No. 19-1191

In the
Supreme Court of the United States

OHIO,
Petitioner,
v.
SHAWN FORD,
Respondent.

On Petition for Writ of Certiorari to the Ohio Supreme Court

BRIEF OF *AMICUS CURIAE* OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus, The Ohio Prosecuting Attorneys Association ("OPAA"), is a non-profit origination created to assist county prosecuting attorneys in their pursuit of truth, justice, and the promotion of public safety.[1] OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and to serve as legal counsel to county and township authorities. In addition to its advocacy efforts, OPAA provides continuing legal education programs for prosecutors across Ohio.

On March 23, 2013, Shawn Ford nearly killed his 18-year-old girlfriend, Chelsea Schobert, when she refused to have sex with him. While she was recovering in the hospital, Ford and a co-defendant brutally murdered Chelsea's parents, Jeffrey and Margaret. A jury found Ford guilty of all counts and specifications and recommended that Ford be sentenced to death, which the trial court imposed. In *Ohio v. Ford*, the Supreme Court of Ohio reversed Ford's death sentence holding that the trial court did not correctly apply the Court's recent precedent on intellectual disability.[2]

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[1] No counsel for either party authored this brief in whole or in part. No person or entity aside from the amicus curiae and its members made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of the intent to file this brief under Sup. Ct. R. 37.2. Consent to file has been granted by both parties.

[2] *Ohio v. Ford*, 158 Ohio St.3d 139, 140 N.E.3d 616 (2019).

A review of the Supreme Court of Ohio's decision in this case is of substantial interest to OPAA. The organization is comprised of prosecutors from Ohio's eighty-eight counties who are left to wonder what to do when faced with an intellectual disability claim. The trial court here heard testimony from three experts, and each *agreed* that Ford is not intellectually disabled. Pet.App. 218a, 223a, 225a-26a, 232a. Because of the confusion caused by *Ford*, these prosecutors are left ill-equipped to properly evaluate cases for possible capital charges and to fully defend against an ever evolving and unclear standard. If every medical expert to analyze Ford reached the same conclusion, what exactly are prosecutors and courts to do?

The OPAA hopes that its viewpoint will highlight the need for the Court's guidance for prosecutors in Ohio and throughout the country.

SUMMARY OF ARGUMENT

Consistent with the Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002), each state has taken steps to define intellectual disability. Ohio followed suit in *Ohio v. Lott*, 779 N.E.2d 1011, 1015 (2002). Following *Atkins*, the Supreme Court of Ohio held that the defendant "bears the burden of establishing that he is mentally retarded by a preponderance of the evidence." *Lott* at 1015. It defined intellectual disability[3] as "(1) significantly subaverage intellectual functioning, (2) significant

[3] This brief will use the term "intellectual disability" in place of "mental retardation" consistent with the Court's current usage. *See Hall v. Florida*, 572 U.S. 701, 704.

limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott* at 1014. Finally, the Ohio Supreme Court held that "there is rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Lott* at 1014.

In *Ford*, the Ohio Supreme Court found the *Lott* test was "outdated" and partially abandoned its decision. It did so because it relied on the Court's recent precedent in *Hall v. Florida*, 572 U.S. 701 (2014), *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), and Moore v. Texas, 139 S. Ct. 666 (2019) (*Moore II*). But what is not clear is what *Hall* and *Moore* require.

The Ohio Prosecuting Attorneys Association ("OPAA") respectfully urges this Honorable Court to grant Ohio's petition for writ of certiorari. The Supreme Court of Ohio's decision rests entirely on Eighth Amendment grounds. The lower court has significantly expanded the class of people who will not be subject to capital punishment and did so because of the lack of clear "guidance" from the Court. *Moore I* at 1058 (Roberts, C.J., dissenting). This case presents the Court with an opportunity to provide that much needed guidance to courts and practitioners throughout the country. Without further review, OPAA members and other prosecutors will be left with more questions than answers.

ARGUMENT

I. Intellectual Disability Claims in Ohio

The eighty-eight elected prosecutors in Ohio have no interest in pursuing capital punishment for individuals that are intellectually disabled. That is why Ford-who was never diagnosed as intellectually disabled, and whose childhood records ruled out such a diagnosis-seemed unlikely to be excluded from capital punishment.

After the Court held Ohio's death penalty law unconstitutional, *Locket v. Ohio*, 438 U.S. 586 (1978), the state enacted a new death penalty statute, O.R.C. 2929.04, which has been in effect since 1981. In that time, Ohio has issued a total of three hundred and forty (340) death sentences and executed fifty-six (56) inmates. See Ohio Attorney Gen., Capital Crimes Annual Report 24 (2019), accessed at https://www.ohioattorneygeneral.gov/Files/Reports/Capital-Crimes-Annual-Reports/2019-Capital-Crimes-Annual-Report.

In 2002, the Court held that the execution of individuals who are intellectually disabled was constitutionally prohibited. *Atkins v. Virginia*, 536 U.S. 304 (2002). It left the task of defining intellectual disability to the states. *Atkins*, 536 U.S. at 317. In response, the Supreme Court of Ohio defined intellectual disability as "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Ohio v. Lott*, 779 N.E.2d 1011, 1014 (2002).

Like other states, the Ohio Supreme Court held that "there is rebuttable presumption that a defendant is not mentally retarded if his or her IQ is above 70." *Lott*, at 1014. Since *Atkins*, "8 death row inmates have been found ineligible for the death penalty due to intellectual disability." Ohio Attorney Gen., Capital Crimes Annual Report 24 (2019), *supra*.

In Ohio, thirty-six (36) death sentences have been imposed post-*Atkins*. The Supreme Court of Ohio has addressed *Atkins* claims in five (5) of those cases. *Ohio v. Ford*, 158 Ohio St.3d 139, 140 N.E.3d 616 (2019); *Ohio v. Jackson*, 23 N.E.3d 1023, 1038-42 (2014); *Ohio v. Maxwell*, 9 N.E.3d 930, 968-72 (2014); *Ohio v. Were*, 890 N.E.2d 263, 290-95 (2008); *Ohio v. Frazier*, 873 N.E.2d 1263, 1290-92 (2007). There are also numerous pending *Atkins* claims in Ohio courts. See *Ohio v. Bays*, Green County Court of Common Pleas, 1994 CR 0030 (stayed pending DNA testing); *Ohio v. Elmore*, Licking County Court of Common Pleas, 2002 CR 00275; *Ohio v. Jackson*, Eighth District Court of Appeals, CA-19-108558; *Ohio v. Lott*, Cuyahoga County Court of Common Pleas, CR-86-211002; *Ohio v. Williams*, Eleventh District Court of Appeals, 2019 TR 00028.

While the actual prevalence of intellectual disability appears to be low, the claim is frequently raised in capital litigation. James W. Ellis, Caroline Everington, & Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases, 46 Hofstra L. Rev. 1305, fn. 109 (2018) (citing studies that place the prevalence range in the general population from .67 to 3 percent); *Atkins* at 338 (Scalia, J., dissent)(noting

there is no incentive for a capital defendant not to feign intellectual disability). It is important to note that in Ohio, "*Atkins* claims" are typically raised before or during trial, and the state is left with little or no recourse to appeal an adverse decision.[4] Without clear guidance from the Court, prosecutors will be left with unreviewable adverse decision, little clarity as to what evidence should be presented to rebut a claim of intellectual disability, and even less idea of what evidence will withstand decades of challenges by a defendant.

A. The trial court heard testimony from three experts, none of which opined that Ford was intellectually disabled.

After the jury found Ford guilty, and following testimony from his mitigation expert, Ford moved the trial court to dismiss his death specifications because his "IQ scores ranged between 62 and 80." *Ford*, 158 Ohio St.3d 139, 149. The trial court overruled Ford's motion but held a hearing on the claim following the jury's verdict.

During the hearing, the trial court heard testimony from a court expert, Ford's retained expert, and an expert for the state.

1. The court's expert

Dr. Connell used the DSM-5 and the standards from the American Association on Intellectual and

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[4] The state's ability to appeal may be different if relief is granted through postconviction proceedings. Ohio Revised Code § 2945.67.

Developmental Disabilities to determine if Ford is intellectually disabled. Pet.App. 227a. Dr. Connell reviewed Ford's five previous IQ tests and opined that "[a]vailable records provided three IQ test results, and even when considering measurement error and that one was an abbreviated measure, all were clearly above the range of scores found in individuals diagnosed with an intellectual disability." *Ford*, 158 Ohio St.3d 139, 150. Dr. Connell also discussed the "Flynn Effect" and its relevance on her analysis. Finally, Dr. Connell found that Ford did not have significant deficits in adaptive functioning. Pet.App. 226a.

2. The defense expert

Ford refused to cooperate with his expert. *Ford*, 158 Ohio St.3d 139, 151. And Ford's expert, Dr. Karpawich, declined to apply the DSM standard for diagnosing intellectual disability, recognizing it as flawed. *Ford*, 158 Ohio St.3d 139, 152. However, Dr. Karpawich testified that Ford's IQ was "below average" with some scores putting him in the "borderline range." In its findings, the trial court noted that Dr. Karpawich testified that Ford's 2006 IQ score of 75 would, using the standard error of measurement, be a range between 69 and 83. Pet.App. 219a. Dr. Karpawich opined that Ford's adaptive-functioning scores were "poor in the domains of conformity, trustworthiness, and disturbing interpersonal behavior" but "in the average range or above" for other adaptive behaviors. Ultimately, Dr. Karpawich opined that Ford "does not meet the criteria for mental retardation or intellectual disability, and that's based on the records that I reviewed." Pet.App. 220a.

3. The state's expert

The Ohio Supreme Court summarized the state's expert testimony in five sentences. Dr. O'Bradovich opined that Ford's IQ scores placed him in the "low average range." Pet.App. 223a. Dr. O'Bradovich then found that Ford's overall adaptive functioning scores placed him in the "adequate" range. Pet.App.224a. Like the trial court's expert, Dr. O'Bradovich opined that Ford was not intellectually disabled.

Applying Ohio's *Lott* standard, the trial court held that Ford (1) did not have significantly subaverage intellectual functioning even when considering the standard error of measurement, (2) did not have significant limitations in two or more adaptive skills, and (3) has never been intellectually disabled "within the standards recognized by the American Psychiatric Association, the American Association on Intellectual and Developmental Disabilities, or *Lott*." *Ford*, 158 Ohio St.3d 139, 153.

B. Ohio's new test for intellectual disability is wrought with uncertainty.

Despite a consensus that Ford was not intellectually disabled, a majority of the Ohio Supreme Court vacated Ford's death sentence and remanded for further proceedings. As will be discussed, it is unclear what those further proceedings should be.

1. The impact of *Hall v. Florida*, 572 U.S. 701 (2014).

Relying on the Court's opinion in *Hall*, the majority opinion stated that "Ford's higher performance on

other IQ tests did not allow the trial court to ignore an IQ score that falls at or below 70." *Ford*, 158 Ohio St.3d 139, 154. But the trial court did not "ignore" anything. All *Hall* requires is that a defendant with an IQ score within the "acknowledged and inherent margin of error…must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall* at 710. The trial court here allowed additional evidence of adaptive functioning and did consider whether Ford had significant adaptive deficits.

In misinterpreting *Hall*, the Ohio Supreme Court majority opinion muddied what trial courts and practitioners should do when faced with an *Atkins* claim. The most glaring example is the lower court's position that a court can find a defendant intellectually disabled despite unanimous expert opinion to the contrary. *Ford*, 158 Ohio St.3d 139, 154. Combined with the majority's statement that a trial court "*may* consider expert testimony and appoint experts if necessary [,] in deciding" intellectual disability, *Id*. at 157, it is unclear what evidence the parties should present and what evidence a court should rely on. That cannot be the intended meaning of *Hall*.

2. Must a trial court consider the "Flynn Effect" when evaluating IQ scores?

The confusion from Ford is compounded by the Ohio Supreme Court's holding that the Eighth Amendment requires trial courts to "discuss" the Flynn Effect. *Ford*, 158 Ohio St.3d 139, 155. How much "discussion" does the Eighth Amendment require? Dr. Connell, the court's expert, testified about the Flynn Effect so the

court was certainly aware of the "phenomenon." *Ford* at 154. What must a trial court say about a "phenomenon" that-as the Ohio Supreme Court noted-it is free to disregard? And even if a court should consider the Flynn Effect, does the failure to do so require vacating a death sentence where the trial court goes on to consider adaptive functioning anyway?

The Ohio Supreme Court required "discussion" of the Flynn Effect because the American Association on Intellectual and Developmental Disabilities now recommends point adjustments for aging norms. *Ford* at 155. This Court has never made a similar requirement. *See Black v. Carpenter*, 866 F.3d 734, 745-746 (CA6 2017). The Ohio Supreme Court's holding highlights the concerns expressed by the dissents in *Hall* and *Moore*. Should the Eighth Amendment be tied so closely to the evolving standards of a private professional organization? the Court's view is "informed by the views of medical experts," what view should be followed? And what if the organizations disagree? See *Hall* at 733 (Alito, J., dissenting). There is evidence of that in this case where Ford's own expert chose not to follow the DSM standard. *Ford*, 158 Ohio St.3d 139, 152.

3. *Ford* blurs the intersection between medical and legal standards.

Finally, the Ohio Supreme Court found reversible the trial court's use of "outdated" standards to assess adaptive functioning. *Ford* at 156. Relying on *Moore I*, the majority held that the trial court "used the wrong standard" when it addressed the second prong of *Lott*. Using the most updated standards, Ford would satisfy

the burden if his "adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets […]." *Moore I* at 1046.

But, as Petitioner points out, did the application of an outdated standard even matter? The "purpose" of the adaptive functioning prong is to "exclude from the definition any individuals whose impaired performance on IQ testing was not accompanied by substantially disabling impairment in functioning in life." James W. Ellis, Caroline Everington, & Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases, 46 Hofstra L. Rev. 1329 (2018). The "goal of this prong of the definition is *to limit* the diagnosis of intellectual disability to people who have an actual, significant, disability." *Id*. Emphasis added. Even with the newest professional standards, none of the experts to analyze Ford felt that he satisfied the definition of intellectual disability.

While "evolving standards of decency" guide the Court's Eighth Amendment analysis, should the evolving standards of professional organizations guide who qualifies for relief? If so, to what extent? Unfortunately, the Court's post-*Atkins* precedent has provided little guidance to the states. The confusion caused by this case presents a good opportunity for the Court to "shed []" some "light", *Moore I* at 1058 (Robert, C.J., dissenting), on what the Eighth Amendment requires.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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