2014. Following his 2014 amendment, over the Warden's objection, the federal court stayed proceedings to allow Were to return to state court to file a successive petition for postconviction relief. Were filed his initial successive petition for postconviction relief on December 22, 2015, and a second successive petition for postconviction relief on June 24, 2016. It was in his 2016 amendment that he again raised the issue of his alleged intellectual disability, although never citing *Atkins*.

The trial court denied Were's successive petition for postconviction relief on the basis of a lack of jurisdiction, *res judicata*, law-of-the-case, and alternatively on the merits. Finding that the trial court lacked jurisdiction over Were's successive postconviction due to his failure to satisfy Ohio's successive postconviction relief statute, the Court of Appeals affirmed the denial of relief. *State v. Were*, Nos. C-170029, C-170030 (Ohio Ct. App. Jun. 27, 2018). The Ohio Supreme Court declined discretionary review. *State v. Were*, No. 2018-1162, 2018-Ohio-4962 (Ohio Sup. Ct. Dec. 12, 2018) (Table).

While the Ohio Supreme Court was considering Were's postconviction relief appeal which contained his *Atkins* claim, Were filed directly with the Ohio Supreme Court his "Motion to Re-Open His Direct Appeal" alleging that, in light of this Court's recent rulings in *Buck v. Davis*, __ U.S. __, 137 S.Ct. 759, 776 (2017), *Pena-Rodriguez v. Colorado*, __ U.S. __,137 S.Ct. 855 (2017), and *Tharpe v. Sellers*, __

U.S. ___, 138 S. Ct. 545 (2018), the trial court violated his constitutional rights in considering his race when determining that the IQ testing he received in the 1960s were culturally biased against minorities such as Were, and that the prosecution improperly inquired about the racial bias of the 1960s era IQ tests.

Were specifically took issue with the trial court's inartful questioning of his expert when, towards the end of his competency hearing, the judge asked: "Now, it is my understanding there, I guess, was a controversy in the field of psychology concerning giving African-Americans, in essence, a white man's test, Stanford-Binet. Isn't there a controversy in (sic) that effect? * * * And I think the discussion centers around the fact that the African-American, taking that white man's test, is at a disadvantage so far as the testing of IQ; am I correct?" Competency Hrg. Trans., Trial Trans. p.221-222. Were then complained that the prosecution took the trial court's cue and asked his experts during the mitigation hearing about the racial bias of the 1960s era Stanford-Binet IQ test.

No place in his "Motion to Re-Open His Direct Appeal" did Were allege his constitutional rights were violated due to ineffective assistance of appellate counsel—the only claim which may properly be brought in an application to reopen direct appeal. The Ohio Supreme Court summarily denied Were's application to reopen his direct appeal. *State v. Were*, No. 2006-1578, 2018 Ohio LEXIS 2647 (Ohio Sup. Ct. Nov. 7, 2018).

REASONS FOR DENYING THE WRIT

I. THE RELIEF WERE REQUESTS, THE REOPENING OF HIS DIRECT APPEAL, IS PROCEDURALLY BARRED.

The ultimate relief Were has requested is the reopening of his direct appeal to litigate his newly-framed racial bias claims. For four reasons, the relief he seeks is procedurally barred. First, while he now claims he asked the Ohio Supreme Court for relief under that court's "miscellaneous relief" rule—Ohio S. Ct. Prac. R. 4.01—the substance of his request was to reopen his direct appeal which is governed by a specific Ohio Supreme Court rule—Ohio S. Ct. Prac. R. 11.06. Second, Were's requested relief is actually governed by Ohio App. R. Proc. 26(B), but Were fails to meet the requirements under that rule for relief. Third, Were actually is asking this Court to force the Ohio courts to give him a virtual "do-over" of his *Atkins* hearing which he has already unsuccessfully requested, and from which Were did not seek a petition for a writ of certiorari. And fourth, Were unsuccessfully raised on direct appeal an allegation that the trial court impermissibly found the IQ tests he took as a child were racially biased; this Court denied Were's petition for certiorari.

A. Were's requested relief is not governed by Ohio S. Ct. Prac. R. 4.01.

Were requested the Ohio Supreme Court reopen his direct appeal to permit him to litigate a claim that, in light of this Court's rulings in *Buck*, *Pena-Rodriguez*, and *Tharpe*, the trial court violated his constitutional rights by considering his race in rejecting his 2003 claim that he was intellectually disabled. While he now claims that his request was made under Ohio S. Ct. Prac. R. 4.01, his motion—entitled "Motion to Re-Open His Direct Appeal"—did not reference he was seeking relief

under that rule; in fact, his motion did not reference *any* rule at all. And his prayer for relief before the Ohio Supreme Court was that his direct appeal be reopened to brief his newest claims. Inexplicably, Were now seeks to recast his motion to reopen his direct appeal as a motion for miscellaneous relief, but he cannot change his ship mid-stream.

The express terms of Ohio S. Ct. Prac. R. 4.01 demand that relief may only be sought under the rule "[u]nless otherwise addressed" by the rules of the Ohio Supreme Court. But, there is a rule that specifically addresses applications to reopen direct appeal—Ohio S. Ct. Prac. R. 11.06. Under the terms of Ohio S. Ct. Prac. R. 11.06, and the comparable Ohio R. App. Proc. 26(B), an application to reopen direct appeal is only permitted for the purposes of litigating ineffective assistance of appellate counsel claims. *See, e.g., Walter v. Kelly*, No. 01:11CV1386, 2012 U.S. Dist. LEXIS 187957, at *35 (N.D. Ohio Sep. 28, 2012) ("A Rule 26(B) motion is reserved for the sole purpose of alleging ineffective assistance of counsel."); *Stojetz v. Ishee*, 389 F. Supp. 2d 858, 907 (S.D. Ohio 2005) ("under Ohio law, an application for reopening pursuant to App. R. 26(B), or a *'Murnahan'* motion, is a procedural mechanism for raising claims of appellate counsel ineffectiveness."). Only if the state court would find a defendant's appellate counsel was ineffective in failing to raise a claim will the court permit the filing of the underlying claim. However, the claims which Were sought to raise were not ones of ineffective assistance of appellate counsel; rather they were claims of trial court and prosecutorial error. Under no Ohio rule does the Ohio Supreme Court maintain

original jurisdiction after a direct appeal to entertain claims of trial error outside the scope of ineffective assistance of appellate counsel.

Ohio Supreme Court Practice Rule 4.01 does not give the Ohio Supreme Court original jurisdiction over his claims of trial court and prosecution error. Were seeks to use Ohio S. Ct. Prac. R. 4.01 to circumvent the filing of his claim in the appropriate location which would be in the trial court via a motion for new trial or a successive petition for postconviction relief. As such, the Ohio Supreme Court was proper to dismiss Were's motion.

The Ohio Supreme Court should not be forced to reopen Were's direct appeal to litigate claims over which the Ohio Supreme Court does not have jurisdiction to review. And certainly this Court should not take Were up on his suggestion that his conviction and sentence should be overturned and his case remanded for a new trial—he has never asked the state courts for a new trial based on his allegations that the trial court impermissibly interjected race into his trial or that the prosecution followed the trial court's lead in questioning the mental health experts about racial bias in the 1960s era IQ tests.

B. Were fails to meet the requirements of Ohio App. R. Proc. 26(B).

Because Were committed his crime in 1993, any proper application to reopen his direct appeal was required to be raised in the Ohio Court of Appeals under Ohio R. App. Proc. 26(B) rather than directly with the Ohio Supreme Court under Ohio S. Ct. Prac. R. 11.06(A) (permitting applications to reopen direct appeal to be filed directly with the Ohio Supreme Court for capital cases involving crimes committed

after January 1, 1995). Therefore, even if an application to reopen direct appeal was the proper avenue to raise his claims, he filed his motion in the wrong court.

Pursuant to Ohio App. R. Proc. 26(B), Were was required to file any application to reopen his direct appeal with the Ohio Court of Appeals within 90-days of the journalization of the appellate judgment, absent a showing of good cause. Ohio App. R. Proc. 26(B)(2)(b). *See, e.g., State v. Maynard*, 10th Dist. No. 11AP-697, 2013-Ohio-802 at ¶4, 2013 Ohio App. LEXIS 714.

Following remand from the Ohio Supreme Court to correct the record and perform an independent sentence review, the Court of Appeals denied Were's direct appeal on July 7, 2006. *State v. Were*, 1st Dist. No. C–030485, 2006-Ohio-3511, 2006 Ohio App. LEXIS 3468 (Ohio Ct. App. July 7, 2006), *aff'd* 118 Ohio St. 3d 448 (2008). Were properly filed an application to reopen his direct appeal with the Court of Appeals on May 5, 2005, and again on October 5, 2006. The Court of Appeals denied those applications on June 20, 2007. *See State v. Were*, No. C-030048 (Ohio Ct. App. Jun. 20, 2007). With his latest motion to reopen direct appeal, Were made no attempt to argue he had good cause for his filing more than 12 years after the Ohio Court of Appeals journalized the denial of his direct appeal, nor did he explain why he filed his motion in the wrong court.

Additionally, Ohio law does not permit successive applications for reopening a direct appeal under Ohio App. R. Proc. 26(B). *See State v. Twyford*, 106 Ohio St. 3d 176, 176 (2005), ¶6 (quoting *State v. Williams*, 99 Ohio St.3d 179 (2003), ¶12 ("'there is no right to file successive applications for reopening' under App. R.

26(B)")); *State v. Peeples*, 1995-Ohio-36, 73 Ohio St. 3d 149, 150 ("we find that App.R. 26(B) makes no provision for filing successive applications to reopen.").

Moreover, even if *Buck*, *Pena-Rodriguez*, and *Tharpe* were new rules made retroactive, because an application to reopen direct appeal may only properly be used to raise claims of ineffective assistance of appellate counsel, it would still be impossible to attempt to raise those claims via a motion to reopen direct appeal. After all, an appellate attorney can hardly be ineffective for not raising a claim which did not exist at the time of the direct appeal. *See generally, State v. Redmond*, No. 74738, 2016 Ohio App. LEXIS 4508, at *2, 2016-Ohio-7600, ¶2 (Ohio Ct. App. Nov. 1, 2016) ("appellate counsel in 1998 could not have argued an issue that would not arise until 2014").

C. Were's request to reopen his direct appeal is a veiled attempt to get a virtual "do-over" of his *Atkins* hearing which he has already unsuccessfully sought.

Were, through his motion to reopen direct appeal, essentially is seeking a means to relitigate his underlying *Atkins* claim. What Were fails to disclose is that he has already appealed the trial court's determination that he did not meet the *Atkins* test, and has unsuccessfully attempted to relitigate that determination.

Following this Court's decision in *Atkins*, the Ohio Supreme Court set forth the procedure to raise claims of intellectual disability in Ohio in *State v. Lott*, 97 Ohio St.3d 303 (2002). For capital cases pending trial or newly indicted cases, the *Atkins* issue had to be decided by the trial court. *Id.* at 308. For capital cases on collateral review, the Ohio Supreme Court required intellectual disability claims to be raised via a petition for postconviction relief. *Id.*at 305. For defendants that had

already litigated a postconviction petition, the Ohio Supreme Court permitted the filing of a successive petition no later than June 9, 2003—180 days following the *Lott* decision.

Since Were was granted a new trial which commenced following the *Atkins* and *Lott* decisions, the trial court appointed experts and afforded Were the required hearing on the issue of his alleged intellectual disability. Following that hearing, the trial court found that Were had not satisfied his burden to establish he was intellectually disabled under the three-part *Atkins* test. The trial court did permit Were to argue to the jury that his low IQ should be taken into account as a mitigating factor.

Following his conviction, Were appealed the trial court's finding that he was not intellectually disabled. The Court of Appeals rejected his claim, *Were*, 2005 Ohio App. LEXIS 348, at *30-31, as did the Ohio Supreme Court. *Were*, 118 Ohio St. 3d at 472-477. This Court then denied certiorari. *Were v. Ohio*, 555 U.S. 1036 (2008).

After he received permission from the federal district court to stall his habeas case to allow him to file a successive petition for postconviction relief, Were again raised the claim that he was actually intellectually disabled. The trial court denied Were's successive petition for postconviction relief. Finding that the trial court lacked jurisdiction over Were's successive postconviction due to his failure to satisfy Ohio's successive postconviction relief statute, the Court of Appeals affirmed the denial of relief. *State v. Were*, Nos. C-170029, C-170030 (Ohio Ct. App. Jun. 27, 2018).

In his memorandum in support of jurisdiction to the Ohio Supreme Court in support of his appeal from the denial of his successive petition for postconviction relief, Were raised the following argument: "The trial judge unconstitutionally relied on race to discount Were's IQ scores. In addition, the prosecution in the sentencing phase in its cross examination told the jury to use Were's race to discount Were's IQ scores. *See Buck v. Davis*, __ U.S. __, 137 S.Ct. 759, 776-77, 197 L. Ed. 1 (2017); *Pena-Rodriguez v. Colorado*, __ U.S. __,137 S.Ct. 855, (2017). The trial judge's and prosecution's use of the color of Were's skin violated the cruel and unusual punishment clause of the Eighth Amendment and the equal protection clause of the Fourteenth Amendments." The Ohio Supreme Court summarily declined to accept jurisdiction over Were's discretionary appeal on December 12, 2018. *State v. Were*, No. 2018-1162, 2018-Ohio-4962 (Ohio Sup. Ct. Dec. 12, 2018) (Table).

Were's *Atkins* claim was an on-the-record claim which was required to be, and actually was, litigated on direct appeal. Additionally, Were raised his *Buck/Pena-Rodriguez* claim tangentially during his appeal of the denial of his successive petition for postconviction relief. Inexplicably, Were did not file a petition for a writ of certiorari to this Court from the Ohio Supreme Court's denial of his postconviction relief appeal. Rather, he requests this Court review only the Ohio Supreme Court's denial of his motion to reopen his direct appeal.

D. Were did not need *Buck*, *Pena-Rodriguez*, and *Tharpe* to raise claims of racial bias in his case.

This Court's decisions in *Buck*, *Pena-Rodriguez*, and *Tharpe* are neither new rules, nor were they made retroactive to cases on collateral review. Rather, Were could have raised—and in fact did raise—in his direct appeal a claim that the trial court erred in determining the IQ tests he took as a child were racially biased. *See Were*, 118 Ohio St. 3d at 476-477. The Ohio Supreme Court found Were's claim lacked merit. *Id.* As the Ohio Supreme Court noted, during cross-examination, Were's mental health expert, Dr. David Hammer testified that the 1960s Stanford-Binet test that Were took "was considered to be culturally biased." *Id.* The State's expert, Dr. W. Michael Nelson, later testified that the Stanford-Binet test administered to Were "was considered culturally biased because there were 'no minorities in the standardization sample. It was an all-white sample.'" *Id.* Dr. Nelson also testified that the cultural bias would "have the effect of lowering test scores for minorities." *Id.*

As can be seen from Were's direct appeal, he did not need to wait for the benefit of this Court's rulings in *Buck*, *Pena-Rodriguez*, and *Tharpe* to allege trial court or prosecution error in engaging the mental health experts in questioning regarding racial bias. Were obviously recognized at the time of his direct appeal the possibility of trial court error in considering his race when it determined that the IQ tests were culturally biased. There is no reason he did not also allege at that time a claim of prosecutorial error for engaging the mental health experts on the issue of

racially biased IQ tests. The fact that Were did raise the issue, or could have raised the issue but failed to do so, results in his claims being barred by *res judicata*.

For all these reasons, Were's motion was procedurally barred under Ohio law and the Ohio Supreme Court was proper to dismiss it.

II. THIS CASE IS A POOR VEHICLE TO EXPAND THE SCOPE OF THIS COURT'S RACIAL BIAS JURISPRUDENCE.

Were asks this Court to expand the scope of this Court's recent racial bias jurisprudence. For two reasons, this case is a poor vehicle for expansion. First, Were's premise that the trial court violated his constitutional rights by impermissibly considering his race is false. Second, Were's case is not even remotely analogous to the harms addressed by this Court in *Buck*, *Pena-Rodriguez*, and *Tharpe*.

A. While inartful, the trial court's mention of Were's race in relation to the 1960s era IQ tests was actually an attempt to *remove* racial bias from Were's case.

It is undeniable that a defendant should not be convicted on the basis of his race. But that is not what happened in Were's case. While Were characterizes the trial court's decision to discount the IQ scores he obtained on the Stanford-Binet tests when he was a child in the 1960s as the trial court impermissibly raising the issue of his race, nothing could be further from the truth. True, the trial court could have chosen more politically correct language in its questioning of the mental health experts, but when taken in context, the trial court's questions about Were taking a "white man's test" show that the trial court was actually attempting to *remove* racial bias from his case. Specifically, the trial court asked defense

psychologist Dr. Hammer during Were's competency hearing: "Now, it is my understanding there, I guess, was a controversy in the field of psychology concerning giving African-Americans, in essence, a white man's test, Stanford-Binet. Isn't there a controversy in (sic) that effect? * * * And I think the discussion centers around the fact that the African-American, taking that white man's test, is at a disadvantage so far as the testing of IQ; am I correct?" Competency Hrg. Trans., Trial Trans. p.221-222. The Court was attempting to understand what impact, if any, the racial bias of the Stanford-Binet test which Were took at ages 7 and 12 would have on the scores he received.

The testimony elicited during Were's competency hearing, the mid-trial *Atkins* hearing, and the mitigation phase of his trial indicated that the cultural bias meant minorities, such as Were, scored *lower* on the test than non-minorities. Were's own experts acknowledged the Stanford-Binet test was normed entirely with non-minorities. *See, e.g.,* Dr. Hammer testimony, *Atkins* Hrg. Trans., Tr. Trans. p. 2357; Dr. Timothy Rheinscheld testimony, *Atkins* Hrg. Trans., Tr. Trans. p. 2420.

Because in the 1960s intellectual disability could be determined solely on the basis of an IQ test, the racial bias of that era's tests caused a disproportionate number of minorities to be classified as intellectually disabled and placed in special education classes. Dr. Nelson testimony, *Atkins* Hrg. Trans., Tr. Trans. p. 2432. It was this disparity that eventually caused the definition of intellectual disability to include both subaverage intelligence *and* significant limitations in adaptive functioning. *Id.*at p. 2433.

The discussion of race during Were's hearings was, therefore, meant to explain why a low score obtained by an African-American such as Were on the Stanford-Binet test did not necessarily indicate he was intellectual disabled. Moreover, multiple courts have documented the racial bias of the 1960s era IQ tests. *See, e.g., Fairchild v. Lockhart*, 744 F. Supp. 1429, 1457 (E.D. Ark. 1989) (quoting *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 511 n. 17 (1979) (Rehnquist, J., dissenting)) ("It is well documented that minorities do not perform as well as Anglo-Americans on standardized exams—principally because of cultural and socioeconomic differences."); *Hibbert v. Poole*, 415 F. Supp. 2d 225, 241 (W.D.N.Y. 2006) (quoting *Fairchild*, 744 F. Supp. at 1457); *Larry P. v. Riles*, 495 F. Supp. 926, 952-960 (N.D. Cal. 1979), *aff'd in part, rev'd in part* 793 F.2d 969 (9th Cir. 1984) (finding the Stanford-Binet IQ test to be culturally biased against minority children because it was normed using only white children); *In re Adoption of Embick*, 351 Pa. Super. 491, 517 n. 13, 506 A.2d 455, 469 n. 13 (Penn. Sup. Ct. 1986) (quoting *In re William L.*, 477 Pa. 322, 351-52 n. 26, 383 A.2d 1228, 1243 n. 26 (1978)) ("Experts generally agree that socially and culturally disadvantaged people tend to score lower on standardized intelligence tests, which suggests that cultural bias may affect the result.").

Moreover, the DSM-IV-TR (the version in use at the time of Were's trial in 2003) dictated that the "choice of testing instruments and interpretation of results should take into account factors that may limit test performance (*e.g.*, the individual's *socio-cultural background*, native language, and associated

communicative, motor, and sensory handicaps)." American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision, Washington, DC, American Psychiatric Association, 2000, pg. 42 (emphasis added). *See also*, *Hernandez v. Thaler*, No. SA-08-CA-805-XR, 2011 U.S. Dist. LEXIS 108823, at *106 (W.D. Tex. Sept. 23, 2011) (recognizing the DSM-IV-TR recommends consideration of a person's socio-cultural background in IQ testing). Therefore, not only was the inquiry into the racial bias of the IQ testing not impermissible, it was actually relevant to the court's determination of Were's intellectually disability claim.

Questioning of the experts regarding the cultural bias of the IQ test, and the subsequent determination that the IQ scores Were obtained in the 1960s were more likely than not invalid, is no different than a court's consideration of other relevant factors like the standard error of measure or the Flynn Effect. The fact that the trial court refused to determine that Were met the first prong of this Court's *Atkins* test was not due to any racial bias on the part of the trial court or prosecution, but was due to the racial bias of the IQ tests Were was given when he was a child.

Moreover, even with the cultural bias of the Stanford-Binet test, Were scored *over* the threshold for intellectual disability. Were obtained IQ scores of 69 on the culturally-biased Stanford-Binet test, and testimony in the trial court revealed that, on the Stanford-Binet test, two standard deviations below the mean was a score of 68, rather than the 70 which is the cut-off for the WAIS-IV test. The testimony was

that a score over 68 on the Stanford-Binet test indicated a person was presumptively *not* intellectually disabled.

It should be noted that Were's challenges to the trial court's finding that he was not intellectually disabled have focused almost exclusively on the first prong of the *Atkins* test—subaverage intelligence. Were does not argue the trial court improperly determined he failed to establish prong two—significant limitations in two or more adaptive functioning skills. Were does not challenge the Ohio Supreme Court's reasonable finding that he failed to prove he suffered significant limitations in two or more adaptive skills. *See Were*, 118 Ohio St. 3d at 476. Therefore, even if he would prevail on his allegation that the trial court erred in finding he did not meet the subaverage intelligence prong of the *Atkins* test, his intellectual disability claim would still fail because the courts below have determined he did not meet the adaptive functioning prong of the test.

For these reasons, because there was nothing improper with the trial court or prosecution questioning the experts about the cultural and racial biases of the Stanford-Binet test of the 1960s, the Ohio Supreme Court did not err in disallowing Were to pursue his claim.

B. Were's case is factually distinguishable from *Buck*, *Pena-Rodriguez*, and *Tharpe*.

Were's case is a poor vehicle to expand this Court's racial bias jurisprudence because this case is factually distinguishable from *Buck*, *Pena-Rodriguez*, and *Tharpe*. Were's assertion is that the trial court and the prosecution, by questioning

the experts about the racial bias of the IQ tests, impermissibly interjected Were's race into his case.

Unlike blatant juror bias present in *Pena-Rodriguez* and *Tharpe*, nothing in Were's cases even remotely hinted that the trial court or experts had racial motivations for their actions. Nor is Were's case similar to the expert in *Buck* that expressed the opinion that Buck had an increased risk of dangerousness due to his race. Rather, the trial court's questioning, and the experts' testimony centered on the racial bias of the IQ test and what affect that bias had on Were's score because he was African-American. As previously explained, the socio-cultural background of a defendant is a proper consideration when determining if a defendant meets the three-pronged *Atkins* test for intellectual disability.

Moreover, Were did not need to wait for this Court's decisions in *Buck*, *Pena-Rodriguez*, and *Tharpe* to raise his claims. In fact, as previously explained, Were raised in his direct appeal a claim that the trial court erred in determining the IQ tests he took in the 1960s were racially biased. *See Were*, 118 Ohio St. 3d at 476-477.

Because the matter of Were's race is not at all similar to the racial concerns addressed by this Court in *Buck*, *Pena-Rodriguez*, and *Tharpe*, his case is not a proper avenue to expand this Court's racial bias jurisprudence.

CONCLUSION

For the above reasons, the Court should deny Were's petition for writ of certiorari.

Respectfully submitted,

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