No. 20-5563 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

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

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

No execution date is presently scheduled.

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PETITIONER'S REPLY

The Warden's arguments in opposition to Petitioner Richard Bays's petition for writ of certiorari lack merit and this Court should reject them. Bays's case presents substantial questions warranting this Court's review, and his petition should be granted. In the alternative, this Court should grant certiorari, vacate the Sixth Circuit's order denying his motion to expand the certificate of appealability ("COA"), and remand the case for further proceedings in light of *Shoop v. Hill*, 139 S. Ct. 504 (2019), and *Moore v. Texas*, 139 S. Ct. 666 (2019) (*Moore II*), which this Court decided after the Sixth Circuit had denied Bays's COA request.

I. This case is not about delay.

The Warden complains that Bays should have been put to death long ago[1] and that the current proceeding is nothing more than an attempt to delay his execution. (Brief in Opposition ("BIO") at 1.) But Bays would not even be on death row if he had been afforded competent representation by the counsel who litigated his intellectual-disability claim in his state post-

[1] Although not directly before the Court here, it is worth noting that serious doubts exist about Bays's guilt in this case. State's witnesses acknowledged that his conviction was primarily supported by a confession that consisted almost entirely of Bays repeating back information that detectives first told him about the crime. The police admitted that they received these details from an anonymous source who contacted them to implicate Bays––but not him- or herself—in Mr. Weaver's murder. Bays has consistently maintained that his confession was false and involuntary, and his intellectual disability sheds light on how law enforcement was able to induce him to go along with their theory of the crime.

The State identified no witnesses to the attack on Mr. Weaver, although neighbors reported seeing several different people near the home on the day of the crime. This was not surprising because there was "usually continuous traffic in and out of the [victim's] house" and the victim was known to purchase food stamps from multiple people. Investigators determined that fingerprints found on multiple surfaces in the victim's home were made by someone other than Bays, although no one introduced these facts at his trial. The only other significant physical evidence against him came from microscopic analysis of hair found at the scene. The FBI, the United States Department of Justice, and numerous courts have recognized this sort of hair microscopy evidence to be invalid. *See, e.g., Commonwealth v. Perrot,* Nos. 85-5415, 5416, 5418, 5420, 5425, 2016 WL 380123, *24, *34, *41 (Jan. 26, 2016 Mass Super. Ct.).

conviction proceedings. The evidence of Bays's intellectual disability is overwhelming, and putting him to death would be a grave miscarriage of justice. The only thing that has been delayed in this case is Bays's entitlement to relief from his death sentence. The Warden's arguments to the contrary are therefore unpersuasive.

II. This case is not about error correction.

The Warden contends that much of Bays's petition requests nothing more than simple error correction and therefore fails to warrant this Court's review. (BIO at 6-7.) Contrary to the Warden's argument, Bays's petition presents "important question[s] of federal law that [have] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). 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 AEDPA's statute of limitations clearly meets this standard, as does the question of whether a petitioner who raises a claim of intellectual disability at the first opportunity in a state post-conviction proceeding has a constitutional right to the effective assistance of counsel. And in any event, if this Court wishes, it can simply bypass the COA inquiry and proceed directly to the merits of the underlying issues that Bays has raised. *See Buck v. Davis*, 137 S. Ct. 759, 774-75 (2017).

Further, in denying Bays's motion to expand the COA, the Sixth Circuit "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Twice, in rejecting Bays's request for a COA on his *intellectual-disability* claim, that court erroneously perceived Bays to be seeking relief on an *incompetency-to-be-executed* claim. Even after Bays pointed out these mistakes in his rehearing petition, the court declined to even correct the factual errors, much less analyze the COA Bays

actually requested. This Court has not hesitated to intervene in analogous circumstances. *Cf. Tharpe v. Sellers*, 138 S. Ct. 545 (2018).

For these reasons, this Court should reject the Warden's "error-correction" arguments.

III. This case presents a conflict among the federal circuits.

The divergence in authority between the lower-court rejection of Bays's claim to a right to counsel in pursuing an intellectual-disability claim in state post-conviction proceedings and the Tenth Circuit's decision in *Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012), provides an additional basis for granting review. *See* Sup. Ct. R. 10(a).

To begin, the Warden's suggestion that the decisions in Bays's case pose no conflict with *Hooks* is disingenuous. *Hooks* located a right to effective representation for litigating intellectual-disability status, regardless of the forum, in the Sixth Amendment guarantee "'to have counsel present at all "critical" stages of the criminal proceedings.'" *Hooks*, 689 F.3d at 1184 (quoting *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)). Indeed, in direct conflict with the district court's assertion—echoed by the Warden, (see BIO at 11)—that AEDPA bars relief from ineffective post-conviction representation, the *Hooks* court noted its suspicion that "the retroactive applicability of *Atkins* to cases on collateral review under 28 U.S.C. § 2244(b)(2)(A) . . . makes void, as a matter of law, any '*post* conviction' character that an *Atkins* proceeding might have." *Id*. at 1183 n.18.

Further, the Warden claims that this question is not presented here because the lower courts did not reach this issue. That is incorrect as a factual matter. (*See* Decision and Order, R. 160, at PageID 7434 (concluding Bays's proposed ineffective-assistance of *Atkins* counsel ground for relief did not state a claim upon which relief could be granted; "Because there is no constitutional right to an attorney in post-conviction proceedings, a habeas petitioner cannot

claim unconstitutional deprivation of effective assistance of counsel in such proceedings."). But even if that argument's premise was supported by the record, this circular reasoning would mean that this Court could *never* grant a COA when it was denied by lower courts, and this Court's practice demonstrates just the opposite. *See, e.g.*, *Buck*, 137 S. Ct. at 767.

IV. Any violation of the AEDPA statute of limitations is excused by Bays's actual innocence of his death sentence.

The Warden argues at length that Bays's claims are barred by the AEDPA statute of limitations. (BIO at 7-9.) But as Bays explained in his petition, and as he reiterates in § V, *infra*, his claims are in fact timely because they were filed *before* this Court issued its retroactive decisions in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

Bays's claims also cannot be considered time-barred for the additional reason that Bays is actually innocent of the death sentence, which excuses any violation of the limitations period. (Petition for Certiorari ("Pet.") at 19.) The evidence of Bays's intellectual disability is overwhelming, (*see id.* at 11-13), and as a result Bays can demonstrate that he is actually innocent under *Sawyer*.

Relying on the concurrence in *Frazier v. Jenkins*, 770 F.3d 485, 507 (6th Cir. 2014), the Warden argues that if the showing Bays has made "were enough to justify overlooking his delay, then the timing limits on federal habeas relief 'would *never* apply to *Atkins* claims.'" (BIO at 9 (emphasis in original).) That's clearly wrong, as the *Sawyer* standard is extremely demanding, and it is only in a very rare case (such as this one) where the petitioner will be able to carry his burden. Merely filing an arguably meritorious claim of intellectual disability in federal court does not make someone actually innocent of his death sentence; a petitioner must instead show by clear and convincing evidence that no reasonable juror could find that the petitioner is not

intellectually disabled. *See Sawyer*, 505 U.S. at 336. Bays meets this burden, but few others will.

V. Bays's proposed claims are timely under 28 U.S.C. § 2244(d)(1)(C) because they were filed before *Moore v. Texas*, 137 S. Ct. 1039 (2017), and *Hall v. Florida*, 572 U.S. 701 (2014), were decided, and these decisions are fully retroactive on collateral review.

Finally, as Bays explained in his petition, he filed his proposed claims before this Court's decisions in the *Moore* cases and *Hall*; as a result, they are timely under 28 U.S.C. § 2244(d)(1)(C). (Pet. at 16, 18-19.) *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"), and *Hall* were both decided on collateral review, meaning this Court has already retroactively applied the new rule announced in those cases. (*See* Pet. at 16 (citing cases).) Section 2244(d)(1)(C) should not be read as requiring this Court to conduct a formal analysis under *Teague v. Lane*, 489 U.S. 288 (1989), when the rule at issue has already been applied retroactively on collateral review by this Court on multiple occasions. Accordingly, Bays's proposed claims are timely.[2]

For the same reason, the Warden's suggestion that Bays's petition presents questions of "fading relevance" is misplaced. (BIO at 11.) In any case in which a petitioner has, like Bays, appropriately raised an intellectual-disability claim in federal court, the potential exists for a question of whether counsel fully and adequately presented the claim in state court. This applies not only to claims raised at trial, but also to post-conviction claims raised under *Atkins* as well as the *Hall* and *Moore* cases. Considering these recent decisions, this Court should resolve the issue of the conflict between the Sixth and Tenth Circuits to ensure that an intellectual disabled

[2] Moreover, in *Smith v. Dunn*, No. 19-7745, this Court considered the retroactivity of *Hall* and *Moore* at multiple conferences, although certiorari was ultimately denied. The fact that the question was considered at more than one conference, however, suggests that the issue is both significant and debatable among jurists of reason, justifying Bays's COA and certiorari requests.

death row inmate pursuing relief under these new cases has a viable remedy in federal court for counsel who fail to properly present the claim to the state courts. Indeed, this Court's decisions in the *Hall* and *Moore* cases make this issue one of renewed importance now.

* * *

A final note: The Warden intimates that because Justice Sotomayor denied a certificate of appealability on these claims—which Bays submitted before the Sixth Circuit heard his case––the Court should now deny Bays' petition. It should not. Bays sought an expanded COA directly from his Circuit Justice while his case was in an interlocutory posture, noting in his request that while "he may in the future seek a writ of certiorari from this Court concerning the lower courts' denial of his request for COAs," that he sought an expansion of his COA at that time "in the interests of judicial efficiency and because of the importance of these claims for his case." *Bays v. Warden*, No. 18A941, Application to expand the Certificate of Appealability, 1 n.1 (March 7, 2019) (citing § 2253(c)(1)).

As a prudential matter, this Court routinely denies COAs (or interlocutory relief) while a case remains pending before the lower courts. *See e.g.*, *Nichols v. Heidle*, 574 U.S. 1025 (2014) (denying certiorari seeking interlocutory review of denial of certificate of appealability); *Alley v. Bell*, 535 U.S. 991 (2002) (same). Presumably, this Court denies interlocutory COA applications for the same reason it routinely denies interlocutory petitions for writ of certiorari: The court of appeals might still provide an applicant relief "before final judgment," making this Court's intervention unnecessary until that time. *See e.g.*, *Guedes v. BATFE*, 140 S. Ct. 789, 791 (2020) (Gorsuch, J., concurring).

When a petitioner has been denied a COA, this Court's general practice has been to review the denial of a COA once the court of appeals has rendered a final judgment, as is the

case here. In fact, this Court has granted COAs when, as here, the petitioner has filed a petition for writ of certiorari seeking a certificate of appealability. *See e.g.*, *Buck*, 137 S. Ct. at 767 (on certiorari, reversing court of appeals' denial of COA in Rule 60(b)(6) proceedings); *Welch v. United States*, 136 S. Ct. 1257, 1267 (2016) (on certiorari, reversing denial of COA); *Smith v. Colson*, 566 U.S. 901 (2012) (granting certiorari, vacating and remanding for reconsideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), after court of appeals had denied certificate of appealability); *Jimenez v. Quarterman*, 555 U.S. 113, 114 (2009) (on certiorari, unanimously reversing court of appeals' denial of certificate of appealability and remanding for further proceedings); *Tennard v. Dretke*, 542 U.S. 274, 276 (2004) (on certiorari, reversing court of appeals' denial of certificate of appealability); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (same); *Miller-El v. Cockrell*, 535 U.S. 903, 903 (2002) (granting certiorari specifically on question whether court of appeals erred in denying a certificate of appealability); *Penry v. Johnson*, 532 U.S. 782, 792, 803-04 (2001) (on certiorari, reversing court of appeals' denial of certificate of appealability).

Now that Bays's case is final in the court of appeals, this Court may appropriately grant the petition for writ of certiorari and hold he should receive a COA on one or both of his claims.

CONCLUSION

Bays's petition for a writ of certiorari should be granted. In the alternative, this Court should grant certiorari, vacate the Sixth Circuit's order denying his motion to expand the COA, and remand for further proceedings in light of *Hall* and *Moore II*.

Respectfully submitted,

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November 3, 2020

CERTIFICATE OF SERVICE

I, Erin G. Barnhart, hereby certify that on this 3rd day of November, 2020, a copy of the foregoing PETITIONER'S REPLY IN SUPPORT OF 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.

Erin G. Barnhart

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