No. 20-5563

In the Supreme Court of the United States

RICHARD BAYS,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

Is Richard Bays entitled to a certificate of appealability regarding the fact-bound question whether a district court abused its discretion in denying leave to amend his habeas petition, five years after its filing, to add claims that were time barred and inserted for the purpose of delay?

LIST OF PARTIES

The petitioner is Richard Bays, an inmate at the Chillicothe Correctional Institution.

The respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Bays v. Warden*, No. 18-3101 (6th Cir.) (final judgment issued March 30, 2020).

2. *Bays v. Warden*, No. 3:08-cv-076 (S.D. Ohio) (final judgment issued Dec. 29, 2017).

3. *State v. Bays*, No. 2015-1073 (Ohio) (jurisdiction declined Aug. 31, 2016).

4. *State v. Bays*, No. 2014 CA 24 (Ohio Ct. App., 2d Dist.) (final judgment issued May 15, 2015).

5. *State v. Bays*, No. 2004 CA 30 (Ohio Ct. App., 2d Dist.) (final judgment issued Jan. 7, 2005).

6. *State v. Bay*s, No. 2003-1348 (Ohio) (jurisdiction declined Oct. 15, 2003).

7. *State v. Bays*, No. 2003 CA 4 (Ohio Ct. App., 2d Dist.) (final judgment issued June 20, 2003).

8. *State v. Bays*, No. 98-515 (Ohio) (jurisdiction declined May 20, 1998).

9. *State v. Bays*, No. 96 CA 118 (Ohio Ct. App., 2d Dist.) (final judgment issued Jan. 30, 1998).

10. *Bays v. Ohio*, No. 99-8376 (U.S.) (cert. denied April 24, 2000).

11. *State v. Bays*, No. 98-520 (Ohio) (final judgment issued Oct. 13, 1999).

12. *State v. Bays*, No. 95 CA 118 (Ohio Ct. App., 2d Dist.) (final judgment issued Jan. 30. 1998).

13. *State v. Bays*, No. 1994 CR 0030 (Green County Court of Common Pleas) (sentence imposed Dec. 15, 1995).

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INTRODUCTION

This is a case about delay. Richard Bays is on death row because he slaughtered a wheelchair-bound elderly man so that he could take the man's money and buy cocaine with it. Bays was convicted over twenty-five years ago. In 2008, he filed a federal habeas petition. And in 2013, he sought to amend that petition to add claims for relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). The District Court denied Bays's request to amend the petition, reasoning that the claim was time-barred and that Bays was improperly attempting to delay the conclusion of his proceedings. The court also refused to issue a certificate of appealability regarding the decision not to allow amendment. The Sixth Circuit declined to expand the certificate of appealability. Justice Sotomayor did too. *See* Order, *Bays v. Shoop*, No. 18A941 (Mar. 19, 2019) (Sotomayor, J., in chambers).

After losing the claims for which he *was* awarded a certificate of appealability, Bays repackaged his application to Justice Sotomayor into his *certiorari* petition. He now claims the Court should grant *certiorari* to decide the factbound question whether he should have been awarded a certificate of appealability to challenge the District Court's refusal to allow a dilatory amendment.

Because Bays presents no certworthy question or meritorious claim, the Court should deny *certiorari*, putting this matter to rest once and for all. This case has gone on much too long already.

STATEMENT

1. In November 1993, Bays murdered 76-year-old, wheelchair-bound Charles Weaver in his home. *State v. Bays*, 87 Ohio St. 3d 15, 15 (1999). An autopsy of

Weaver's body revealed two stab wounds to the chest, wounds on the neck, and several contusions, abrasions, and lacerations on the head consistent with blows from a blunt object. *Id.* at 16.

Bays eventually confessed to the slaying. *Id.* He told detectives that he went to Weaver's house after smoking crack cocaine. There, he asked Weaver to lend him $30. Weaver replied that he had no money. *Id.* At that point, Bays killed Weaver by stabbing him with a kitchen knife after hitting him over the head with a battery charger and a portable tape recorder. *Id.* Bays then emptied Weaver's wallet, taking $25 in cash and $9 in food stamps. *Id.* at 16–17. Bays left, bought crack, and smoked it. He attempted to cover his tracks by throwing Weaver's wallet and his own clothing into the sewer. *Id.* at 17.

The detectives arrested Bays after his confession. While in the county jail, Bays described his crime to another inmate, including how he had hit Weaver in the head with a battery charger, "stabbed" Weaver "in the chest," and then cut Weaver's throat "to make sure he wasn't alive." *Id.* (quoting trial testimony).

2. A grand jury indicted Bays for aggravated murder with capital specifications. After Bays waived his right to a jury trial, a three-judge panel convicted him and sentenced him to death. *Id.*

Bays appealed his conviction and sentence, to no avail. Later, however, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). And the Ohio Supreme Court held that even the already-convicted could seek *Atkins* relief in state-postconviction proceedings. *State v. Lott,* 97 Ohio St. 3d 303, 306 (2002). Bays filed his state-

postconviction petition seeking *Atkins* relief in April 2003. The trial court denied it without a hearing. But an Ohio appellate court reversed and remanded with directions to fund an expert witness. *State v. Bays,* 159 Ohio App. 3d 469, 470 (2d Dist. 2005). On remand, the trial court authorized funds for Bays to retain Dr. David Hammer "to evaluate [Bays] and to assist his counsel in preparing evidence on the factual issue of Petitioner's [intellectual disability] status." Entry, Return of Writ Apx., R.151, PageID#5822. After Dr. Hammer "evaluated [Bays] for his [intellectual disability] status," Notice of Intent, R.3, PageID#14, Bays voluntarily dismissed his *Atkins* petition on November 9, 2007, Notice, Return of Writ Apx., R.151-14, PageID#5825.

3. In 2008, Bays filed a federal petition for a writ of habeas corpus. Habeas Petition, R16. It included no claim under *Atkins v. Virginia*, though it did mention that "Bays functions at the borderline level of intelligence, with an I.Q. of 74." *Id.* at ¶66, PageID#93. A magistrate judge recommended that Bays's habeas petition be dismissed. Pet.App.89a–159a. Before the District Judge ruled on those objections, Bays amended his petition to include challenges to Ohio's method of execution. Amend. Pet., R.122, PageID#1671–82. Then, more than *five years* after he filed his notice of intent to file a habeas petition, and more than a year after the magistrate judge recommended dismissing the petition, Bays moved to amend his petition again. This time, Bays wanted to include two *Atkins* claims. Mtn. to Amend., R.153, PageID#6574–85. One argued that Bays was entitled to relief under *Atkins*. *See* Mtn. to Amend., Ex.1, R.153-1, PageID#6589. The second argued

that Bays's state-postconviction counsel provided constitutionally ineffective assistance with respect to his *Atkins* claim. *See id.*, PageID#6621.

The magistrate judge recommended denying leave to amend. The magistrate concluded (among other things) that the proposed *Atkins* claims were barred by the statute of limitations and that Bays had been dilatory in pursuing them. Pet.App.33a–34a. Specifically, the magistrate noted that "Bays' possible" intellectual disability "was an issue at trial in 1995," that Bays was evaluated for intellectual disability in relation to his 2007 *Atkins* claim in state court, and that a public defender, in an evidentiary hearing held in federal court, had cross-examined one of the doctors who evaluated Bays for that 2007 claim. Pet.App.33a–34. In light of all the discussion pertaining to Bays's potential intellectual disability, the magistrate judge determined, any "claim that Bays is [intellectually disabled] could have been made" earlier and the attempt to raise it so late in the proceedings "evidence[d] a dilatory motive." Pet.App.35a–36a.

The District Court adopted the magistrate's recommendation and denied the amendment. Pet.App.6a–9a. When the District Court later denied substantive relief on Bays's petition, it granted a certificate of appealability on multiple claims, but denied a certificate on the question whether Bays should have been allowed to add the *Atkins* claims. Pet.App.40a–41a.

Bays then petitioned the Sixth Circuit to grant him an expanded certificate of appealability on several claims, including the denial of leave to amend his habeas petition to include his two *Atkins* claims. Mtn. for COA, R.8, 6th Cir. No. 18-3101

(Mar. 30, 2008). The Sixth Circuit denied Bays's motion for an expanded certificate of appealability. Pet.App.1a–2a. Bays sought *en banc* review of that denial, but the Sixth Circuit denied that request as well. Pet.App.62a. Bays then sought an expanded certificate on the *Atkins* claims from Justice Sotomayor. She too declined to expand the certificate of appealability. Order, *Bays v. Shoop*, No. 18A941 (Mar. 19, 2019) (Sotomayor, J., in chambers). Then, on the eve of oral argument pertaining to Bays's other claims—the claims for which he *had* obtained a certificate of appealability—Bays moved yet again for an expanded certificate on the *Atkins* issues. Pet.App.5a. The Sixth Circuit again denied his request. With the issues set, the Sixth Circuit heard argument, took the case under advisement, and affirmed the District Court's denial of habeas relief. *Bays v. Warden, Chillicothe Corr. Inst.*, 807 F. App'x 481, 482 (6th Cir. 2020).

Bays petitioned for *certiorari*, again challenging his entitlement to a certificate of appealability on the question whether the District Court abused its discretion by denying his motion to amend.

REASONS FOR DENYING CERTIORARI

Bays's petition presents four questions for this Court's consideration. The first three all ask whether Bays should have been granted a certificate of appealability on the question whether the District Court abused its discretion by refusing to allow an untimely amendment to Bays's habeas petition. Pet.i. The fourth asks whether murderers (like Bays) convicted before the decision in *Atkins* are entitled to effective assistance of counsel in state-postconviction proceedings

pertaining to *Atkins*. Pet.ii. None of these questions is worthy of the Court's review.

I. The question whether Bays should have been granted an expanded certificate of appealability is not certworthy.

The first three of Bays's questions all ask something like the following question: Should Bays have been granted a certificate of appealability with respect to the question whether the District Court abused its discretion in refusing to allow him to amend his habeas petition to add an *Atkins* claim? Bays's petition seeking review of this question is simply a longer version of the argument he presented to Justice Sotomayor last year when he sought an expanded certificate of appealability. Indeed, his application to Justice Sotomayor and his current *certiorari* petition are almost identical. The most significant change is a small one: Bays added citations to *Moore v. Texas*, 139 S. Ct. 666 (2019) (*per curiam*) and *Shoop v. Hill*, 139 S. Ct. 504 (2019) (*per curiam*). But those citations are immaterial to the questions presented because neither case had anything to do with the question whether to expand a certificate of appealability to include late-filed claims, which is the only issue at stake here. What is more, both *Moore* and *Hill* were summary reversals that applied already-binding case law. Neither case broke new ground, and so neither strengthened or weakened the case for expanding the certificate of appealability.

As all this suggests, Bays's petition raises factbound questions and seeks pure error correction. That is enough to defeat his petition; this Court does not grant *certiorari* to resolve case-specific errors. But in this case, Bays has not even

identified an error. To the contrary, the Sixth Circuit and Justice Sotomayor correctly denied the request to expand the certificate of appealability, because Bays's arguments for doing so are meritless. To win a certificate of appealability, a habeas petitioner must show "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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Bays has not made that showing. To see why, recall how the *Atkins* issues came to be involved in this case. Bays, in 2013, sought to amend his habeas petition, which he filed in 2008, to include an *Atkins* claim. The District Court denied him leave to amend. On appeal, the denial of leave to amend would have to be reviewed for abuse of discretion. *See, e.g., Penney v. United States*, 870 F.3d 459, 461 (6th Cir. 2017); *Hill v. Mitchell*, 842 F.3d 910, 922 (6th Cir. 2016). Thus, Bays sought a certificate of appealability *not* on the merits of his *Atkins* claim, but instead on the question whether the District Court erred in denying leave to amend. On that score, jurists of reason could neither conclude that the District Court erred nor conclude that the issues deserve encouragement to proceed further. *Miller-El*, 537 U.S. at 327. The District Court denied leave to amend both because the claim fell outside the relevant one-year statute of limitations and because it found Bays acted with a dilatory motive. It did not abuse its discretion with respect to *either* of these conclusions, let alone both.

First, the District Court did not abuse its discretion in concluding that the *Atkins* claims were outside the one-year statute of limitations. Under 28 U.S.C.

§2244(d)(1)(D), petitioners may seek habeas relief within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Bays, the District Court determined, could not rely on this provision to justify his bringing the *Atkins* claims only in 2013. After all, Bays's alleged intellectual disability had been an issue during his trial and in state-postconviction proceedings—all of which predated the initial 2008 federal habeas petition. In denying the motion for leave, the District Court correctly ruled that the factual predicate of these claims was not "newly discovered" because the issue of intellectual disability was known to be an issue much earlier, including at Bays's original trial. *See* Pet.App.14a–16a.

Second, the District Court correctly determined that Bays had unjustifiably delayed raising his *Atkins* claims. The court—counting from the time of the original trial—had this to say about the 2013 request to amend: "In the ensuing twenty years, Bays has been represented by a succession of skilled and trained attorneys, all of whom knew his possible [intellectual disability] was an issue. It is no insult to his dignity as a human being to conclude that he had enough time prior to May 24, 2013, to raise and litigate his claim or to infer from the fact that he wants to 'start over' with a new lawyer that he has a dilatory motive in seeking to amend at this late stage." Pet.App.17a–18a. This dilatory motive provided a second valid basis for denying the motion for leave to amend.

The District Court also disposed of various reasons that Bays offered to justify his long delay. The court rejected Bays's arguments that he could not bring

his claim earlier because his state-court attorney was also his attorney at the time of the original habeas petition. Any possible conflict in the habeas attorney raising her own incompetence was cured when that attorney withdrew from the case in 2010. Pet.App.15a. The District Court also brushed aside the argument that Bays's asserted intellectual disability should have tolled the statute of limitations. That argument might make sense if Bays had represented himself *pro se*, but he had been represented by accomplished attorneys throughout his habeas proceedings. Pet.App.18a (discussing *Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011)); *see also Ryan v. Gonzales*, 568 U.S. 57, 68 (2013) ("[g]iven the backward-looking, record-based nature of most federal habeas proceedings," *counsel* can raise most claims despite client's disability). Nor did the District Court find merit in the idea that Bays's delay should be excused because he is actually innocent of the death penalty. "'[T]enable actual-innocence gateway pleas are rare.'" *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quotation omitted). Here, Bays had not and cannot identify anything that clearly establishes his intellectual disability. True enough, he identifies *some* evidence of intellectual disability. *See* Pet.11–12. But if that were enough to justify overlooking his delay, then the timing limits on federal habeas relief "would *never* apply to *Atkins* claims." *Frazier v. Jenkins*, 770 F.3d 485, 507 (6th Cir. 2014) (Sutton, J., concurring in part). That would completely undermine the finality and federalism concerns that AEDPA is supposed to protect.

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Because the District Court did not abuse its discretion in denying leave to amend, and because no reasonable jurist could conclude otherwise, the Court of Appeals properly refused to expand the certificate of appealability. Bays thus seeks factbound error correction in a case involving no error.

II. The Court should not take this case to decide whether murderers convicted before *Atkins* are entitled to the assistance of counsel in post-conviction proceedings.

The foregoing shows that Bays's argument for a certificate of appealability is meritless. From that, it follows that the Court should decline to hear the first three of Bays's questions presented. That leaves only the fourth question: Do murderers, like Bays, convicted before the decision in *Atkins*, have "a right to the effective assistance of counsel in litigating a post-conviction claim of intellectual disability." Pet.ii. While this question is less case-specific than the others, the Court should decline to hear it for three reasons.

First, the question is not presented by this case. Unless this Court concludes that Bays is entitled to a certificate of appealability on the *Atkins* claim, the question whether Bays was denied a right to effective counsel in litigating that claim never arises. Thus, because Bays's request for a certificate of appealability is meritless, the Court will have no way to reach this issue. What is more, because the District Court and Sixth Circuit denied a certificate of appealability, they never reached the issue either. As a result, the question is "not adequately presented" because the lower courts "did not need to resolve" it. *Mitchell v. United States*, 140 S. Ct. 2624, 2625 (2020) (Sotomayor, J., concurring in denial of stay).

Second, the question presents no circuit split in need of resolution. Bays claims a conflict with *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), which recognized a right to assistance of counsel in "jury-based *Atkins* proceedings of the kind employed in Oklahoma." *Id*. at 1183. But there is no conflict. For one thing, the Sixth Circuit did not reach the issue whether Bays had a right to assistance of counsel, and so could not possibly have issued a decision at odds with the Tenth Circuit's. For another, Bays's *Atkins* claims were litigated in a post-conviction proceeding tried before the bench, not before a jury, distinguishing his case from *Hooks*. And finally, the question Bays presents is of fading relevance: he asks whether those convicted before the 2002 *Atkins* decision have a right to effective counsel in post-conviction proceedings raising an *Atkins* issue. Pet.ii. Because *Atkins* was decided twenty years ago, the question is not likely to arise in very many cases going forward. *Cf., e.g.*, *Issa v. Bradshaw*, 910 F.3d 872, 877 (6th Cir. 2018) (denying *en banc* review because the "number of cases presenting this issue is small and growing smaller") (Sutton, J, concurring in denial), *cert. denied*, 139 S. Ct. 2616 (2019).

Finally, the claim lacks merit. As an initial matter, AEDPA expressly prohibits seeking federal habeas relief based on counsel's performance in postconviction proceedings. 28 U.S.C. §2254(i). What is more, Bays's counsel was anything but ineffective here. She won an Ohio appeals court victory to get a funded expert to evaluate Bays. Only after that did Bays and his counsel decline to pursue relief under *Atkins* in state court—presumably because the expert was unable to develop a plausible basis for an intellectual-disability diagnosis. Counsel was not ineffective

for failing to win an *Atkins* claim in a case involving a non-intellectually-disabled defendant. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 691, 699 (1984); *Bobby v. Van Hook*, 558 U.S. 4, 10 (2009).

CONCLUSION

The Court should deny Bays's petition for writ of *certiorari*.

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