No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2019

Richard Bays,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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CAPITAL CASE

QUESTIONS PRESENTED

Because his trial took place before this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Petitioner Richard Bays has never had a court fully consider his strong claim that he is categorically exempt from the death penalty due to intellectual disability. The federal courts, which should have reviewed this claim, instead denied him leave to amend and denied certificates of appealability (COAs) related to this issue.

The questions presented are:

1. Is it at least debatable whether Petitioner was improperly denied the right to amend his federal habeas corpus petition to include a claim that he is intellectually disabled, where, exactly as in *Moore v. Texas*, 586 U.S. ___ (2019) (*Moore II*), he has IQ test scores below 75, proof of adaptive deficits, and proof of onset of his disability before age eighteen?
2. Is it at least debatable whether a death-sentenced petitioner, on the basis of purported "delay," may be denied leave to amend his federal habeas petition with an intellectual-disability claim, when he moved to amend his petition *before* this Court even issued *Moore II* and the retroactive decisions in *Moore v. Texas*, 581 U.S. ___ (2017) (*Moore I*), and *Hall v. Florida*, 572 U.S. 701 (2014)?
3. Is it at least debatable whether a petitioner who is actually innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992), is entitled to an equitable exemption from the statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA)?

4. Is it at least debatable whether Petitioner, who was sentenced to death before *Atkins*, has a right to the effective assistance of counsel in litigating a post-conviction claim of intellectual disability—as has been held by the United States Court of Appeals for the Tenth Circuit in *Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012), and a dissenting judge in Petitioner's own case—particularly when defendants in his jurisdiction who have been sentenced to death after *Atkins do* have a right to raise their counsel's ineffective assistance in litigating an intellectual-disability claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Bays respectfully requests that the Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the Sixth Circuit denying Bays's motion to expand the certificate of appealability is unpublished and is reproduced as Appendix A. The order of the Sixth Circuit denying Bays's petition for rehearing and rehearing *en banc* with respect to his motion to expand the certificate of appealability is unpublished and is reproduced as Appendix H. The order of the Sixth Circuit denying Bays's renewed motion to expand the certificate of appealability is unpublished and is reproduced as Appendix B.

The decision of the district court denying Bays's motion to amend his petition to include an intellectual-disability claim and a claim raising his counsel's ineffectiveness in litigating his intellectual disability, and the report and recommendation of the Magistrate Judge recommending the same, are unpublished and jointly available at *Bays v. Warden*, No. 3:08-cv-076, 2014 WL 29564 (S.D. Ohio Jan. 3, 2014), and are reproduced as Appendix C and D. The earlier decision and order of the Magistrate Judge denying Bays's motion to amend is unpublished and available at *Bays v. Warden*, No. 3:08-cv-076 (S.D. Ohio Aug. 22, 2013 (R. 160), and reproduced as Appendix E. The order of the district court denying Bays COAs on these claims is unpublished and available at *Bays v. Warden*, No. 3:08-cv-76, 2017 WL 6731493 (S.D. Ohio Dec. 29, 2017), and is reproduced as Appendix F. The supplemental substituted report and recommendation of the Magistrate Judge recommending the same is unpublished and available at *Bays v. Warden*, No. 3:08-cv-076, 2017 WL 6035231 (S.D. Ohio Dec. 6, 2017), and is reproduced as Appendix G.

The opinion of the Ohio Court of Appeals remanding Bays's case for further proceedings relating to his allegations of intellectual disability is unpublished and available at *State v. Bays*, No. 2014-CA-24, 2015 WL 2452324 (Ohio Ct. App. May 15, 2015), and is reproduced as Appendix I.

The opinion of the Sixth Circuit affirming Bays's convictions and death sentence is unpublished and available at *Bays v. Warden*, 807 F. App'x 481 (6th Cir. 2020), and is reproduced as Appendix J. The opinion of the district court denying a portion of Bays's habeas claims is unpublished and available at *Bays v. Warden*, No. 3:08–cv–076, 2012 WL 3224107 (S.D. Ohio. Aug. 6, 2012), and is reproduced as Appendix K. The report and recommendation of the Magistrate Judge recommending the same is unpublished and available at *Bays v. Warden*, No. 3:08–cv–076, 2012 WL 553092 (S.D Ohio Feb. 21, 2012), and is reproduced as Appendix L.

The opinion of the Ohio Supreme Court affirming Bays's convictions and death sentence on direct review is published as *State v. Bays*, 716 N.E.2d 1126 (Ohio 1999), and is reproduced as Appendix M.

JURISDICTIONAL STATEMENT

In this petition, Bays seeks review of the lower courts' interlocutory orders denying his requests to expand his COA. Following those denials, the United States Court of Appeals for the Sixth Circuit affirmed the denial of Bays's habeas corpus petition on March 30, 2020. The time for filing Bays's petition for certiorari was extended by 60 days by this Court's general order of March 19, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States provides:

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

Section One of the Fourteenth Amendment to the United States Constitution provides:

> 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.

Section 2241 of Title 28 of the United States Code provides, in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Section 2244(d) of Title 28 of the United States Code provides, in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2253 of Title 28 of the United States Code provides:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to

> review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
>
> (c)
>
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a Statecourt; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Section 2254 of Title 28 of the United States Code provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Rick Bays was convicted of aggravated murder in 1995 and sentenced to death by a three-judge panel in Greene County, Ohio. *State v. Bays*, No. 95-CA-118, 1998 WL 32595 (Ohio Ct. App. Jan. 30, 1998). Because this conviction happened prior to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), there was no substantive consideration of Bays's intellectual disability throughout his trial and direct appeal. His intellectual disability was treated

merely as a mitigation factor under Ohio Revised Code section 2929.04(B)(7), and a minor one at that. *See State v. Bays*, 716 N.E.2d 1126, 1145 (Ohio 1999) (citation omitted) ("Bays's below-average intelligence, caused by brain damage, is also a (B)(7) mitigating factor. . . . However, we assign it little weight.")

But even after this Court issued *Atkins*, Bays's state-court counsel who pursued his newly recognized intellectual-disability claim likewise assigned too little weight to the proper investigation and presentation of the claim. Counsel failed to undertake and complete an appropriate evaluation of Bays's adaptive functioning, despite its centrality as a criterion of any and every intellectual-disability claim. *Atkins*, 536 U.S. at 318.[1] Feeling prematurely defeated by state expert testimony that would not have withstood scrutiny and was entirely rebuttable, counsel chose to withdraw Bays's intellectual-disability claim.

That same counsel filed Bays's petition seeking habeas corpus relief under 28 U.S.C. § 2254 in the Southern District of Ohio following the conclusion of his state-court proceedings. She did not include an intellectual-disability claim in that petition. Eventually, counsel withdrew from representation for health reasons and ultimately succumbed to cancer. Once prior counsel had withdrawn, Bays's remaining counsel began to investigate his intellectual disability, as well

[1] Ohio applies the three criteria established in *Atkins*, first adopted by the state in *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002), to intellectual-disability claims. The Ohio Supreme Court recently reaffirmed this:

> For purposes of eligibility for the death penalty, a court determining whether a defendant is intellectually disabled must consider three core elements: (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—*i.e.*, a score of roughly 70 or lower when adjusted for the standard error of measurement), (2) significant adaptive deficits in any of the three adaptive-skill sets (conceptual, social, and practical), and (3) the onset of these deficits while the defendant was a minor.

State v. Ford, 140 N.E.3d 616, 655 (Ohio 2019).

as prior counsel's litigation of that issue. When federal counsel discovered prior counsel's mishandling of Bays's intellectual-disability claim, they moved to amend his habeas petition with both an intellectual-disability claim and a claim of ineffective assistance from prior counsel. The district court denied the motion to amend, and also denied a certificate of appealability ("COA") for those denials. (*See* Appx. C, D, E, F, and G.)

Bays requested that the Sixth Circuit Court of Appeals expand his COA to include these issues, but the panel denied that request. (Appx. A.) Bays sought rehearing, but the panel and the *en banc* Sixth Circuit denied that as well. (Appx. H.)

Bays also submitted an application to expand his COA to the Circuit Justice of this Court under 28 U.S.C. § 2253(c)(1), but that was also denied. *Bays v. Shoop*, U.S. No. 18A941 (Mar. 19, 2019) (Sotomayor, J.).

Meanwhile, after his COA requests had been denied and his merits brief filed in the Sixth Circuit, this Court issued decisions in *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*), and *Shoop v. Hill*, 139 S. Ct. 504, 508–09 (2019). Accordingly, Bays filed a renewed motion to expand his COA with the Sixth Circuit before his oral argument. That too, was denied. (Appx. B.)

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's refusal to expand Bays's COA is an affront to the orderly administration of justice in this capital case. He more than meets the COA standard—"a substantial showing of the denial of a constitutional right"—for both his intellectual-disability claim and his ineffective-assistance-of-counsel claim.

First, Bays 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). The district court's refusal to grant Bays an equitable exemption from the AEDPA statute of limitations under *Sawyer* was flawed, but since this Court subsequently decided *Moore I and II* and *Hill*, its analysis is moot. As Bays argued to the Sixth Circuit, his claims could not possibly be considered untimely now, when he raised them *before* the *Moore* and *Hill* decisions.

The district court also incorrectly held that Bays's ineffective-assistance-of-counsel claim was not cognizable; it reasoned that he had no right for his counsel to be effective in raising his intellectual-disability claim 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: all Ohio defendants prosecuted after *Atkins* raise such claims in the trial court, where the Sixth Amendment right to effective counsel unquestionably applies. But because he was convicted pre-*Atkins*, Bays followed the Ohio Supreme Court's instructions in raising his initial intellectual-disability claim in post-conviction proceedings. Bays deserves the same protections regarding his *Atkins* counsel as all Ohio capital defendants.

Regardless, no one need 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 the dissenting opinion of a judge in Bays's own state-court proceedings. These circumstances are the very definition of a debatable claim deserving of a COA.

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. 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 v. Cockrell*, 537 U.S. 332, 338 (2003).

If Bays's COA is not expanded, the State of Ohio may execute him even though his eligibility for the death penalty has been unexamined by the federal courts. The constitutional propriety of his death sentence is in grave doubt, but he has had no ability to press the most important of his issues in federal court. Allowing Bays's death sentence to stand under these circumstances would therefore be a serious miscarriage of justice.

Further, the lower courts' denials conflict with the relevant precedent of this Court, including *Buck v. Davis*, 137 S. Ct. 759 (2017), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Slack v. McDaniel*, 529 U.S. 473 (2000). Before Buck's case reached this Court, Judge Dennis, joined by Judge Graves, dissented from the Fifth Circuit's denial of Buck's petition for rehearing *en banc*, noting that the Court of Appeals' denial of his COA "flouted *Miller-El*'s clear command" for denying a COA. *Buck v. Stephens*, No. 14-70030, 630 F. App'x 251, 252 (5th Cir. 2015) (Dennis, J., dissenting). Despite this Court's repeated admonitions that "a petitioner satisfies the *Slack* standard 'by demonstrating 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*. (citing *Miller-El*, 537 U.S. at 327), habeas petitioners, including capital inmates like Bays, have no recourse other than a plea to this Court when the lower federal courts continue to flout the COA standard and prevent them from appealing their most meritorious claims.

The Sixth Circuit's decision denying Bays an expanded COA not only blatantly ignored this Court's clear commands concerning the COA standard, it also devoted so little attention to his arguments that it (twice) misperceived his intellectual-disability claim protesting his *eligibility* to be executed as a challenge to "his *competency* to be executed." (Order, Doc. 14-1, at 2, 4, Appx. A, pages A-2, 4.) Neither the word "*Atkins*" nor "intellectual disability" even appears in the Sixth Circuit's order denying his request to expand his COA. (*Id. et seq.*) 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. (Appx. H.) The Sixth Circuit's indifference to this discrepancy underscores its legal error in denying his request to appeal this claim.

These departures from precedent are intolerable, especially in a capital case. Bays should not be sent to the execution chamber without having the opportunity to appeal the claims that he made clear are the "heart of the problems" in his case. (Mot. to Expand the COA, Doc. No. 8, at 3.) Both of Bays's claims deserve encouragement to proceed further. Our justice 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*, 137 S. Ct. at 773. "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.* (internal quotation marks omitted). Indeed, a petitioner is not even 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 intellectual-disability 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

[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.)

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*, 529 U.S. at 484.

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 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 counsel rendered constitutionally ineffective assistance in litigating his intellectual-disability claim. 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 counsel explains the interruption caused by an erroneous voluntary dismissal in state court, and Bays acted diligently in fully developing evidence of intellectual disability upon discovering prior counsel's ineffectiveness during proceedings before the district court.

A. The denial of a certificate of appealability on Bays's intellectual-disability claim will result in a grave miscarriage of justice.

Bays can establish that he is intellectually disabled under *Atkins* and its progeny. These cases require 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,[3] 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*, 572 U.S. 701, 712 (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).[4]

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

[3] As James R. Flynn (after whom the Flynn Effect is named) stated: "Failure to adjust IQ scores in the light of IQ gains over time turns eligibility for execution into a lottery . . . ." James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 PSYCHOL., PUB. POL'Y, & L. 170, 174–75.

[4] As discussed below, *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*), *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), and *Shoop v. Hill*, 139 S. Ct. 504 (2019), were decided after the district court denied Bays leave to amend, but before the Sixth Circuit's COA denials.

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, 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 or checkbook, never 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. (Supp. Opinion and Supp. R&R, R. 169, PageID 7526–30, Appx. D, pages A-14–18; Decision and Order, R. 160, PageID 7433–41, Appx. E, pages A-28–36.) But the Sixth Circuit has recognized that 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 acknowledged 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* Decision and Order, R. 160, PageID 7441–42, Appx. E, page A-36–37.)

Bays has never fully litigated his intellectual-disability 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 Bay's claim of intellectual disability is inconsistent with this Court's recent decisions in *Moore II* and *Hill.*

In *Moore II*, this Court held that Moore was entitled to relief on the merits of his intellectual-disability claim. *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*). To reach this conclusion, this Court acknowledged the three Eighth Amendment criteria for intellectual disability, and further emphasized that "a court's intellectual disability determination 'must be informed by the medical community's diagnostic framework.'" *Id*. at 668–69 (quoting *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (*Moore I*)). This Court noted Moore's IQ test scores (slightly above 70); the "general agreement that any onset took place when Moore was a minor," *id.* at 668 (citing *Moore I*, 137 S. Ct. at 1045, n.3); and the existence of his adaptive deficits, *id.* at 668–69. It then concluded that the Texas Court of Criminal Appeals had failed to focus on Moore's adaptive deficits but instead improperly relied on adaptive strengths (including those

developed in prison), as well as lay stereotypes of those with intellectual disability, *id.* at 629–71, and held that Moore was intellectually disabled.

Moore II also recognized that *Atkins* had not set definitive standards for assessing intellectual disability under the Eighth Amendment; rather, it was not until *Hall* and *Moore I* that this Court first mandated that a court's intellectual-disability determination "must be informed by the medical community's diagnostic framework," *Moore II*, 139 S. Ct. at 669, including those set out by the American Association on Intellectual and Developmental Disabilities in its 2010 manual, (AAIDD-11), and the American Psychiatric Association in its 2013 Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5), *see id.* at 668.

In *Shoop v. Hill*, 139 S. Ct. 504 (2019), this Court reviewed another decision by the Sixth Circuit which had granted habeas relief based on the unreasonableness of a pre-*Moore I* state-court decision. The Sixth Circuit had found the state-court decision unreasonable for failing to follow the standards set out in *Moore I*. This Court determined, however, that those standards had not been "clearly established" law for purposes of 28 U.S.C. § 2254(d) at the time of the state-court decision. Accordingly, they could not be applied on habeas review of a state court intellectual-disability determination that pre-dated *Moore I*. In reaching that conclusion, the Supreme Court acknowledged (as it did in *Moore II*) that "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes," and it wasn't until "[m]ore than a decade later [that] we expounded on the definition of intellectual disability in two cases," namely *Hall* and *Moore I*. *Hill*, 139 S. Ct. at 507.

Thus, *Hall* and the *Moore* cases changed the law applicable to intellectual-disability claims. Under *Atkins*, the standards were set by the States; *Hall* and the *Moore* cases replaced those state standards and mandated that current clinical standards apply. In Ohio, for instance,

under the *Atkins* regime, "the five-point margin of error . . . was not adopted by the [Ohio] Supreme Court" in *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). *State v. Elmore*, 2005-CA-32, 2005 WL 2981797, at *8 (Ohio Ct. App. Nov. 3, 2005). After *Hall*, of course, States must apply the standard error of measurement. *See Hall*, 572 U.S. at 723. Likewise, the *Moore* cases establish that other clinical standards, such as those that reject overemphasizing perceived adaptive strengths, must apply to States' determinations of intellectual disability. *See, e.g.*, *Moore II*, 139 S. Ct. at 670–71.

And, these new standards are retroactive, as evidenced by this Court's retroactive application of these new standards in *Hall* and the *Moore* cases themselves, which arose out of state-court collateral proceedings. *See also, e.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016) (holding that any rule that excludes a class of people from a particular form of punishment is a substantive rule must be applied retroactively, even if the rule has procedural components). Accordingly, cases such as *Hall* and the two *Moore* cases (which exclude persons from capital punishment when their criteria are met) are substantive, retroactively applicable rules. *See also Smith v. Sharp*, 935 F.3d 1064, 1084–85 (10th Cir. 2019) (retroactively applying *Hall* and *Moore II* on collateral review); *White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016) (holding *Hall* is retroactive).

1. Bays's intellectual-disability claim is at least debatable in light of *Moore II*.

In 2013, Bays filed an intellectual-disability claim and an associated ineffective-assistance-of-counsel claim in state court, and then moved to amend his pending federal habeas petition with these two claims. In light of the evidence supporting this Court's *Moore II* conclusion that Moore is intellectually disabled, Bays has at least a debatable claim that he is similarly intellectually disabled and exempt from execution under the Eighth Amendment.

In particular, the many parallels between Bays's and Moore's adaptive deficits demonstrate the merits of Bays's intellectual-disability claim—and certainly its debatability and worthiness of a COA. Like Moore, who "had significant mental and social difficulties beginning at an early age," *Moore II*, 139 S. Ct. at 667 (internal quotation marks omitted), Bays's intellectual disability began at birth, as complications deprived his brain of oxygen and inflicted neurological damage, (Proposed Grounds, R. 153-1, PageID 6604–05). These deficits, combined with head injuries and deformities in his eye, left Bays unable to see, understand spatial relationships, or move like normal children. (*Id*. at PageID 6605–06.)

Bays's struggles with school, as detailed in § I.A, *supra*, parallel Moore's experiences; Moore "could not keep up with lessons" and eventually dropped out of school "after failing every subject in the ninth grade," *Moore II*, 139 S. Ct. at 668. Other children teased and manipulated Bays, calling him "stupid," "slow," and "retarded," (*id*. at PageID 6612), just as Moore's "father, teachers, and peers called him 'stupid' for his slow reading and speech," *Moore II*, 139 S. Ct. at 668.

Just as Moore struggled with reading, writing, and communication skills, *id.* at 671, neuropsychological screening revealed Bays suffered from a host of deficits, including trouble with word recognition, oral comprehension, listening comprehension, arithmetic computation and reasoning, oral language comprehension, written language expression, and written language comprehension, (Proposed Grounds, R. 153-1, PageID 6609–10). By sixth grade, "Moore struggled to read at a second-grade level." *Moore II*, 139 S. Ct at 671. Bays too functioned in the range of a second grader in seventh grade, and his teachers described him as unable to understand the directions or the work and as having difficulties with following written and oral instructions. (Proposed Grounds, R. 153-1, PageID 6610.)

This and other evidence catalogued extensively in Bays's proposed claim (*id.* at PageID 6605–20), demonstrate that, just like Moore, Bays satisfies the adaptive-functioning component of an intellectual-disability claim. In addition, Bays's evidence of onset during the developmental period, (Proposed Grounds, R. 153-1, PageID 6620–21), and his IQ scores (as noted in § I.A, *supra*) are at least as compelling as Moore's. Like Moore, Bays has "demonstrated sufficient intellectual-functioning deficits to require consideration of the second criterion—adaptive functioning." *Moore II*, 139 S. Ct. at 668.

Moore II, which concluded that "Moore has shown he is a person with intellectual disability," *id*. at 672, mandates the same conclusion about Bays. And certainly *Moore II* establishes, for COA purposes, that Bays's intellectual disability claim is debatable among reasonable jurists.

2. Bays's claim is not untimely, so the lower courts' denial of the motion to amend is debatable.

In addition, both *Moore II* and *Hill* confirm the debatability of the district court's denial of Bays's motion to amend his federal petition to include his intellectual-disability claim in his federal habeas proceedings. The district court's denial of the motion to amend is indeed debatable.

First, the district court denied the motion to amend by asserting that Bays's amended claim would be untimely. That was debatable then and is now clearly wrong: Bays sought to amend with this claim in 2013, before the decisions in *Hall* (in 2014) and *Moore I* and *Moore II* (in 2017 and 2019) established that the Eighth Amendment requires application of current clinical standards for determining intellectual disability. Since *Hall* and *Moore* are retroactive (as is evident from *Moore II* and *Hill*), Bays's claim is, by definition, not untimely.

In fact, Bays's motion to amend his petition with his new claim was not late, but early. The one-year limitations period in 28 U.S.C. § 2244(d)(1)(C) runs "from the latest of . . . the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Accordingly, Bays would have had at least until 2015 (one year after *Hall*) and certainly until 2018 (one year after *Moore I*) to amend his federal petition in light of these retroactive cases. Moreover, Bays's 2013 state-court petition constitutes a "properly filed" petition for relief in state court that itself has been tolling, under 28 U.S.C. § 2244(d)(2), the time for applying *Hall* and *Moore* in these federal proceedings. Bays's claim, therefore, was not and is not untimely, and certainly it is debatable whether the district court properly denied the motion to amend on the grounds of untimeliness. This Court should therefore grant a COA.

Second, as shown above, Bays's proof of intellectual disability is equal to, if not stronger than, Moore's evidence, which this Court found to establish conclusive proof of intellectual disability. Thus, even if Bays's amended intellectual disability claim were untimely, Bays would still overcome any timeliness concerns, through the "actual innocence" exception to the habeas corpus statute of limitations, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013), and because he is "actually innocent" of the death penalty under *Sawyer*, 505 U.S. at 343. Whether Bays meets the *Sawyer* test—by establishing by clear and convincing evidence that no reasonable decision maker would have failed to find him intellectually disabled—is at least debatable. *See Sawyer*, 505 U.S. at 336.

Even without the benefit of *Moore II*, however, the debatability of the district court's denial of Bays's motion to amend his petition is clear. That is because the district court improperly denied Bays's *Sawyer* argument. Although the district court explicitly stated that it

would not reach the merits of Bays's intellectual-disability claims, but rather, put off that determination until after the factual development in the state-court proceedings concluded, (Decision and Order, R. 160, PageID 7442, Appx. E, page A-37), it nevertheless rejected Bays's *Sawyer* argument for failing to adequately prove he was actually innocent of the death penalty because of an intellectual disability. In doing so, however, the district court failed to conduct any merits analysis of Bays's evidence.

In other words, the district court said it would wait to determine the merits of Bays's intellectual-disability claim, but then, without waiting, denied a merits-based argument under *Sawyer* without analyzing the merits. The district court could have conducted an evidentiary hearing, or even analyzed the evidence in the paper record before it to decide the *Sawyer* question, but it did neither. This also counsels in favor of granting Bays a COA.

C. The denials of a COA regarding Bays's claim of ineffective assistance of counsel in litigating his intellectual-disability claim ignored conflicts with the precedent of the Tenth Circuit and a state-court judge in Bays's own case.

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 counsel failed to order a full adaptive-function evaluation of Bays and voluntarily dismissed his intellectual-disability claim in 2007. Once new counsel began representing Bays in his federal habeas corpus proceedings, they learned of counsel's incompetence. They completed the investigation that prior 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 intellectual-disability claim. *Lott*, 779 N.E.2d at 1014, 1016.

The district court incorrectly held that Bays's claim under *Strickland v. Washington*, 466 U.S. 668 (1984), was not cognizable because he enjoys no constitutional right to effective post-conviction counsel. (Supp. R&R, R. 169, PageID 7524–26, Appx. D, page A-12–14.) Bays's intellectual-disability 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. Accordingly, Bays has a constitutional right to the effective assistance of counsel in an intellectual-disability proceeding.

Reasonable jurists not only *could*, but *actually do* disagree as to whether an inmate pressing an intellectual-disability claim possesses the right to effective assistance of counsel under the Sixth Amendment. *Hooks* recognized a right to effective assistance of counsel to litigate an intellectual-disability claim in the post-conviction context. *Hooks*, 689 F.3d at 1183. *See also United States v. Wilson*, No. 04-CR-1016, 2013 WL 1338710, at *5 n.8 (E.D.N.Y. Apr. 1, 2013); *State v. Bays*, No. 2014-CA-24, 2015 WL 2452324, at *12, ¶ 40–41 (Ohio Ct. App. May 15, 2015) (Donovan, J., dissenting) ("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").

Further, a judge in Bays's own case reasoned that "[t]his is Bays' first opportunity to litigate his *Atkins* claim, therefore, to suggest he has a right to counsel, but not effective counsel, renders his right to counsel meaningless and would only eviscerate his *Atkins* claim." *Bays*,

2015 WL 2452324, at *10, *12, ¶ 35, ¶ 40–41 (Donovan, J., dissenting). 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. Therefore, an expanded COA is warranted on this claim as well.

CONCLUSION

For the foregoing reasons, Petitioner Bays respectfully requests this Court grant the petition for writ of certiorari and either order merits briefing or vacate and remand the case for reconsideration in light of *Moore II* and *Hill*. *See White v. Kentucky*, 139 S. Ct. 532 (2019) (Mem).

Respectfully submitted,

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August 27, 2020

CERTIFICATE OF SERVICE

I, Erin G. Barnhart, hereby certify that on this 27th day of August, 2020, a copy of the foregoing PETITION FOR WRIT OF *CERTIORARI* was served, in compliance with the parties' agreement, via email on the following Counsel for Respondent Margret Bagley:

Brenda S. Leikala
Benjamin Flowers
Michael Hendershot

All parties required to be served have been served.

Counsel for Petitioner Richard Bays