

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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JERRY E. RUSSELL, SR.

Petitioner,

v.

THE STATE OF INDIANA,

Respondent.

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On Petition for Writ of Certiorari to the  
Indiana Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In an appeal to the Indiana Supreme Court, Petitioner argued that the Eighth Amendment prohibition against sentencing intellectually disabled individuals to death, announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be extended to prohibit sentences of life without possibility of parole (LWOP) for intellectually disabled individuals. The Indiana Supreme Court declined to address Petitioner's Eighth Amendment claim but explicitly found that the claim was preserved.

Should the Eighth Amendment prohibition, against sentencing intellectually disabled individuals to death, announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), be extended to prohibit sentences of LWOP for intellectually disabled individuals?

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PETITION FOR WRIT OF CERTIORARI

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Jerry E. Russell, Sr. petitions for a writ of certiorari to review the judgment of the Indiana Supreme Court.

OPINIONS BELOW

The opinion of the Indiana Supreme Court was issued on June 3, 2024, under *State v. Russell*, No. 21S-LW-451. The Indiana Supreme Court's opinion is reported at *Russell v. State*, 234 N.E.3d 829 (Ind. 2024), and it is contained in the Appendix to this petition at pages 3 to 36. The trial court's order on re-sentencing was issued on August 16, 2021 in *State v. Russell*, No. 28D01-9801-CF-000624. The order is unpublished, and it is contained in the Appendix at pages 37 to 47.



## JURISDICTION

The Indiana Supreme Court entered its judgment on June 3, 2024. Because the Indiana Supreme Court is the highest court of the state Indiana, and a right is claimed under the Constitution of the United States, this Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

### *Constitution of the United States, Amendment VIII*

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

### *Constitution of the United States, Amendment XIV*

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

Petitioner was first diagnosed with intellectual disability and placed in special education classes when he was in the fourth grade. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. 758; Exhibits, *Russell v. State*, No. 21S-LW-451, Vol. X, p. 55] The diagnosis was reaffirmed on multiple occasions between 1976 and 2013. [Exhibits, *Russell v. State*, No. 21S-LW-451, Vol. III, p. 55-56, Vol. IV, p. 7-10, 33-37, 49-67; Transcript, *Russell v. State*, No. 21S-LW-451, Vol. II, p. 15-16, 25, 33, 40] When Petitioner was nineteen years old, he began receiving Social Security Disability (SSDI) due to intellectual disability and a seizure disorder. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. IV, p. 760] Except for a period of incarceration in the early 1990s,

Petitioner continued receiving SSDI, due to those conditions, until 1998 when he was arrested in this case. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. IV, p. 760; Exhibits, *Russell v. State*, No. 21S-LW-451, Vol. IV, p. 41-56, Vol. X, p. 10-192]

Petitioner was charged in the Greene County Superior Court with felony murder, conspiracy to commit murder, criminal confinement, and criminal deviate conduct. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. I, p. 17, 187] He was convicted by a jury on October 15, 1999. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. III, p. 704-07] On November 12, 1999, the trial court imposed a sentence of LWOP for murder and an aggregate sentence of 120 years for the other offenses. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. IV, p. 789-93]

In Indiana, an intellectually disabled individual is statutorily ineligible for a sentence of LWOP. Ind. Code § 35-36-9-1 to 35-36-9-7. However, Petitioner's trial counsel did not follow the state statutory procedures, to have the trial court determine if Petitioner was intellectually disabled, and therefore subject to the statutory exemption. [Record, *Russell v. State*, No. 28S00-9912-CR-697] Trial counsel and the original sentencing judge were both unaware of the statutory exemption. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. XIII, p. 3263-64, 3270]

On March 9, 2001, the Indiana Supreme Court affirmed the convictions for murder and conspiracy to commit murder and the LWOP sentence. *Russell v. State*, 743 N.E.2d 269, 275 (Ind. 2001). The Indiana Supreme Court reduced the conviction for criminal confinement to a class D felony, with a sentence of three years, and reduced the

conviction for criminal deviate conduct to a class B felony, with a sentence of twenty years. *Id.* at 275.

Petitioner filed a Petition for Post-Conviction Relief (PCR) in the Greene County Superior Court on March 26, 2003. He filed nine amendments to the PCR between May of 2018 and March of 2019. [Appendix, *Russell v. State*, No. 21S-LW-451, Vol. II, p. 7, 84, 104, 123, 140, 147, 158, 166, 222]

On September 16, 2019, the parties filed a Joint Motion to Dismiss PCR With Prejudice and Modify Sentence. The Joint Motion requested that the court: (1). conduct a new sentencing hearing; (2). permit the parties to argue and submit evidence regarding: (a). Petitioner's statutory ineligibility for LOWP, due to intellectual disability (an issue which had not been addressed by any prior court); (b). any double jeopardy violations not addressed by the original sentencing court or the Indiana Supreme Court in the first appeal; and (c). any applicable statutory or non-statutory aggravating or mitigating circumstances; (3). order Petitioner's PCR dismissed with prejudice; and (4) impose a new sentence after hearing evidence and argument from the parties. [Appendix, *Russell v. State*, No. 21S-LW-451, Vol. IV, p. 112] The joint motion stated that Petitioner was not waiving his right to challenge the new sentence on appeal. [Appendix, *Russell v. State*, No. 21S-LW-451, Vol. IV, p. 113]

The trial court granted the joint motion the day it was filed. [Appendix, *Russell v. State*, No. 21S-LW-451, Vol. IV, p. 114; Transcript, *Russell v. State*, No. 21S-LW-451, Vol. II, p. 6] The trial court conducted a re-sentencing hearing on September 16 and 20, 2019 and February 28, 2020. [Transcript, *Russell v. State*, No. 21S-LW-451, Vol. I, p. 2-3, Vol.



II, p. 2] The court took the matter under advisement on February 28, 2020. [Transcript, *Russell v. State*, No. 21S-LW-451, Vol. II, p. 248]

On August 16, 2021, the trial court found that Petitioner was not intellectually disabled and re-sentenced Petitioner to an aggregate sentence of LWOP plus seventy-three years. [Appendix, p. 37-47] The court found that Petitioner's IQ scores placed him in the mildly intellectually disabled range. [Appendix, p. 40] However, the court found that he did not have significant deficits in adaptive functioning because: (1) he was able to perform some simple tasks; (2) he obtained a GED in prison; (3) he gave himself high scores on the ABAS-II; (4) Dr. Denis Keyes, who evaluated Petitioner in 2013, relied in part on information provided by Petitioner's family members; (5) Petitioner's scores on the ILS and the WRAT tests (which were administered after Petitioner had been in prison for almost twenty years) were within the range for intellectual disability, but they were at the high end of the range; and (6) Petitioner can distinguish between right and wrong. [Appendix, p. 40-41]

Petitioner filed an appeal in the Indiana Supreme Court, pursuant to Indiana Appellate Rule 4(A)(1)(a), which provides that the Indiana Supreme Court has mandatory and exclusive jurisdiction over criminal appeals in which a sentence of death or LWOP is imposed. Petitioner argued that the trial court erred when it found that Petitioner was not intellectually disabled. [Brief of Appellant, *Russell v. State*, No. 21S-LW-451, p. 33-60] Petitioner argued that, because the Indiana statutory sentencing scheme for the death penalty also applies to LWOP sentences, the trial court erred by failing to follow this Court's decision in *Moore v. Texas*, 581 U.S. 1 (2017). [Brief of

Appellant, *Russell v. State*, No. 21S-LW-451, p. 34, 36, 40-60] Petitioner also argued that the Eighth Amendment prohibition, against sentencing intellectually disabled individuals to death, announced in *Atkins v. Virginia*, 536 U.S. 304 (2002), should be extended to prohibit sentences of LWOP for intellectually disabled individuals. [Brief of Appellant, *Russell v. State*, No. 21S-LW-451, p. 34-35]

On June 3, 2024, the Indiana Supreme Court affirmed the trial court's decision in a 4-1 opinion. *Russell v. State*, 234 N.E.3d 829 (Ind. 2024). [Appendix, p. 3] The Indiana Supreme Court majority found that Petitioner had significant subaverage intellectual functioning. [Appendix, p. 10] However, the majority found that the trial court's decision, regarding Petitioner's adaptive functioning, was not clearly erroneous. [Appendix, p. 10-13] The majority found that, because Petitioner was not under a sentence of death, the Indiana courts were not required to follow the federal constitutional standards, articulated in *Moore v. Texas*, 581 U.S. 1 (2017), for determining if a person is intellectually disabled. [Appendix, p. 34]

The dissent found that the trial court's decision, regarding intellectual disability, should be reversed, because the trial court did not apply a medically informed standard. [Appendix, p. 29-30] The dissent found that, because the Indiana statutory sentencing scheme for the death penalty also applies to LWOP sentences, Indiana courts were required to follow this Court's decision in *Moore v. Texas*, 581 U.S. 1 (2017), in both LWOP and death penalty cases. [Appendix, p. 29-30] The dissent found that the trial court's order "would not pass muster in a death-penalty case." [Appendix, p. 29-30]



The Indiana Supreme Court declined to address Petitioner's Eighth Amendment claim, but the majority explicitly found that the claim was preserved. [Appendix, p. 34]

### REASONS FOR GRANTING THE PETITION

CERTIORARI IS WARRANTED BECAUSE THE INDIANA SUPREME COURT HAS BEEN PRESENTED WITH, BUT DECLINED TO ADDRESS, AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, REGARDING THE EXTENSION OF THE EIGHTH AMENDMENT PROHIBITION, AGAINST SENTENCING INTELLECTUALLY DISABLED INDIVIDUALS TO DEATH, ANNOUNCED IN *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), TO PROHIBIT SENTENCES OF LWOP FOR INTELLECTUALLY DISABLED INDIVIDUALS.

One reason for granting a writ of certiorari is when "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). In this case, the Indiana Supreme Court was presented with, but declined to decide, an important Eighth Amendment question that has not been, but should be, decided by this Court. The Indiana Supreme Court declined to address Petitioner's Eighth Amendment claim but explicitly found that the claim was preserved. *Russell v. State*, 234 N.E.3d 829, 844, n.2 (Ind. 2024). [Appendix, p. 34]

To determine if a punishment is cruel and unusual under the Eighth Amendment, this Court looks to "the evolving standards of decency that mark the progress of a maturing society." *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). One branch of Eighth Amendment jurisprudence uses "categorical rules to define Eighth Amendment standards," prohibiting certain punishments for certain categories of offenses and/or defendants with certain characteristics. *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting death penalty for rape



of adult woman); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (prohibiting death penalty for rape of child where crime did not result, and was not intended to result, in victim's death); *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting death penalty for anyone who was under age eighteen at time of offense); *Graham, Supra* (prohibiting sentence of LWOP for anyone who committed non-homicide offense before age eighteen); *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (prohibiting mandatory LWOP sentences for anyone who committed murder before age eighteen).

One of this Court's most significant categorical Eighth Amendment decisions is *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the execution of intellectually disabled defendants. Thus far, this Court has not decided if the *Atkins* rule should be extended to LWOP cases. Most state and lower federal courts have declined to hold that the Eighth Amendment prohibits sentences of LWOP for intellectually disabled defendants. However, almost all of those decisions rely on the language of *Atkins*, nothing that the holding thereof appears to be limited to capital cases. *Smith v. Ryan*, 813 F.3d 1175, 1202 (9<sup>th</sup> Cir. 2016) (reversing intellectually disabled defendant's death sentence and remanding with instructions for district court to grant writ of habeas corpus and return case to state court to reduce sentence to life or natural life); *United States v. Gibbs*, 237 Fed.Appx. 550, 567-68 (11<sup>th</sup> Cir. 2007) (*Atkins* does not apply to case where life sentence was imposed); *Harris v. McAdory*, 334 F.3d 665, 668, n.1 (7<sup>th</sup> Cir. 2003) (finding *Atkins* had no relevance to case where life sentence was imposed); *White v. Kiser*, 2021 WL 3616642 (W.D. Va. 2021) (Eighth Amendment does not restrict length of sentence imposed on intellectually disabled individuals); *People v. Brewer*, 279 Cal.Rptr.3d 546,

560 (Cal. App. 2021) (Eighth Amendment does not prohibit States from sentencing intellectually disabled individuals to LWOP); *Avalos v. State*, 635 S.W.3d 660, 670-72 (Tex. App. 2020) (Eighth Amendment does not prohibit automatic LWOP sentence for intellectually disabled individuals convicted of murder).

In cases involving categorical rules, the Court “first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue.” *Graham*, 560 U.S. at 61 (quoting *Roper*, 543 U.S. at 572). Next, “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’ the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Id.* (quoting *Kennedy*, 554 U.S. at 421).

The “clearest and most reliable” objective evidence of modern values lies in the laws enacted by the country’s legislatures. *Id.* at 62 (quoting *Atkins*, 536 U.S. at 312). Legislative enactments admittedly do not show a national consensus against sentencing intellectually disabled individuals to LWOP. Every state except Alaska provides for sentences of LWOP for certain offenses.<sup>1</sup> Of those forty-nine states, only Indiana and Kansas have statutory provisions, prohibiting LWOP sentences for intellectually disabled individuals. Ind. Code § 35-36-9-2, 35-50-2-3(b), 35-50-2-9(a); Kans. Code § 21-662(f).

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<sup>1</sup> Life Without Parole | Death Penalty Information Center

Federal law also provides for LWOP sentences, with no exemption for intellectually disabled defendants. 18 U.S.C. § 1111.

Nevertheless, the inquiry does not end with a survey of legislative enactments. *Graham*, 560 U.S. 62. “There are measures of consensus other than legislation.” *Kennedy*, 554 U.S. at 433.

“Actual sentencing practices” are often an important aspect of the analysis of an Eighth Amendment claim. *Graham*, 560 U.S. at 62. Unfortunately, however, there is no reliable way to discern the actual sentencing practices in this context. In *Graham*, the Court relied heavily on a nationwide study regarding the number of juvenile offenders serving LWOP sentences for nonhomicide offenses. *Id.* at 62-63. There is no way to conduct an accurate, nationwide survey of intellectually disabled defendants who are serving LWOP sentences. In many LWOP cases, the defendant’s mental status, unlike the defendant’s age, is not part of the official court record, and it may not even be known to the sentencing court.

There are many cases where LWOP is a sentencing option, but the death penalty is not, either because: (1) a jurisdiction provides for LWOP for a non-homicide offense; (2) the jurisdiction does not have a death penalty; or (3) the prosecution exercises its discretion to seek LWOP, instead of the death penalty for capital murder, as it did in this case. See *Graham*, 560 U.S. at 62; Ind. Code § 35-50-2-9(a). In cases where the death penalty is not an option, a defendant’s “intellectual disability often remains hidden throughout the litigation” because defense counsel lack the incentives or the resources to



investigate the defendant's mental status. Katie Kronick, *Intellectual Disability, Mitigation and Punishment*, 65 BCLR 1561, 1569 (2024).

The lack of resources is evident in this case. Like many states, Indiana has stringent requirements, regarding the training, workloads, and level of experience, of attorneys representing capital defendants. Ind. Criminal Rule 24. Indiana's criminal rules also provide for funds for investigators, experts, and other necessary support services in capital cases. Ind. Criminal Rule 24. However, there are no similar provisions for LWOP cases. In this case, even though Indiana statutorily exempts intellectually disabled individuals from LWOP, the issue was not presented to a court, until twenty years after the LWOP sentence was first imposed. Trial counsel and the original sentencing judge were both unaware of the statutory exemption. [Record, *Russell v. State*, No. 28S00-9912-CR-697, Vol. XIII, p. 3263-64, 3270]

Although there is no way to determine the number of intellectually disabled defendants sentenced to LWOP, there is another indicator of a national consensus. Intellectual disability and cognitive impairments are widely recognized as compelling mitigating circumstances in non-capital, criminal cases. *State v. Laney*, 627 S.E.2d 726, 649 (S.C. 2006); *State v. Barsness*, 473 N.W.2d 325, 329 (Minn 1991); *McCarty v. State*, 802 N.E.2d 959, 964-65, 967-68 (Ind. App. 2004); *In Re D.C.*, 618 A.2d 1325, 1326 (Vt. 1992); *State v. Nataluk*, 720 A.2d 401, 408 (N.J. 1998); *United States v. Robbins*, 2009 WL 1513408, p. 3 (E.D. Ark. 2009); *United States v. Henderson*, 541 F. Supp.3d 1312, 1313 (M.D. Ala. 2021).<sup>2</sup> The Indiana Supreme Court prohibits a term of years that is

<sup>2</sup> See Also Kronick, *Supra*, p. 1579-80. (noting jurisdictions where intellectual disability or cognitive impairments are statutory mitigating circumstance).

functionally equivalent to LWOP for intellectually disabled defendants. *Young v. State*, 696 N.E.2d 386, 391 (Ind. 1998). Oregon requires consideration of intellectual disability under the state constitution's proportionality requirement. *State v. Ryan*, 396 P.3d 867, 876 (Ore. 2017). A majority of American judges believe that a mental impairment, which results in diminished capacity, is mitigating.<sup>3</sup>

This Court's "own understanding and interpretation of the Eighth Amendment" favors extending the rule of *Atkins* to LWOP cases. *Graham*, 560 U.S. at 61. In *Atkins*, the Court found that the Eighth Amendment prohibits the execution of intellectually disabled individuals because they have limitations in reasoning, judgment, and impulse control, which prevent them from acting with the level of moral culpability that characterizes the most serious adult criminal conduct. 536 U.S. 306. The Court noted that "by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 318. The Court also observed that intellectually disabled individuals are more likely to be followers, rather than leaders. *Id.* Moreover, their impairments can jeopardize the reliability and fairness of the trial and sentencing proceedings. *Id.* at 306-07.

For these same reasons, the intellectually disabled should also be exempt from LWOP. LWOP is the "second most severe penalty permitted by law." *Graham*, 560 U.S. at 69 (Kennedy, J., concurring) (*quoting Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)). A sentence of LWOP "means the denial of hope; it means that good behavior and

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<sup>3</sup> Kronick, *Supra*, p. 1580-81.



character improvements are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convicted person], he will remain in prison for the rest of his days.” *Graham*, 560 U.S. at 70 (*quoting* *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)). Some people believe LWOP is a more severe punishment than the death penalty. *People v. Elliott*, 269 P.3d 494, 518 (Cal. 2012). Imposing the “second most severe penalty permitted by law” upon an intellectually disabled person violates the evolving standards of decency just as much as executing an intellectually disabled person.<sup>4</sup>

Due to his intellectual disability, Petitioner is not capable of acting with the level of moral culpability that justifies a sentence of LWOP. *Atkins*, 536 U.S. at 306. Even though he is a model prisoner, his sentence precludes any hope of his ever living outside the prison walls. [Appendix, *Russell v. State*, No. 21S-LW-451, Vol. III, p. 189] *Graham*, 560 U.S. at 70. His cognitive impairments jeopardized the reliability and fairness of the trial and sentencing proceedings in this case. *Atkins*, 536 U.S. at 306-07. Petitioner was convicted and sentenced to LWOP, and the LWOP sentence was affirmed in subsequent proceedings, despite compelling exculpatory evidence that disproves the prosecution’s theory and completely discredits the prosecution’s primary witnesses. [Brief of Appellant, *Russell v. State*, 21S-LW-451, p. 68-97] This court should grant a writ of certiorari and determine, in the exercise of its own independent judgment, that Petitioner’s sentence violates the Eighth Amendment. *Graham*, 560 U.S. at 61.

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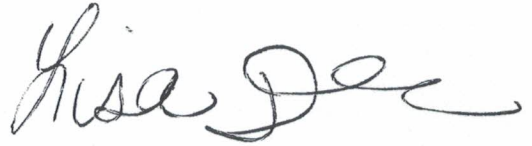
<sup>4</sup> Robert Johnson, Life Without Parole, America’s Other Death Penalty, Volume 88, *Prison Journal* pp. 328-46 (June 2008).



## CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Indiana Supreme Court.

Respectfully Submitted



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