No. _____

In the Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,
v.

LARRY LAMONT WHITE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether a capital defendant can waive a claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny.

PARTIES TO THE PROCEEDING

The Commonwealth of Kentucky, petitioner here, was the appellee below.

Larry Lamont White, respondent here, was the appellant below.

STATEMENT OF RELATED PROCEEDINGS

No such proceedings exist.

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PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Kentucky respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Kentucky.

OPINIONS BELOW

The Supreme Court of Kentucky's decision remanding this matter for an evidentiary hearing, which is the decision upon which certiorari is sought, is reported at 600 S.W.3d 176. Pet. App. 1–12. The Supreme Court of Kentucky's initial decision affirming Larry Lamont White's convictions and sentences is reported at 544 S.W.3d 125. Pet. App. 16–68. This Court's decision granting certiorari, vacating the judgment, and remanding this matter for further consideration is reported at 129 S. Ct. 532. Pet. App. 15. The Jefferson Circuit Court's decision rejecting White's intellectual-disability claim is unreported. Pet. App. 69–86

JURISDICTION

The Supreme Court of Kentucky rendered its decision on March 26, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VIII, provides:

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

U.S. Const. amend. XIV, § 1 states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

Larry Lamont White, a 62-year-old death-row inmate, desires to waive his right to pursue a claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). In his words, he wants to move past the "intellectual disability foolishness" and focus on proving his innocence in post-conviction proceedings. Pet. App. 114, 116. White *agrees* with the Commonwealth of Kentucky that he is not intellectually disabled. As he put it, "if given the chance I would argue the same way." Pet. App. 108.

White has a firmer grasp on his case than most. As the Supreme Court of Kentucky recounted, during his trial White "was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced." Pet. App. 63. And White has been an effective jailhouse lawyer. During his trial, White "often advocated for himself through numerous pro se motions. One such motion was written so persuasively

that defense counsel specifically asked the trial court to rule on its merits." *Id.* at 61.

Yet, in the decision below, the Supreme Court of Kentucky refused White's request to waive his *Atkins* claim. In the court's view, White is powerless to effect such a waiver. According to the court, the Eighth Amendment compels that this matter be remanded for an evidentiary hearing under *Atkins*. Pet. App. 6–7. White, of course, does not want this hearing and will refuse to participate in it. *See* Pet. App. 108, 114, 117. And so this evidentiary hearing, in all likelihood, will be an empty exercise. The primary effect will be to delay justice for a murder that happened nearly 40 years ago.

The Supreme Court of Kentucky viewed this result as compelled by *Atkins* and its progeny. But that is wrong. *Atkins*, this Court has told us, did not establish "definitive procedural . . . guides." *Bobby v. Bies*, 556 U.S. 825, 831 (2009). Instead, this Court has said that *Atkins* provides defendants a "*fair opportunity* to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014) (emphasis added). A "fair opportunity," however, does not equate to a *forced* opportunity, like that imposed on White.

This case is not just an instance of the court below making a legal error. The question presented in this matter—whether an *Atkins* claim can be waived—is an issue about which state courts of last resort disagree. On one side of the divide are the highest courts of Ohio, Virginia, Georgia, and Texas, which have held that an *Atkins* claim can be waived. *State v. Frazier*, 873 N.E.2d 1263, 1291 (Ohio 2007); *Winston v.*

Commonwealth, 604 S.E.2d 21, 51 (Va. 2004); *Head v. Hill*, 587 S.E.2d 613, 618, 620 (Ga. 2003); *Ex parte Blue*, 230 S.W.3d 151, 153–59 (Tex. Crim. App. 2007). Prior to this matter, the Supreme Court of Kentucky *agreed* with these courts. *Bowling v. Commonwealth*, 163 S.W.3d 361, 371–72 (Ky. 2005), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). The highest courts of Pennsylvania and Georgia (Georgia is on both sides of the split of authority), by contrast, have held that an *Atkins* claim cannot be waived or cannot be waived under certain circumstances. *Commonwealth v. Robinson*, 82 A.3d 998, 1020 (Penn. 2013); *Rogers v. State*, 575 S.E.2d 879, 882 (Ga. 2003). This deep, established disagreement among the states' highest courts warrants plenary review by this Court.

STATEMENT OF THE CASE

In 2014, a jury convicted Larry Lamont White of the 1983 rape and murder of Pamela Armstrong. Pet. App. 16–17. Ms. Armstrong's body was found "in a public alley, with her pants and underwear pulled down around her legs and shirt pulled up to her bra line." *Id.* at 16. She had been shot twice in the head. *Id.* at 16–17.

From the outset, the police suspected that White was responsible, but Ms. Armstrong's murder remained unsolved for more than 20 years, until a cold-case unit recovered DNA from the victim's underwear. *Id.* at 17, 37–38. The police then secured White's DNA from a cigar that he left on the back of a car during a lawful traffic stop. *Id.* at 31–33, 43. White's DNA matched the

DNA recovered from Ms. Armstrong's underwear "with certainty—one in 160 trillion people." *Id.* at 43.

In 2007, a grand jury indicted White for Ms. Armstrong's rape and murder. *Id.* at 17. During the ensuing trial, the Commonwealth introduced, among other things, the DNA evidence connecting White to Ms. Armstrong and evidence of two other murders that White committed within several weeks of Ms. Armstrong's murder.[1] *Id.* at 17, 19. These two other murders bore remarkable similarities to Ms. Armstrong's murder—namely, the race and age of the victims, the date and location of the murders, and the mode of execution. *Id.* at 23–24.

White played an active role during the guilt phase of his trial. As the Supreme Court of Kentucky recounted, White "often advocated for himself through numerous pro se motions. One such motion was written so persuasively that defense counsel specifically asked the trial court to rule on its merits." *Id.* at 61. White, the court further observed, "was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced." *Id.* at 63.

White's counsel nevertheless argued to the trial court, albeit in an untimely fashion, that White suffered from an intellectual disability and asked for an evidentiary hearing on the issue. Pet. App. 99–101,

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[1] A jury found White guilty of these other murders and he was sentenced to death. That judgment, however, was later vacated, *White v. Commonwealth*, 725 S.W.2d 597, 598 (Ky. 1987), after which White pleaded guilty to the two murders in exchange for a term-of-years sentence, Pet. App. 19.

103–06. White's counsel primarily pointed to an IQ score of 76 from a test administered in 1971. *Id.* at 100, 105. The trial judge denied the motion. Pet. App. 82–83, 85.

The jury convicted White of Ms. Armstrong's rape and murder. Pet. App. 17. The jury subsequently recommended a death sentence for Ms. Armstrong's murder plus 20 years' imprisonment for her rape. *Id.* The trial judge imposed those sentences. *Id.*

On direct appeal, the Supreme Court of Kentucky unanimously affirmed. *Id.* at 67. Relevant here, the court rejected the argument that White was entitled to an evidentiary hearing to determine whether he suffered from an intellectual disability. *Id.* at 58–61. The court did so based largely on this Court's decision in *Hall v. Florida*, 572 U.S. 701 (2014). Applying *Hall*, the court reasoned that, accounting for the standard error of measurement in an IQ score, White's IQ score of 76 "is higher than the 70-point minimum threshold." Pet. App. 59–60. In the alternative, the court concluded that even if it "was obliged to . . . place less weight on [White's] IQ score, there is ample evidence of [White's] mental acumen." *Id.* at 61.

White's counsel sought a writ of certiorari. This Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017). Pet. App. 15. Justices Alito, Thomas, and Gorsuch dissented because "*Moore* was handed down on March 28, 2017—almost five months before the Supreme Court of Kentucky reached a decision in this case." *Id.*

On remand to the Supreme Court of Kentucky, the Commonwealth and White's attorneys filed briefs addressing the effect of *Moore*. Shortly thereafter, White, acting *pro se*, wrote to the then-Attorney General of Kentucky. Pet. App. 107–08. White expressed surprise that his attorneys were arguing that he has an intellectual disability: "I was never apprised of existent litigation and had not until here lately received any copies of this litigation about me being retarded, this news was very astonishing to me." *Id.* at 107. White also expressed agreement with the Commonwealth's position that he is not intellectually disabled. *Id.* at 108.

In his letter, White emphasized that his objective is to "prove my innocence." *Id.* Or, "all I want is a fair opportunity for post-conviction 11.42,[2] but my lawyers cannot start because of this 'retarded foolishness.'" *Id.* at _. Thus, White correctly understood the nuance that he could not meaningfully pursue post-conviction relief until the Supreme Court of Kentucky resolved his direct appeal. *See* Ky. R. Crim. P. 11.42(10); *Palmer v. Commonwealth*, 3 S.W.3d 763, 764 (Ky. App. 1999); *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983).

White did not stop there. He also filed several *pro se* motions in this matter. In a July 1, 2019 filing, White wrote:

> [T]he appellant asks this Court to take the words of mine and not allow this intellectual

[2] State post-conviction proceedings can be filed under Kentucky Rule of Criminal Procedure 11.42.

> disability issue to stand. I am asking this Court to dismiss the issue because it was argued without my approval and the law states that these attorney's [sic] are my assistance therefore they were obligated to inform appellant of their plan to cross me out.

Pet. App. 111. White therefore made clear that he did not wish to pursue an *Atkins* claim, but instead "to proceed with . . . my post-conviction team." *Id.* at 109.

In another *pro se* filing, White similarly emphasized:

> I am innocent of these charges and don't understand where this intellectual disable [sic] "foolishness" come[s] from, they are trying or have toss[ed] my real issues aside, instead of representing me like they do their white clients.

Pet. App. 113. White again underscored that he wanted to "move on to prove my innocence." *Id.* at 114. In another *pro se* filing, White referred to his *Atkins* claim as "intellectual disability foolishness" and requested that the court deny "anything" filed by his attorneys "relating [to] intellectual disability." Pet. App. 116–17; *see also* Pet. App. 119–20.

Based upon White's *pro se* filings, the Commonwealth argued that White had waived his *Atkins* claim. After ordering supplemental briefing, in which White's attorneys disagreed with their client, the Supreme Court of Kentucky concluded that, as a legal matter, White cannot waive his *Atkins* claim. *Atkins* and its progeny, the court reasoned, "placed an absolute bar against imposing the death penalty on the

intellectually disabled." Pet. App. 5. In particular, the court relied on *Moore*'s statement that "the Constitution 'restricts the State's power to take the life of' *any* intellectually disabled individual." *Id.* at 5–6 (cleaned up) (quoting *Moore*, 137 S. Ct. at 1048). The court explained: "We take the *Moore* court's emphasis on 'any' to include any individual who has not yet been determined to have an intellectual disability, but who is entitled to an evidentiary hearing by showing 'some evidence creating a [reasonable] doubt as to whether he is [intellectually disabled].'" *Id.* at 6 (citation omitted).

The court below thus concluded that "when a punishment is prohibited by the Eighth Amendment blocking an entire category of individuals from a certain penalty, and evidence has been established creating a reasonable doubt as to whether a defendant is a member of that category, the issue cannot be waived." *Id.* A contrary rule, in the court's view, "would impose the death penalty on a potentially intellectually disabled defendant—something the Commonwealth is without power to do." *Id.* at 6–7. The court reached this conclusion despite recognizing that White wants to "waive his intellectual disability claim, so he can move forward with post-conviction proceedings." *Id.* at 2.

With the waiver issue decided, the court remanded for an evidentiary hearing to determine whether White suffers from an intellectual disability. The court reasoned that "[a]t the very least—combined with [White's] low-end IQ scores achieved while still a minor—White's potential adaptive deficits and the lack of any substantial contact with the outside world during adulthood warrant further consideration in the

form of an evidentiary hearing at the trial court level." *Id.* at 10. The court, however, emphasized that White "still bears the burden of proving intellectual disability by a preponderance of the evidence." *Id.* at 11 (citation omitted). The court also noted that, on remand, White could request a hearing "regarding his competency to self-represent." *Id.*

This petition for a writ of certiorari follows.

REASONS TO GRANT THE PETITION

The Court should grant certiorari. The Supreme Court of Kentucky's decision is not only wrong, but it also deepens an established split of authority among state courts of last resort. This matter is an ideal vehicle for addressing whether and under what circumstances a capital defendant can waive a claim of intellectual disability.

I. The lower court's decision is wrong.

The Supreme Court of Kentucky held that a defendant is powerless to waive his *Atkins* right if he is entitled to an evidentiary hearing in which he must prove an intellectual disability. But surely a defendant can waive a constitutional right that provides him no protection absent the presentation of sufficient supporting evidence. The lower court's holding also overlooks the presumption, affirmed time and again by this Court, that constitutional rights can in fact be waived. Although the court below believed that *Atkins* and its progeny dictate its anti-waiver rule, those cases do no such thing. On the contrary, it necessarily follows from *Hall* that a capital defendant can waive a claim of intellectual disability.

1. Legal rights, even constitutional ones, are presumptively waivable. *United States v. Mezzanatto*, 513 U.S. 196, 200–01 (1995). This is true not just in the civil context, but in the criminal one as well. "The most basic rights of criminal defendants are . . . subject to waiver." *Peretz v. United States*, 501 U.S. 923, 936 (1991). Thus, "the Constitution affords no protection to a defendant who waives [his or her] fundamental rights." *Id.* at 937. This notion is not new. Almost 80 years ago, this Court emphasized that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in the criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). This, the Court acknowledged, may lead to a circumstance where a court "refuse[s] to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken." *Id.* The Court nevertheless presumes that constitutional rights can be waived. *See New York v. Hill*, 528 U.S. 110, 114 (2000) (stating the "general rule that presumes the availability of waiver").

Under this rule of presumptive waivability, the Court has allowed criminal defendants to waive all manner of constitutional rights. A criminal defendant can waive the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938). So too the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969). The same goes for the right to be tried in the state and district where

the defendant allegedly committed the crime, *Singer v. United States*, 380 U.S. 24, 35 (1965), the right to a public trial, *id.*, the right to a speedy trial, *Barker v. Wingo*, 407 U.S. 514, 529 (1972), and the protection against double jeopardy, *Ricketts v. Adamson*, 483 U.S. 1, 10–11 (1987). Fourth Amendment rights likewise can be waived. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (warrant and probable cause).

Eighth Amendment rights, even in the death-penalty context, also are subject to the general rule of presumptive waivability. In *Stewart v. LaGrand*, 526 U.S. 115 (1999) (per curiam), a death-row inmate chose to be executed by lethal gas, rather than by lethal injection—the state's default method of execution. *Id.* at 119. The state sought to execute the inmate by lethal gas, but the Ninth Circuit enjoined the state from using that method of execution. *Id.* at 118. The court reasoned that the defendant's choice of lethal gas did not waive his claim that this method of execution violates the Eighth Amendment. This was so, the Ninth Circuit found, because "Eighth Amendment protections may not be waived, at least in the area of capital punishment." *See LaGrand v. Stewart*, 173 F.3d 1144, 1148 (9th Cir. 1999); *see Stewart*, 526 U.S. at 118 (noting the Ninth Circuit found that this "reasoning remained sound").

This Court, however, disagreed. It found that the inmate, "by his actions, *has waived* his claim that execution by lethal gas is unconstitutional."[3] *Id.* at 119 (emphasis added). The Court continued: "By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—[the defendant] has waived any objection he might have to it." *Id.* For this proposition, the Court cited its decision in *Johnson*, which, as discussed above, recognizes that a defendant can waive his Sixth Amendment right to counsel. *Johnson*, 304 U.S. at 464. By analogizing the defendant's waiver to *Johnson*, *Stewart* determined that the waiver of constitutional rights is viewed no differently in the Eighth Amendment context. *See Stewart*, 526 U.S. at 119. In this context as well, constitutional rights are presumptively waivable.

The court below did not grapple with the presumption that constitutional rights can be waived. Instead, the court viewed *Atkins* and its progeny as compelling its holding. But *Atkins* did not establish specific procedures to implement the constitutional right it recognized. To the contrary, *Atkins* expressly disclaimed doing so. It left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399 (1986)). Or, as this Court more recently put it, *Atkins* "did not

[3] Justices Souter, Ginsburg, and Breyer joined this holding "on the understanding that petitioner makes no claim that death by lethal injection would be cruel and unusual under the Eighth Amendment." *Stewart*, 526 U.S. at 120–21 (Souter, J., concurring in part and concurring in the judgment).

provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within [*Atkins*' compass].'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317).

2. Yet, the court below read *Atkins* and its progeny to do exactly that—to constitutionalize the procedure for determining whether a defendant has an intellectual disability. For this proposition, the court mostly relied on a single sentence from *Moore v. Texas*, 137 S. Ct. 1039 (2017), to the effect that *Atkins* "'restricts the State's power to take the life of' *any* intellectually disabled individual." *Id.* at 1048 (cleaned up) (quoting *Atkins*, 536 U.S. at 321). This portion of *Moore* merely summarized *Atkins*' holding. To the court below, however, *Moore*'s emphasis of the word "any" was key. That emphasis, the court found, means that *Atkins* extends to "any individual who has not yet been determined to have an intellectual disability, but who is entitled to an evidentiary hearing . . . ." Pet. App. 5–6. In the court's view, the Commonwealth is "without power" to execute such an individual. *Id.* at 6–7.

This conclusion reads far too much into the italicized term "any." And it plucks that term from the context in which *Moore* arose. *Moore* did not concern whether an inmate claiming an intellectual disability is entitled to an evidentiary hearing. *See Brumfield v. Cain*, 576 U.S. 305, 344 (2015) (Thomas, J., dissenting) (*Atkins* "did not so much as mention an evidentiary hearing, let alone hold that prisoners raising *Atkins* claims are entitled to one."). Instead, *Moore* primarily dealt with a state court's failure to follow the

instruction from *Hall v. Florida*, 134 S. Ct. 1986 (2014), that "adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Moore*, 137 S. Ct. at 1044 (citation omitted). In summary, not one word of *Moore* dealt—directly or even indirectly—with whether the Constitution prohibits executing an inmate if he or she is entitled to, but does not desire, an evidentiary hearing on an *Atkins* claim. Viewed in context, the italicized term from *Moore* is much too thin a reed to bear the enormous weight that the lower court placed upon it.

This is all the more true in light of this Court's decision in *Hall*—another case that the court below mentioned in fashioning its anti-waiver rule. Pet. App. 5. *Hall* invalidated Florida's "rigid rule" under which an inmate with an IQ score above 70 could not be found intellectually disabled. *Hall*, 572 U.S. at 704. Important for present purposes, *Hall* concluded that a defendant must prove the existence of an intellectual disability. *Id.* at 724 ("[T]he law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime."). More to the point, under *Hall*, "[p]ersons facing that most severe sanction [of death] must have *a fair opportunity to show* that the Constitution prohibits their execution." *Id.* (emphasis added).

This passage can only mean that *Atkins* does not bar the execution of a defendant who fails to prove an intellectual disability. Indeed, the court below plainly held that although White does not want an evidentiary hearing, he still bears the burden of proving an

intellectual disability during that hearing. Pet. App. 11 ("It is important to note that even after receiving an evidentiary hearing the defendant still bears the burden of proving intellectual disability by a preponderance of the evidence." (brackets and citation omitted)). It follows that a person who decides not to offer evidence of an intellectual disability—*i.e.*, the person waives that right—likewise can be executed consistent with *Atkins*.

Or, consider the issue this way: According to Kentucky's highest court, White cannot waive his right to pursue an *Atkins* claim, but he presumably can decide to offer no evidence at an evidentiary hearing or, at a minimum, not to cooperate with his counsel at that hearing.[4] In fact, the court below recognized that White may well be entitled to represent himself during an evidentiary hearing. Pet. App. 11. The reasoning of the court below, taken to its logical end, therefore means that the Commonwealth is powerless to execute someone who wants to waive his *Atkins* claim, but is free to execute someone who altogether refuses to offer evidence of such a claim at an evidentiary hearing. *See White v. Commonwealth*, 500 S.W.3d 208, 212, 215 (Ky. 2016) (holding that such an inmate acts "to his great

[4] The Supreme Court of Kentucky did not decide who—lawyer or client—gets to decide whether to pursue an *Atkins* claim. Pet. App. 5. But this decision plainly belongs to White in the circumstances presented here. As White repeatedly explained in his *pro se* filings, he desires to prove his innocence in post-conviction proceedings. Pet. App. 108, 109, 114. That is, White's objective is not simply to get off death row (*i.e.*, by being found intellectually disabled), but to walk out of prison a free man. Establishing the objectives of the legal representation belongs to White, not to his attorneys. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1508–09 (2018).

risk of not being spared"), *abrogated on other grounds by Woodall v. Commonwealth*, 536 S.W.3d 1 (Ky. 2018). The Supreme Court of Kentucky offered no explanation for why one should be treated differently from the other, and no such justification exists.

Taking *Hall* at its word, *Atkins* entitles defendants to "a fair opportunity to show that the Constitution prohibits their execution." *Hall*, 572 U.S. at 724. *Atkins* does not give constitutional protection to a defendant who, like White, has no desire to take advantage of that "fair opportunity." Stated differently, a "fair opportunity" does not mean a *forced* opportunity.

II. There is a split of authority about whether an *Atkins* claim can be waived.

The Supreme Court of Kentucky deepened an existing split of authority about whether an *Atkins* claim can be waived. Contrary to the holding here, the highest courts of Ohio, Virginia, Georgia, and Texas have held that an inmate can waive an *Atkins* claim. Those courts so held without regard to whether the defendant otherwise was entitled to an evidentiary hearing. In addition, prior to this case, the Supreme Court of Kentucky actually agreed with these sister courts on this point. Other courts, however, disagree. Two state courts of last resort have found that an *Atkins* claim cannot be waived or cannot be waived in certain circumstances. The Court should grant certiorari to resolve this split of authority. *See* S. Ct. R. 10(b).

1. The Supreme Court of Ohio has plainly held that a defendant can waive an *Atkins* claim. In *State v.*

Frazier, 873 N.E.2d 1263 (Ohio 2007), the defendant filed a pre-trial motion seeking an intellectual-disability determination. *Id.* at 1290. The inmate received IQ scores of 72 and 75. However, rather than pursue an *Atkins* claim, "trial counsel withdrew the claim"—a decision to which the defendant acceded. *Id.* at 1290, 1292. In his direct appeal, the defendant re-asserted his *Atkins* claim. *Id.* at 1277, 1290. The state responded by arguing that the defendant had "waived this claim because the defense counsel withdrew its *Atkins* motion at trial." *Id.* at 1291.

Ohio's highest court recognized that this was a question of first impression, but acknowledged the general rule (discussed above) that "a constitutional right can be waived in criminal cases by the failure to make timely assertion of it." *Id.* (citing *Peretz*, 501 U.S. at 936–37). The court also surveyed how other courts have decided this question, summarizing that "other jurisdictions have held that the failure to raise an *Atkins* claim results in waiver." *Id.* (collecting cases). Based upon this analysis, the court held that a defendant can waive an *Atkins* claim. *Id.* ("Absent plain error, [the defendant] has waived his *Atkins* claim."). Other courts have recognized *Frazier*'s holding. *State v. Jackson*, 23 N.E.3d 1023, 1041 (Ohio 2014) (reiterating that an inmate "would have waived his *Atkins* claim if he had not raised it at trial"); *Frazier v. Jenkins*, 770 F.3d 485, 496 (6th Cir. 2014) (reading *Frazier* as holding that a defendant can "forfeit his rights under *Atkins*").

Virginia's highest court likewise has held that an *Atkins* claim can be waived. In *Winston v.*

Commonwealth, 604 S.E.2d 21 (Va. 2004), the defendant argued that an offender's lack of an intellectual disability must be proved by the state. In rejecting this argument, the court recognized that *Atkins* "expressly left 'to the states the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.'" *Id.* at 50 (quoting *Atkins*, 536 U.S. at 317). The court held that the presence of an intellectual disability is "an affirmative defense to the imposition of the death penalty" and that "the burden of such proof is on the defendant." *Id.*

Although it resolved these issues, the court declined to reach the defendant's additional *Atkins* arguments. *Id*. at 51. These issues were "waived," the court held, because the defendant "deliberately declined to raise such a claim of mental retardation under the statutory provisions that apply to him and his trial." *Id.* That is to say, because the inmate never argued to the trial court that he suffered from an intellectual disability, he waived his further arguments on this issue. *See id.*

The Supreme Court of Georgia reached an analogous conclusion in *Head v. Hill*, 587 S.E.2d 613 (Ga. 2003).[5] The court explained that, under Georgia law, capital defendants tried after a certain date "are entitled to present evidence of retardation to the jury at the guilt/innocence phase of their trials and, if found beyond a reasonable doubt to be retarded, to avoid a death sentence." *Id.* at 618. However, the defendant in *Head* did not follow this procedure. Although he

[5] As discussed below, another decision by the Supreme Court of Georgia takes a somewhat different view.

"presented evidence of his intellectual slowness" at trial, the defense's expert "testified that [the defendant] had an intelligence quotient of 77 and was not mentally retarded." *Id.* In addition, the defendant "did not request that the jury be charged on a 'guilty but mentally retarded' verdict." *Id.*

The court concluded that this qualified as a waiver of the defendant's *Atkins* claim. "Because [the defendant] did not seek a jury determination of his alleged mental retardation at trial, that issue is procedurally defaulted." *Id.* The court went on to emphasize that the defendant had the "right" to have the jury decide at his original trial whether he was intellectually disabled, but he "waived it." *Id.* at 620.

Texas's highest criminal court has reached a similar conclusion. In *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), a defendant filed a successive habeas petition claiming that he was intellectually disabled—an issue he had failed to raise in his initial petition. *Id.* at 153. In arguing that his successive petition was proper, the defendant claimed that "because the Eighth Amendment prohibition against executing the mentally retarded is absolute, [the court] should suspend all notions of waiver, forfeiture, procedural default, and abuse of the writ . . . ." *Id.* The court disagreed: "[H]aving afforded the applicant one opportunity to raise his *Atkins* claim in a post-conviction setting, the Texas Legislature may legitimately limit any second chance it may afford him to raise it again, notwithstanding the absolute nature of the prohibition against executing the mentally retarded." *Id.* at 154.

In so holding, the court rejected the defendant's argument that a state violates the Constitution simply because "it might deny a particular applicant review of an allegation of facts that, if true, might impose a fundamental bar to execution." *See id.* at 156. The court similarly "reject[ed] any assertion that, because the Eighth Amendment erects an absolute bar to executing the mentally retarded, an applicant must be permitted to proceed with his subsequent writ application upon no more than a bare allegation of mental retardation . . . ."[6] *Id.* at 159; *see also Ex Parte Ramirez*, Nos. WR-71,401-01, WR-71,401-02, 2015 WL 6282336, at *1–*2 (Tex. Crim. App. Oct. 14, 2015) (Alcala, J., concurring) ("[I]t appears to me that applicant abandoned all of his intellectual-disability claims in his initial and subsequent writs.").

Consequently, the highest courts of Ohio, Virginia, Georgia, and Texas have held that an *Atkins* claim can be waived. These courts reached this conclusion without regard to whether a defendant is otherwise entitled to an evidentiary hearing.

2. Although the Supreme Court of Kentucky now disagrees with these sister courts, it was not always so. In *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005), *abrogated on other grounds by Woodall v.*

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[6] Although this quote from *Blue* refers to a defendant who offers only a "bare allegation of mental retardation," *Blue*, 230 S.W.3d at 159, earlier in the opinion, the court made clear that the amount of evidence does not make a constitutional difference, *id.* at 154 ("[T]he Texas Legislature may legitimately limit *any second chance* it may afford him to raise [an *Atkins* claim] again, notwithstanding the absolute nature of the prohibition against executing the mentally retarded." (emphasis added)).

Commonwealth, 563 S.W.3d 1 (Ky. 2018), a death-row inmate filed a civil action seeking to invalidate his sentence under *Atkins*. *Id.* at 364. The trial court dismissed this action on the basis that, as relevant here, the inmate "had not timely asserted his mental retardation claim." *Id.* at 365. Kentucky's highest court affirmed. It started with the proposition that "[e]ven a constitutional right can be waived by failure to timely assert it." *Id.* at 371. The court also recognized that under *Coleman v. Thompson*, 501 U.S. 722 (1991), there is "[n]o procedural principle [that] is more familiar" than that a criminal defendant can forfeit a constitutional right. *See Bowling*, 163 S.W.3d at 371 (citation omitted).

Against this backdrop, the *Bowling* court determined that the defendant had waived his *Atkins* claim. The court summarized that "[t]he Commonwealth did not prevent [the defendant] from presenting his mental retardation claim; he simply did not assert it at his trial or in his [post-conviction] motion." *Id.* Because the defendant "chose not to assert the claim at trial," he "waived it." *Id.* at 372. In reaching this conclusion, *Bowling* cited the Supreme Court of Virginia's decision in *Winston* as well as the Supreme Court of Georgia's decision in *Head*. *Id.*

This case, then, not only presents a clear split of authority about whether an *Atkins* claim can be waived, but it also involves dueling opinions from the Supreme Court of Kentucky on this issue. Notably, although the decision under review cited *Bowling*, the court did not cite it while deciding whether an *Atkins* claim can be waived. Pet. App. 8–9.

3. In concluding that White cannot waive his *Atkins* claim, the Supreme Court of Kentucky did not identify any other court that agreed with its holding. *Id.* at 5–7. But it could have cited two cases to that effect, one from Pennsylvania and the other from Georgia. Thus, the decision under review deepened an already-existing split of authority.

Consider first *Commonwealth v. Robinson*, 82 A.3d 998 (Pa. 2013), where the Supreme Court of Pennsylvania explained that it had "broadly stated that questions relating to the legality of sentencing are not waivable." *Id.* at 1020 (citing *Commonwealth v. Aponte*, 855 A.2d 800, 802 n.1 (Pa. 2004)). The court extended this reasoning to *Atkins* claims, reasoning that *Atkins* "places a substantive restriction on the State's power to take the life of a mentally retarded offender, leaving little doubt that actual *Atkins* claims implicate the legality of sentencing." *Id.* (cleaned up) (quoting *Atkins*, 536 U.S. at 321).

The second case stating that *Atkins* claims cannot be waived, at least under certain circumstances, is *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003). There, the Supreme Court of Georgia considered an intellectual-disability claim brought by an inmate who was sentenced to death before *Atkins* and before Georgia adopted a statute prohibiting the execution of an intellectually disabled person. Following the procedure set by Georgia's courts for an offender in this circumstance, the defendant requested a jury trial on the issue of intellectual disability. *Id.* at 880. At the hearing to determine whether to order a jury trial, the defendant "presented evidence of mental retardation,

including affidavits of mental health experts who diagnosed him as mentally retarded and suffering from significant neurological impairment." *Id.* at 880–81. On the basis of this evidence, the trial court found a "genuine issue of fact" and ordered a jury trial on the issue. *Id.* at 881.

The defendant then had his first of three changes of heart. Shortly before the jury trial, he asked the judge to dismiss his intellectual-disability claim, to which the court acceded. *Id.* The defendant, however, changed his mind again. And then he changed it still again, ultimately telling the trial court that "I do not want the mental retardation trial and I would like it dismissed." *Id.* The trial court again granted this request. *Id.*

On appeal, the Supreme Court of Georgia reversed. It reasoned that "[o]nce a petitioner carries his burden of proof in the habeas corpus court of creating a genuine issue regarding his mental retardation, the issue must be thoroughly reviewed and passed upon. At such point in the proceedings, the issue is no longer subject to waiver by a petitioner." *Id.* at 882 (internal citation omitted). Thus, Georgia's highest court concluded that a defendant who initiates the process for determining whether he has an intellectual disability cannot pretermit that process once he has convinced a trial court that he is entitled to a jury trial on the issue. *See id.*

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In sum: Three state courts of last resort have held that an *Atkins* claim can be waived (*Frazier*, *Winston*, and *Blue*). One state high court disagrees (*Robinson*). And two state courts of last resort are on both sides of

this split of authority (Kentucky in this case and *Bowling*, and Georgia in *Head* and *Rogers*). This Court should grant certiorari to resolve this issue once and for all.

III. This case raises an important and recurring issue and is an ideal vehicle for deciding it.

Whether and under what circumstances a capital defendant can waive an *Atkins* claim warrants this Court's plenary review.

This legal issue is a recurring one. Since the Court decided *Atkins* in 2002, six state courts of last resort have passed on the question presented. The issue has arisen in direct appeals (as here and in *Frazier* and *Winston*) and in state post-conviction proceedings (in *Blue*, *Robinson*, *Head*, *Rogers*, and *Bowling*). In short, this is not an instance where the question presented needs to percolate further. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) ("We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional [courts]."). Rather, the states' highest courts have exhaustively reviewed the question presented in different procedural contexts over nearly two decades.

The question presented also is an important one. It cannot be disputed that the decision below invites delay, maybe much more delay, in death-penalty appeals. *See Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring) ("[T]he delay in carrying out the prisoner's execution stems from this

Court's Byzantine death penalty jurisprudence."). The decision under review remands for an evidentiary hearing that White does not want and in which he will not participate. Whether the Constitution forces this delay not just on the Commonwealth, but also on White, warrants this Court's attention. For the Commonwealth, the delay undercuts its sovereign ability to impose White's sentence in a timely manner. And for the 62-year-old White, he must delay any meaningful pursuit of his objective in post-conviction proceedings.

This case also is important because it arises in the context of a capital defendant who desires to waive a right protected by the Eighth Amendment. Although *Stewart* demonstrates that Eighth Amendment rights are presumptively waivable, several justices have voiced concerns about this issue. In his *Stewart* dissent, for example, Justice Stevens viewed this as an "important question" that should be decided with "full briefing and argument." *See Stewart*, 526 U.S. at 121 (Stevens, J., dissenting); *see also Whitmore v. Arkansas*, 495 U.S. 149, 175 (1990) (Marshall, J., dissenting); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting); *Lenhard v. Wolff*, 444 U.S. 807, 810–12 (1979) (Marshall, J., dissenting). This case will allow the Court to build on *Stewart* and to provide further clarity on this important issue.

In addition, there can be no doubt that this case squarely raises the question presented. The Supreme Court of Kentucky unequivocally decided the issue after receiving supplemental briefing on it. Nor is this an issue that matters little to this case. White's

insistence on waiving his *Atkins* rights, as shown by his *pro se* filings, underscores the centrality of the question presented to this case. White desires to get moving on post-conviction proceedings so that he can try to demonstrate his innocence. Pet. App. 108, 109, 114. This is White's prerogative alone. *See McCoy*, 138 S. Ct. at 1508 ("Autonomy to decide that the objective of the defense is to assert innocence" belongs to a criminal defendant.). Due entirely to the Supreme Court of Kentucky's holding, White is stuck litigating an issue on which he agrees with the Commonwealth and that keeps him from pursuing his objective.

One final point. The Supreme Court of Kentucky's remand of this matter for an evidentiary hearing does not affect this Court's jurisdiction. The applicable jurisdictional statute, it is true, speaks in terms of reviewing "[f]inal judgments," 28 U.S.C. § 1257(a), but a "pragmatic approach" governs in determining finality, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 486 (1975). The Supreme Court of Kentucky's decision is "plainly final" on the waiver issue and "is not subject to further review in the state courts." *See id.* at 485. If the Commonwealth ultimately prevails during the evidentiary hearing (for example, on the basis that White introduced too little evidence), that will mean that an important constitutional question on which state courts of last resort are divided will be "le[ft] unanswered." *See id.* at 486 (citation omitted). If, however, the Commonwealth prevails on the waiver issue in this Court, "this litigation ends." *See id.* at 485–86 ("[I]f the [state] court erroneously upheld the statute, there should be no trial at all.").

In addition, finding no jurisdiction at this stage will "seriously erode federal policy." *See id.* at 483. White raped and murdered Ms. Armstrong nearly 40 years ago, yet Kentucky's highest court remanded this case for an evidentiary hearing that White does not desire and during which he may well represent himself. Pet. App. 11, 108, 109, 117. The end result will be more delay. Even if the Commonwealth can seek certiorari on the waiver issue after the trial court's ruling on the evidentiary hearing and after the inevitable appeal to the Supreme Court of Kentucky, that will, in all likelihood, be *years* from now. To permit the Supreme Court of Kentucky's waiver holding to go un-reviewed until that late date will add to the "proliferation of labyrinthine restrictions on capital punishment." *See Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring). "Courts should police carefully against attempts to use [death-penalty litigation] as tools to interpose unjustified delay." *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). This is because "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *See id.* at 1133 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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