No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Richard Bays,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

On Application for a Certificate of Appealability
The United States Court of Appeals for the Sixth Circuit

APPLICATION TO EXPAND THE CERTIFICATE OF APPEALABILITY

No execution date is presently scheduled.

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APPLICATION TO EXPAND THE CERTIFICATE OF APPEALABILITY

To the Honorable Sonia Sotomayor, Circuit Justice for the United State Court of Appeals for the Sixth Circuit:

Applicant-Petitioner Richard Bays, an inmate on Ohio's death row, respectfully requests, under 28 U.S.C. § 2253(c), an expansion of his certificate of appealability ("COA") pertaining to his appeal before the United States Court of Appeals for the Sixth Circuit of the district court's denial of his request for habeas corpus relief under 28 U.S.C. § 2254. Bays seeks to appeal the district court's denial of his motion to amend his habeas petition to include: (1) a claim for relief from his death sentence due to intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, as well as (2) a claim based on the ineffective assistance of his *Atkins* counsel in state court. Although he requested COAs on these two claims from both the district court and the Sixth Circuit, these courts denied his requests.[1]

If Bays's COA is not expanded, the State of Ohio may execute him even though his constitutional claims concerning his eligibility for execution have been unexamined by the federal courts. The constitutional propriety of his death sentence is in grave doubt, but at present, he has no ability to press the most important of these problems. He has been granted COAs only on claims relating to his confession and Ohio's use of lethal injection, but these issues do not get to the heart of the problems with his case. Meanwhile, Bays more than meets the COA standard—"a substantial showing of the denial of a constitutional right"—for both his *Atkins* claim and his ineffective-assistance-of-*Atkins*-counsel claim. In fact, no one need

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[1] Bays recognizes that he may in the future seek a writ of certiorari from this Court concerning the lower courts' denial of his request for COAs on these claims. Bays seeks an expansion of his COA at this time, however, in the interests of judicial efficiency and because of the importance of these claims for his case. Because § 2253(c)(1) gives the Circuit Justice the authority to issue COAs, Bays submits that this request is appropriate at this time and need not wait until he concludes his appeal in the Sixth Circuit.

speculate whether "jurists of reason could disagree" with the district court's resolution of his ineffectiveness claim; the district court's denial of that claim conflicts with the opinion of the Court of Appeals in *Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012), and a judge in Bays's state-court proceedings on that claim. It is thus indisputable that an expanded COA is warranted.

Yet the Sixth Circuit denied Bays's motion to expand his certificate of appealability, (COA Order, Doc. No. 14-1, attached as Exhibit B), and also denied his petition for rehearing *en banc*, (Rehearing Order, Doc. No. 28-1, attached as Exhibit C). Bays's present request is the same as that in his rehearing petition, for his certificate of appealability to be expanded to include his claims presented to the district court as his proposed Fourteenth and Fifteenth Grounds for Relief.

INTRODUCTION

Bays's requested expansion of his COA is warranted because he has made an extremely strong showing that he is intellectually disabled and therefore actually innocent of his death sentence under *Sawyer v. Whitley*, 505 U.S. 333 (1992). Due to procedural obstacles, however, Bays has never been permitted to present his claim for consideration on the merits in his federal habeas corpus proceedings.

Further, Bays received ineffective representation in litigating his intellectual-disability claim in state court. The district court incorrectly held that Bays's ineffective-assistance-of-counsel claim was not cognizable; it reasoned that he had no right for his *Atkins* counsel to be effective because that litigation took place in state post-conviction proceedings, where a constitutional right to effective counsel does not exist. But Bays's intellectual-disability claim was not an ordinary *post-conviction* claim. Convicted pre-*Atkins*, Bays followed the Ohio Supreme Court's instructions in raising his *Atkins* claim for the first time in post-conviction

proceedings. Unlike Bays, Ohio defendants prosecuted post-*Atkins* raise such claims in the trial court, where the Sixth Amendment right to effective counsel unquestionably applies. Bays deserves the same protections regarding his *Atkins* counsel as all Ohio capital defendants.

Allowing Bays's death sentence to stand when he has been denied an opportunity to press either of these claims in federal court would therefore be a grave miscarriage of justice.

Further, the lower courts' denials conflict with the relevant precedent of this Court, including *Buck v. Davis*, 137 S. Ct. 759, 773 (2017), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). Bays should not be sent to the execution chamber without having the opportunity to appeal these claims that he made clear are the "heart of the problems" in his case. (Mot. to Expand the COA, Doc. No. 8, at 3.)

REASONS FOR GRANTING THE APPLICATION

While a right to appeal in a habeas proceeding is not absolute, the COA standard does not present a high bar. At issue is merely whether the claim deserves encouragement to proceed further, not the ultimate merits. A petitioner must show only that reasonable jurists could disagree about the disposition of the claim, and a "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller- El*, 537 U.S. at 338.

Put bluntly, the Sixth Circuit's refusal to expand Bays' COA is an affront to the orderly administration of justice in this capital case.

First, a state appellate judge *in Bays's own case* has already expressed her disagreement with the district court's position that Bays enjoys no right to effective *Atkins* counsel. So has another federal circuit. These circumstances are the very definition of a debatable claim deserving of a COA.

Second, as for Bays's intellectual-disability claim, the word "*Atkins*" never even appears in the Sixth Circuit panel's order denying his request to expand his COA. The panel's denial not only failed to explain why his request to amend his petition with the claim was insufficient under the COA standard, it twice misapprehended the nature of this intellectual-disability claim and erroneously called it a challenge to "his *competency* to be executed." (COA Order, Ex. B, at 2, 4 (emphasis added).) In his rehearing petition, Bays pointed out that his eligibility for execution, not his competency, was at issue, but the court refused to revise its decision. (Rehr'g Pet. Order, Ex. C.) The Sixth Circuit's indifference to this discrepancy underscores its legal error in denying his request to appeal this claim.

Both of Bays's claims deserve encouragement to proceed further. Before he is put to death, our legal system owes Bays an accurate application of the COA standard and a correct appreciation of the nature of his claims based on a categorical exclusion to execution under the Constitution.

I. The COA standard mandates expansion in this case.

As this Court has explained, 28 U.S.C. § 2253(c)(2)'s requirement of a "substantial showing of the denial of a constitutional right" to obtain a COA is not "coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Indeed, a petitioner is not required to prove "that some jurists would grant the petition for habeas corpus." *Miller-El*, 537 U.S. at 338.

The requirements of § 2253(c) are "non-demanding," *Wilson v. Belleque*, 554 F.3d 816, 826 (9th Cir. 2009), and a COA should be granted unless the claim presented is "utterly without

merit," *Jefferson v. Welborn,* 222 F.3d 286, 289 (7th Cir. 2000). Further, in cases where the death penalty is at issue, courts have recognized that any doubts regarding the propriety of a certificate of appealability must be resolved in the petitioner's favor. *See, e.g.*, *Skinner v. Quarterman,* 528 F.3d 336, 341 (5th Cir. 2008); *Jermyn v. Horn*, 266 F.3d 257, 279 n.7 (3d Cir. 2001); *Miller v. Johnson,* 200 F.3d 274, 280-81 (5th Cir. 2000); *Petrocelli v. Angelone*, 248 F.3d 877, 884 (9th Cir. 2001); *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).

Reasonable jurists could find that Bays should have been granted leave to amend his petition to include his proposed Fourteenth and Fifteenth Grounds for Relief: his *Atkins* claim and related ineffective-assistance-of-counsel claim.[2] The governing standard here asks whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling" and whether "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Under Federal Rule of Civil Procedure 15, leave to amend "should . . . be 'freely given'" absent "any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Bays's proposed claims are clearly valid causes of action and filing the claims would not be futile, because, as explained in more detail below, he is intellectually disabled and because his

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[2] Bays's proposed claims were stated as follows:

> Fourteenth Ground for Relief: Richard Bays is mentally retarded, and as a result his execution is barred under *Atkins v. Virginia*, 536 U.S. 304 (2002).
>
> Fifteenth Ground for Relief: Richard Bays was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* proceeding.

(Proposed Grounds, Dkt. 153-1, at PageID 6587-88.)

Atkins counsel rendered constitutionally ineffective assistance. Bays also did not act in bad faith or delay unduly, and no dilatory purpose motivated his request to amend. The ineffective assistance of his *Atkins* counsel explains the delay caused by an erroneous voluntary dismissal in state court, and Bays acted diligently in fully developing evidence of intellectual disability upon discovering prior *Atkins* counsel's ineffectiveness during proceedings before the district court.

A. The denial of a certificate of appealability on Bays's *Atkins* claim will result in a grave miscarriage of justice.

Bays can establish that he is intellectually disabled under *Atkins*. *Atkins* requires an inmate to demonstrate subaverage intellectual functioning, significant adaptive deficits, and onset before the age of 18. *Atkins*, 536 U.S. at 318. Reasonable jurists could conclude that Bays has met these requirements. Indeed, it is unlikely that reasonable jurists could reach a finding to the contrary.

Bays's IQ has been tested four times, and his reported scores were 73 at age eleven, 71 at age thirteen, 74 at age twenty-nine, and 78 at age forty-two. (Proposed Grounds, R. 153-1, PageID 6602, 6624.) The test resulting in an IQ of 78 was not scored correctly, however; if it had been, Bays would have received a score of 73. (Exhibits, R. 153-4, PageID 6789.) Furthermore, when Bays's IQ scores are adjusted for the Flynn Effect, the results are 72 at age eleven, 69 at age thirteen, 69 at age twenty-nine, and no more than 71, and potentially lower, at age forty-two. (Proposed Grounds, R. 153-1, PageID 6602.) Even if Bays's actual IQ is above 70, this would not preclude a finding of intellectual disability. *Hall v. Florida*, 134 S. Ct. 1986, 1994-95 (2014). "The relevant clinical authorities all agree that an individual with an IQ score

above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist." (*Id.* (citation, brackets, and internal quotation marks omitted).)[3]

Bays can also demonstrate significant adaptive deficits with an onset before the age of 18. Early signs of Bays's conceptual limitations emerged in his elementary school years as his academic achievement suffered, and he was held back after failing fourth grade. (Proposed Grounds, R. 153-1, PageID 6607.) In fifth grade, he was placed in a special education program associated with intellectually disabled children. (*Id.* at 6607-08.) He attended special education classes full time in sixth grade. (*Id.* at 6609.) By seventh grade, Bays was earning Ds and Fs in most of his classes. (*Id.*) He failed every class in ninth grade, and did not complete school beyond tenth grade. (*Id.*) He never obtained a GED. (*Id.*)

When Bays was thirteen, he "was three years behind in social adaptation and self-help skill development, performance consistent with an intellectual disability." (*Id.* at 6611 (internal quotation marks omitted).) Bays had few friends his own age, but instead spent time with older teenagers who took advantage of his social ineptitude and viewed him as someone to be ridiculed and provide entertainment to the group. (*Id.* at 6612.) They regularly teased Bays, calling him "stupid," "slow," and "retarded." (*Id.*) His suggestibility and naivety made him an easy target. (*Id.*) He was often prodded into doing dangerous and foolish things. (*Id.*) These "friends" also introduced Bays to abusing substances when he was only nine years old. (*Id.*)

As he grew older, Bays lacked the skills to be self-sufficient and live independently, a hallmark feature of intellectual disability. (*Id.* at 6614.) Bays married a woman who was ten years older than him and she essentially acted as his guardian. (*Id.* at 6615-16.) Furthermore,

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[3] *Moore v. Texas*, 137 S. Ct. 1039 (2017), was decided after the district court denied Bays leave to amend with his *Atkins* claim. It further supports Bays's proposed ground for relief.

Bays demonstrated an eagerness to please and be accepted by others, and was highly suggestible, naïve, and susceptible to others taking advantage of him; these are additional hallmarks of intellectual disability. (*Id.* at 6616.)

Bays's deficits also prevented him from maintaining regular employment. He held a string of sporadic simple labor odd jobs, such as yard work and janitorial positions, for no more than $50 a week. (*Id.* at 6619.) He was unable to maintain regular employment because he was befuddled by basic instructions; in one instance, he confused inches for feet when trimming bushes and cut them down to the ground. (*Id.*) His wife ran the household by managing things like errands, bills, and cooking. (*Id.*) He never had a savings account, checkbook, or saved money, and had difficulty even making change. (*Id.*)

All of these factors demonstrate severe adaptive deficits, and it is clear that the onset occurred before the age of 18. Accordingly, reasonable jurists could conclude that Bays is intellectually disabled, and that the district court abused its discretion in denying Bays leave to amend his petition and raise this claim.

The district court denied amendment on procedural grounds of delay. But as this Court has recognized, intellectual disability renders a petitioner actually innocent of a death sentence under *Sawyer v. Whitley*, 505 U.S. 333 (1992), and "cuts through all of the potential procedural bars," *Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014). The district court recognized this as well, yet decided that Bays was unable to satisfy the actual-innocence exception without even discussing the merits of Bays's claim. (*See* R&R, R. 160, PageID 7441-42.)

Bays has never had an opportunity to litigate his *Atkins* claim, and permitting his death sentence to stand under such circumstances would constitute a grave miscarriage of justice. His COA should be expanded to include this claim.

B. The denial of a COA on Bays's claim of ineffective assistance of *Atkins* counsel conflicts with the precedent of the Tenth Circuit and a state-court judge in Bays's own case.

The Sixth Circuit's denial of a COA on Bays's claim of ineffective assistance of post-conviction *Atkins* counsel conflicts with the decision of the Tenth Circuit in *Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012), and with an Ohio judge in Bays's case, *State v. Bays*, No. 2014-CA-24, 2015 WL 2452324, at *12, ¶40-41 (Ohio App. May 15, 2015) (Donovan, J., dissenting). *Hooks* recognized a right to effective assistance of *Atkins* counsel in the post-conviction context, but Bays was denied a COA on his claim notwithstanding the strong showing he has made.

Despite the fact that Bays's IQ would qualify him as intellectually disabled in Ohio, despite all of the evidence of Bays's intellectual disability already developed in the record, and despite known flaws in the State expert's evaluation declaring Bays not intellectually disabled, Bays's *Atkins* counsel failed to order a full adaptive-function evaluation of Bays and voluntarily dismissed his *Atkins* petition in 2007. Once new counsel began representing Bays in his federal habeas corpus proceedings, they learned of *Atkins* counsel's incompetence. They completed the investigation that *Atkins* counsel should have done and found strong evidence of Bays's intellectual disability.

Had Bays been tried after this Court decided *Atkins* and after the Ohio Supreme Court implemented that decision in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), there would be no question that he could seek relief if his trial counsel was constitutionally deficient in litigating his intellectual disability. But because Bays was tried before *Atkins*, he was directed to use Ohio's statutory post-conviction framework to raise his *Atkins / Lott* claim. *Lott*, 779 N.E.2d at 1014, 1016.

The district court incorrectly held that Bays's *Strickland* claim was not cognizable because he enjoys no constitutional right to effective post-conviction counsel. (Supp. R&R, R. 169, PageID 7524-26.) Bays's *Atkins* claim, however, is not an ordinary *post-conviction* claim. It is a new claim based on a retroactive, categorical Eighth Amendment ban on executions of intellectually disabled persons. Bays has a constitutional right to the effective assistance of counsel in an *Atkins* proceeding.

Reasonable jurists not only *could*, but *actually do* disagree as to whether an *Atkins* petitioner possesses the right to effective assistance of counsel under the Sixth Amendment. *See Hooks*, 689 F.3d at 1183; *United States v. Wilson*, No. 04-CR-1016, 2013 WL 1338710, at *5 n.8 (E.D.N.Y. Apr. 1, 2013); *Bays*, 2015 WL 2452324, at *12, ¶40-41 (Donovan, J., dissenting).[4] As the Seventh Circuit has noted, "[w]hen a state appellate court is divided on the merits of the constitutional question, *issuance of a certificate of appealability should ordinarily be routine*." *Jones v. Basinger*, 635 F.3d 1030, 1040 (7th Cir. 2011) (emphasis added).

The fact that courts have reached opposing conclusions underscores that the district court's conclusion is debatable among reasonable jurists. At an absolute minimum, *Hooks*, *Wilson*, and the opinion of the dissenting state appellate judge in Bays's case show that this issue deserves "encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Accordingly, an expanded COA is warranted on this claim as well.

II. Action from the Circuit Justice is necessary.

Bays recognizes that his request to the Circuit Justice is unusual. But it is necessary because the lower courts' denials of COAs to Bays on these crucial claims have left him without federal review of the constitutional claims at the heart of his death sentence. The Sixth Circuit's

[4] As Judge Donovan explained, "Although this right to counsel is afforded by statute, I agree with the reasoning of *Hooks* that it should be recognized as a federal constitutional right as well."

decisions not only fail to provide confidence that it applied correct standard, they show an affirmative misapprehension of the basics of Bays's claims.

A. The Sixth Circuit provided no analysis under the proper standard.

First, the panel order from the Sixth Circuit contained no reasoning demonstrating that it correctly applied the proper standard. The panel stated only, "we conclude that Bays has not made a substantial showing of the denial of a federal constitutional right for any of the issues from his COA application." (COA Order, Ex. B, at 4.) This statement merely tracks the language of the statute with no additional analysis. It is impossible to tell whether the COA was denied because the panel believed that Bays would ultimately lose on the merits even if the issue was debatable among jurists of reason. *Cf. Buck*, 137 S.Ct. at 773-74.

As illustrated above, the claims raised in Bays's application for an expanded COA were more than sufficient to satisfy the "non-demanding" requirements of § 2253(c), *Wilson*, 554 F.3d at 826, as they were certainly "debatable." In light of the strength of Bays's claims, and in the absence of any meaningful explanation for the denial of the COA, it is appropriate to conclude that the panel did not properly apply the COA standard. This result should not be countenanced, especially when a person's eligibility for execution is at stake.

B. The Sixth Circuit also mischaracterized Bays's claim for relief.

The court of appeals also mischaracterized Bays's *Atkins* claim multiple times, instead calling it a challenge to "his competency to be executed." (COA Order, Ex. B, at 2, 4.) This is a significant and important mischaracterization, as Bays's *Atkins* claim is a critical factor in each of his claims for relief.

Bays asserts that he is ineligible for the death penalty under *Atkins*, in which this Court held that "the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (citation and internal quotation marks

omitted). An *Atkins* claim concerns an offender's permanent condition of intellectual disability, and requires showing that the defendant exhibits significant deficits in both intellectual functioning and in adaptive skills. To meet the *Atkins* standard, these deficits must have manifested while the defendant was a minor.

Despite the fact that Bays's motion to expand the COA referred to his "intellectual disability" claim under "*Atkins*" dozens of times, the Sixth Circuit panel twice characterized it as a challenge to his "competency to be executed," which would be a claim for relief under *Ford v. Wainwright*, 477 U.S. 399 (1986), *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Madison v. Alabama*, No. 17–7505, 586 U.S. ____, 2019 WL 938522 (Feb. 27, 2019). A challenge to a defendant's "competency to be executed" is an entirely different claim, focusing the defendant's current mental state at a specific point in time, when execution is imminent. *See Panetti*, 551 U.S. at 954-56. Competency to be executed does not require an analysis of the defendant's intellectual capacity. *See id.* Instead, competency to be executed turns on a defendant's ability to "rationally understand the reasons for his death sentence." *Madison*, 2019 WL 938522, at *6.

Although the panel recognized that Bays had raised his intellectual disability as a ground for relief in his state court proceedings, (COA Order, Ex. B, at 1), the panel's subsequent characterization of Bays's claim as challenging his competency to be executed indicates that the nature of Bays's federal claim may have been misapprehended. This could further indicate a fundamental misunderstanding of not only of Bays's *Atkins* claim, but also of all of the claims raised his motion to expand the COA which were each related by varying degrees to Bays's intellectual disability. (*See* Mot. to Expand the COA, Doc. No. 8, at 3 ("And, Bays's intellectual disability resulted in an involuntary and false confession, an involuntary jury waiver, and ultimately, his wrongful conviction. The constellation of constitutional errors in his case warrant

habeas relief and, at a minimum, appellate review in this Court.").) The Sixth Circuit could not have adequately adjudicated Bays's request without understanding the basis of this claim. Bays deserves better from the federal courts before facing execution.

CONCLUSION

For the foregoing reasons, Applicant-Petitioner Bays respectfully requests an order be entered expanding his certificate of appealbility to include his claim under *Atkins* and its progeny and his claim of ineffective assistance from his *Atkins* counsel, which were presented to the district court as his proposed Fourteenth and Fifteenth Grounds for Relief.

Respectfully submitted,
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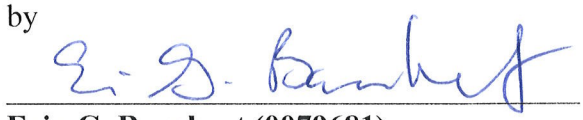
Federal Public Defender
by



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Certificate of Service

I, Erin G. Barnhart, hereby certify that on this 7th day of March, 2019, a copy of the foregoing APPLICATION TO EXPAND THE CERTIFICATE OF APPEALABILITY was served in compliance with Supreme Court Rule 29.3 by regular United States Mail, first-class postage prepaid, on the following Counsel for Respondent Margret Bagley:

Brenda S. Leikala
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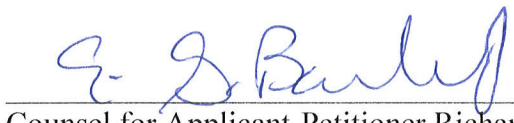
All parties required to be served have been served.



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