

Capital Case

Case No. _____

October Term, 2017

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN WADDY, PETITIONER,

VS.

STATE OF OHIO, RESPONDENT.

On Petition For Writ Of Certiorari To
The Supreme Court Of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Warren Waddy is an intellectually disabled man who sits on death row in Ohio. Mr. Waddy was tried, convicted, and sentenced to death in 1987. Mr. Waddy's trial counsel never raised the issue of intellectual disability in the guilt or penalty phase, even though ample historical evidence was available that Mr. Waddy was intellectually disabled. Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 302 (2002), Mr. Waddy filed a petition for post conviction relief in state court claiming that his death sentence was unconstitutional because he is intellectually disabled. The state trial court held an *Atkins* hearing in 2009, but because of the ineffective assistance of his counsel in that proceeding, the expert retained by counsel was not well-versed in intellectual disability, and did not conduct a full assessment for intellectual disability as this Court has required in *Atkins*, *Hall v. Florida*, 134 S.Ct. 1986 (2014), *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), and *Moore v. Texas*, 137 S.Ct. 1039 (2017).

When current habeas counsel were appointed, counsel's investigation revealed new evidence in the form of a recantation from the forensic psychologist who testified in the 2009 hearing, as well as a full intellectual disability assessment, which showed that Mr. Waddy is intellectually disabled. Mr. Waddy asked for leave to file a Motion for a New Trial in the state trial court to present this newly discovered evidence. The motion was denied. Mr. Waddy appealed the denial of his Motion through the state courts, but did not prevail. The State of Ohio does not provide a forum to litigate the ineffective assistance of *Atkins* counsel, and because of this Mr. Waddy's right to due process has been denied.

Immediately following the Court's *Atkins* decision, the Ohio Supreme Court decided *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), which set forth procedures for making a retrospective *Atkins* determination. That procedure entailed filing a successive state post-conviction petition within 180

days of the *Lott* decision. Currently, capital defendants who claim they are intellectually disabled raise the claim at the trial level, and therefore have the Sixth Amendment right to the effective assistance of counsel. No such right exists for the individuals like Mr. Waddy who, simply based on timing, must raise their claims in the post conviction forum. No forum exists for Mr. Waddy to raise a claim of ineffective assistance of *Atkins* counsel in order to demonstrate that he is subject to the categorical ban on the execution of intellectually disabled persons.

Based on this narrative, the question presented for review is:

1. Does Ohio's denial of any meaningful opportunity to present a claim for ineffective assistance of *Atkins* counsel violate Mr. Waddy's constitutional rights to due process and equal protection?

LIST OF PARTIES

The parties are the same as those listed in the caption.

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Citations to Opinions Below

The Order of the Ohio Supreme Court summarily denying Petitioner Warren Waddy's memorandum in support of jurisdiction on July 5, 2017, and is reproduced in the Appendix at A-1.

The Opinion of the Ohio Twelfth District Court of Appeals denying Mr. Waddy's Motion for Leave to File a Motion for New Trial on July 11, 2016, and is reproduced in the Appendix at A-2.

The Memorandum of Opinion and Order of the trial court, in which the court denied Petitioner Waddy's Motion for Leave to File a Motion for New Trial on March 13, 2015, and is reproduced in the Appendix at A-3.

JURISDICTIONAL STATEMENT

Petitioner Warren Waddy timely filed his first Petition for a Writ of Habeas Corpus in the United States District Court, Southern District of Ohio on February 26, 1998. This Court decided *Atkins v. Virginia* 536 U.S. 304 (2002) on June 20, 2002, and Mr. Waddy timely filed his *Atkins* petition in state court on May 30, 2003. On June 16, 2003, the district court stayed the habeas case so that Mr. Waddy could litigate his successor post conviction *Atkins* claim in state court.

On July 20, 2005, the Franklin County Court of Common Pleas denied Waddy's petition without an evidentiary hearing. *State v. Waddy*, Franklin C.P. No 86 CR 003182, Docket at July 20, 2005. The Ohio Court of Appeals reversed on June 6, 2006, and the case was remanded with instructions to conduct an evidentiary hearing. *See generally, State v. Waddy*, Franklin App. No. 05AP-866, 2006 WL 1530117 (Ohio App., June 6, 2006). Following the hearing, the trial court again denied the petition on November 25, 2009. *State v. Waddy*, Franklin C.P. No. 86 CR 003182, Docket at November 25, 2009. The Ohio Court of Appeals affirmed on June 28, 2011. *See generally State v. Waddy*, Franklin App. 09AP-1197, 2011 WL 2536366 (Ohio App. June 28, 2011). The Ohio Supreme Court denied Mr. Waddy's request for discretionary review on October 24, 2012.

On July 24, 2012, habeas counsel moved withdraw from further representation of Mr. Waddy. The magistrate judge granted the motion to withdraw on July 25, 2012, and the district court officially appointed the Capital Habeas Unit of the Office of the Federal Public Defender for the Northern District of Ohio to represent Mr. Waddy.

On November 9, 2012, counsel for Mr. Waddy filed a motion for leave to file second amended habeas petition which included claims relating to the question of whether Mr. Waddy's death sentence should be vacated in light of *Atkins v. Virginia* which was granted on December 31, 2012.

On January 8, 2013, Petitioner Waddy filed an Amended Habeas Petition, including his *Atkins* claims. On April 9, 2013, Mr. Waddy filed a Motion to Stay and Hold Petition for Writ of Habeas Corpus in Abeyance Pending Exhaustion of Newly Discovered Evidence Being Presented to State Court in order to permit Mr. Waddy to litigate a delayed motion for new trial to exhaust claims based on newly discovered evidence. The Motion for Stay was denied by the district court on October 9, 2013

After receiving permission to litigate in state court, Mr. Waddy filed a Motion for Leave to File a Motion for New Trial Pursuant to Crim. R. 33(B) in *State v. Waddy*, Franklin County Court of Common Pleas on July 18, 2013. Mr. Waddy's proposed Motion for New Trial was attached as an exhibit. The trial court denied the Motion for Leave on March 13, 2015, and a timely appeal was filed on April 9, 2015

After the briefing was accomplished, Mr. Waddy filed a request that the Tenth District Court of Appeals recuse from the appeal because original trial counsel was a sitting judge on the appellate court. The judges voluntarily recused. The Chief Justice on the Ohio Supreme Court

appointed a panel from the Twelve District Court of Appeals to decide the appeal. Oral argument was held on April 4, 2016, and the court issued its opinion on July 11, 2016.

A Memorandum in Support of Jurisdiction for discretionary appeal in the Ohio Supreme Court was filed on September 13, 2016. The court denied jurisdiction in a summary order on July 5, 2017.

Jurisdiction is appropriate under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Sixth Amendment

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... .” U.S. CONST. amend. VI.

United States Constitution, Fourteenth Amendment

“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.” U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

In 1986, Mr. Waddy was charged with the following counts in two separate indictments, one capital and one non-capital, which were subsequently joined for trial over objection:

- **Case No. 86-CR-09-2754:** five counts of aggravated burglary with a specification in violation of O.R.C. § 2911.11 (aggravated first degree felonies); one count of attempted rape with a specification in violation of O.R.C. §§ 2923.02 and 2907.02 (aggravated second degree felony); two counts of rape with specification in violation of O.R.C. § 2907.02 (aggravated first degree felonies); one count of robbery with specification in violation of O.R.C. § 2911.02 (aggravated first degree felonies); two counts of aggravated robbery with specification in violation of O.R.C. § 2911.01 (aggravated first degree felony); two counts of felonious assault with specifications in violation of O.R.C. § 2903.11 (aggravated second degree felony); one count of extortion with specification in violation of O.R.C. § 2905.11 (an aggravated third degree felony); and one count of theft with a specification in violation of O.R.C. § 2913.02 (a fourth degree felony). There are fifteen (15) counts in this indictment involving three victims.

- **Case No. 86-CR-10-3182** (the capital indictment): two counts of aggravated murder with death penalty specifications in violation of O.R.C. §§ 2903.01 (aggravated murder) and 2929.04(A)(3) and (7) (aggravating circumstances); two counts of aggravated burglary in violation of O.R.C. § 2911.11 (aggravated first degree felony), and two counts of kidnapping in violation of O.R.C. § 2905.01 (aggravated first degree felony). There are six counts in this indictment all involving the same victim.

Mr. Waddy was convicted of the crimes from the two indictments. Mr. Waddy was sentenced to the following:

- **Case No. 86-CR-09-2754:** aggravated burglary, 7-25 years; rape, 9-25 years consecutive; attempted rape, 9-15 years concurrent; rape, 9-15 years concurrent; robbery, 5-15 years concurrent; aggravated burglary, 5-25 years consecutive; aggravated burglary, 5-25 years concurrent; felonious assault, 9-15 years consecutive; extortion, 2 years consecutive; theft, 2 years concurrent.
- **Case No. 86-CR-10-3182:** aggravated murder, death; aggravated burglary, 15-25 years consecutive; kidnapping, 15-25 years concurrent.

Mr. Waddy's convictions and sentences were affirmed on direct appeal. *See State v. Waddy*, 1989 WL 133508 (10th Dist Nov 2, 1989) (unpublished). Mr. Waddy then appealed to the Ohio Supreme Court which also affirmed his conviction and sentence. *See State v. Waddy*, 588 N.E.2d 819 (Ohio 1992), *cert denied* 506 U.S. 921 (1992).

Mr. Waddy filed a petition for his initial petition for post conviction relief with the Franklin County Court of Common Pleas under Case No. 86CR-12-3182. The trial court dismissed the petition without an evidentiary hearing in an unpublished order on June 10, 1996. The court of appeals affirmed the trial court. *See State v. Waddy* 1997 WL 318032 (10th Dist June 10, 1997) (unpublished). The Ohio Supreme Court declined jurisdiction, 685 N.E.2d 237 (Ohio 1997) (table).

Mr. Waddy filed his initial Petition for Habeas Corpus Relief on February 26, 1998. On June 20, 2002, while his petition was pending, the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the execution of mentally retarded individuals constitutes cruel and unusual punishment. Shortly thereafter, the Ohio Supreme Court decided *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), which set out the state procedures by which death sentenced individuals who were mentally retarded could obtain relief under *Atkins*.

On May 30, 2003, Mr. Waddy filed a timely *Atkins* petition in state court in which he alleged he was mentally retarded and therefore ineligible for the death penalty under *Atkins* and *Lott*. *State v. Waddy*, Franklin C.P. No. 86 CR 003182.

On July 20, 2005, the Franklin County Court of Common Pleas denied Mr. Waddy's petition without an evidentiary hearing. *State v. Waddy*, Franklin C.P. No. 86 CR 003182, Docket at July 20, 2005. The Ohio court of appeals reversed on June 6, 2006, and the case was remanded with instructions to conduct an evidentiary hearing. *See State v. Waddy*, 2006 WL 1530117 (10th Dist. June 6, 2006) (unpublished). Following the hearing, the trial court again denied the petition which the court of appeals affirmed on June 28, 2011. *See State v. Waddy*, 2011 WL 2536366 (10th Dist June 28, 2011) (unpublished). The Ohio Supreme Court denied Mr. Waddy's request for discretionary review on October 24, 2012.

The United States District Court for the Southern District of Ohio appointed undersigned counsel of the Capital Habeas Unit, Office of the Federal Public Defender for the Northern District of Ohio on July 26, 2012, following the decision of the Supreme Court in *Martinez v. Ryan*, 566 U.S. 1 (2012). On January 8, 2013, counsel filed an amended habeas petition which included claims relating to the question of whether Mr. Waddy's death sentence should be vacated in light of *Atkins*. That amended habeas petition is currently pending with the federal district court.

Current habeas counsel obtained authorization from the federal district court to litigate in state court. That authorization was granted June 18, 2013. On July 18, 2013, counsel filed the Motion for Leave to File a Motion for New Trial Pursuant to Crim. R. 33(B) in *State v. Waddy*, Franklin County Court of Common Pleas. Mr. Waddy's Proposed Motion for New Trial was attached as an exhibit. The trial court denied the Motion for Leave on March 13, 2015, and Mr. Waddy filed a timely appeal to the court of appeals.

After the briefing was completed, Mr. Waddy filed a request that the Tenth District Court of Appeals recuse from the appeal because original trial counsel was a sitting judge on the appellate court. The judges voluntarily recused. The Chief Justice on the Ohio Supreme Court appointed a panel from the Twelve District Court of Appeals to decide the appeal. Oral argument was held on April 4, 2016, and the court issued its opinion on July 11, 2016.

II. STATEMENT OF THE FACTS

The underlying facts of the crimes for which Mr. Waddy has been convicted and sentenced to death and several years' imprisonment are not relevant to the issue in this petition.

The newly discovered evidence that was uncovered as a result of habeas counsel's investigation is relevant. The new evidence casts the evidence presented at the mitigation hearing and found in the subsequent investigations concerning Mr. Waddy's childhood and life in a different light, and revealed a more complete picture of Mr. Waddy's difficult childhood and intellectual disability.

A. Evidence Presented At The Mitigation Trial

The twenty-one pages of testimony presented at the mitigation hearing revealed that the defendant was one of nine children in his family, with only one family member, his youngest brother, Aubry Waddy, testifying on his behalf. Mr. Waddy's father was a truck driver who was rarely home. When he arrived home, father would beat the children for whatever they had gotten in trouble for while he was away, or for no specific reason. The family was not a particularly close one, nor were the children closely supervised. Warren Waddy had several problems early-on in his life. At age fourteen, he was before the court for attempting to have sexual contact with a fourteen-year-old girl. He was still wetting the bed at age fifteen. He had a history of beating his head into things and there was some indication in an early psychiatric report of brain damage.

Eventually, Mr. Waddy came to Ohio and met Kay Drake in 1978. Ms. Drake became pregnant with Mr. Waddy's daughter, Natalie. Ms. Drake testified that Warren was always home on time to watch Natalie when she went to work.

In November of 1985, Mr. Waddy was beaten up badly by a group of men. He lost two front teeth during the fight. Following that incident, he wrote a statement that was entered into evidence. The statement recited his goals, including his desire to make a better life for his children, pay off his mother and father's house, and get away from crime and drugs.

Following arguments to the jury, the court recessed until the next day without sequestering the jury. Several of the jury members rode in the elevator with members of the murdered victim's family. This fact was brought to the court's attention the following morning by way of a motion to remove the possibility of the death penalty from the jury's consideration. The court overruled the motion.

The court subsequently instructed the jury and they retired to deliberate. The jury returned two death recommendations, one per count.

B. Post-Conviction Mitigation Investigation

In preparation for the 1996 state post conviction petition, post conviction counsel had Mr. Waddy evaluated by Dr. Jeffrey Smalldon, a forensic psychologist who conducted a psychological evaluation that incorporated the part of Mr. Waddy's history and background that was made available to him at the time. However, Dr. Smalldon was never asked to conduct a full evaluation for intellectual disability. Yet Dr. Smalldon found significant brain impairment and deficits in Mr. Waddy's every day functioning. Dr. Smalldon's report was an exhibit to Mr. Waddy's first state post conviction petition.

C. Further Investigation

After current habeas counsel were appointed to represent Mr. Waddy, an investigation into his background and functioning was commenced. That investigation revealed significant mitigation that was never previously discovered by trial counsel, direct appeal counsel, post-conviction counsel or *Atkins* counsel.

Also as part of current habeas counsel's investigation, Mr. Waddy was evaluated by Dr. Cynthia Hartung, a psychologist with specific training and experience with the diagnosis of mental retardation. Her conclusions were:

When historical information, IQ testing, and adaptive behavior testing are considered, the majority of the available evidence indicates Mr. Waddy is functioning in the mild mental retardation range and has been performing at this level since childhood. Therefore, with a reasonable degree of psychological certainty, I conclude that Mr. Waddy has mild mental retardation.

(Attachment 1 Hartung Psychological Report, dated 10-19-12; Attachment 2, Dr. Hartung CV).

Dr. Hartung's conclusion was confirmed by Dr. Stephen Greenspan, a nationally recognized and respected expert in the psychological field of intellectual disability.

It is my professional opinion, to a reasonable degree of scientific certainty, that Warren Waddy meets all three prongs for a diagnosis of Intellectual Disability, as specified in diagnostic manuals relied on by mental health professionals and as urged by the courts in Ohio after *Lott*.

(Attachment 3 Affidavit of Dr. Greenspan 2013.9.9). This evidence was not previously available to Mr. Waddy.

1. Mr. Waddy Suffers From Subaverage Intelligence.

As Dr. Hartung concludes in her report, Mr. Waddy's score on the WAIS-IV shows significant subaverage intellectual functioning and places him in the range of mild mental retardation. As defined by the AAMR, a limitation is "significant" if it is approximately two standard deviations below the mean as measured by appropriate instruments. 2002 AAMR Manual

at 58-59. The average score is 100 with a standard deviation of 15; therefore two standard deviations below is approximately 70. *Id.* Both the AAMR and the DSM-IV find there is a standard error of measurement in IQ tests of five points; thus, the benchmark for MR is up to 75. (*Id.*, see also DSM IV at 41-42). Mr. Waddy's IQ scores as a child and as an adult place him within the mental retardation range.

Dr. Hartung's evaluation and testing is the most accurate reflection of Mr. Waddy's intellectual functioning. Dr. Hartung administered the WAIS-IV, which is considered to be the gold standard for IQ tests, and Mr. Waddy's score resulted in a full scale IQ of 73. As Dr. Hartung further concluded, "There is a 95% chance that his true [Full Scale IQ] is between 69 and 78," well within the mental retardation range. (Attachment 1, Hartung Report at 3). This result is totally consistent with the picture painted by Mr. Waddy's school records.

Mr. Waddy's counsel also interviewed Roslyn Ramsey, who was the Chief Psychiatric Social Worker at the Educational Therapy Center (ETC), which was a special education program for the Richmond Public Schools. In 2012, Ms. Ramsey reviewed records pertaining to Mr. Waddy from ETC dated January 1969. She informed that the records revealed Mr. Waddy was referred by the school to the ETC program.

Dr. Smalldon provided an affidavit in 2013 recanting his testimony at the 2009 *Atkins* hearing. (Attachment 4, Affidavit of Dr. Jeffrey L. Smalldon). Dr. Smalldon evaluated Mr. Waddy in 1995 as part of an overall evaluation of Mr. Waddy for post-conviction.

Dr. Smalldon acknowledged in his 2013 affidavit that he was not asked to assess Mr. Waddy for mental retardation in 1995. Dr. Smalldon's training as a psychologist was in the field of forensics and not in the specific area of intellectual disabilities. "I did not undertake a formal MR assessment, using best practices for such an assessment . . ." (Attachment 4, Smalldon

Affidavit, at ¶ 22). At the 2009 *Atkins* hearing, Dr. Smalldon testified Mr. Waddy was not mentally retarded. Now, after reviewing additional material specific to Mr. Waddy and with an awareness of the evolving psychological study of the area of intellectual disabilities, Dr. Smalldon agrees the evidence supports the conclusion that the three prongs of *Lott* are met in Mr. Waddy's case. (*Id.* ¶ 24). Dr. Smalldon also agreed that Dr. Hartung's evaluation should be given the most weight. (*Id.* ¶ 21).

2. Mr. Waddy Has Adaptive Deficits Consistent With The Second Prong Of The Diagnosis.

As Dr. Hartung's report reflects, Mr. Waddy's adaptive functioning was in the mild mental retardation range. She found he had significant deficits in the areas of communications, functional academics, self-direction, leisure skills, social skills, community use, home living, health and safety, and self-care. When conducting her evaluation, Dr. Hartung utilized the Adaptive Behavior Assessment Scale-Second Edition (ABAS-II), a standardized, comprehensive measure of adaptive skills that measures independence and adaptive skills. Dr. Hartung conducted this assessment by interviewing two of Mr. Waddy's siblings to ascertain his level of adaptive functioning during the developmental period. She also relied on information obtained from Mr. Waddy as well as historical documentation. Based on this assessment, Dr. Hartung found Mr. Waddy had significant deficits in adaptive functioning as a child and into adulthood. (Attachment 1, Hartung Report at 5-6). Dr. Smalldon never administered an adaptive skills test to Mr. Waddy.

3. Onset Before The Age Of Eighteen.

Mr. Waddy's low functioning and demonstrated intellectual disability was demonstrated throughout his school records.

While Dr. Smalldon opined that motivation could have been an issue for Mr. Waddy, which could affect his IQ scores, he admitted that Mr. Waddy did not want to see himself as retarded.

Mr. Waddy felt stigmatized after being sent to what he believed was a school for retarded children. At the critical time for this determination, prior to the age of eighteen, Dr. Smalldon agreed that Mr. Waddy's desire not to be considered retarded would tend to motivate him to not act or appear retarded.

Dr. Hartung noted in her report that:

Historical information suggests an IQ in the mild mental retardation range that was documented at age 14. Further Mr. Waddy attended a residential school for children with behavior problems and mental retardation (i.e., Beaumont) and a professional at this school recommended that he be sent to a school for African-American boys with mental retardation (i.e., Peteresburg). His childhood history is also positive for a number of behaviors that are common in children with mental retardation including head-banging, rocking and nocturnal enuresis.

(Attachment 1, Hartung Report at p. 6). Thus, it is clear that Mr. Waddy meets the third prong of the *Atkins* diagnosis. All the records and anecdotal evidence suggest that he was functioning at a subaverage level throughout his school years. Dr. Hartung concluded that "Mr. Waddy is functioning in the mild mental retardation range and has been performing at this level since childhood." (*Id.* at 7). The new evidence presented in her report shows that Mr. Waddy is mentally retarded.

4. Anecdotal Evidence Of Brain Dysfunction During The Developmental Years.

The reports indicate that Mr. Waddy was sent home at least six times in 1965 for banging his head against the desk and being generally disruptive. Other documents show that Mr. Waddy often rocked back and forth as a child, in addition to banging his head. Mr. Waddy's siblings confirm that he banged his head and rocked back and forth every day. Rocking and head banging can signal the presence of brain dysfunction. The records indicated that an EEG that was administered on Mr. Waddy showed slow activity in the occipital region of the brain. There was

ample evidence of mild brain impairment in Mr. Waddy that occurred during Mr. Waddy's developmental years, before the age of eighteen.

Mr. Waddy's school records, including his placement in "slow learner" classes, as well as the affidavit of Ms. Ramsey from the Educational Therapy Center show that Mr. Waddy was mentally retarded during the developmental period.

REASONS FOR GRANTING THE WRIT

Does Ohio's denial of any meaningful opportunity to present a claim for ineffective assistance of *Atkins* counsel violate Mr. Waddy's constitutional rights to due process and equal protection?

In determining the appropriate procedures for retrospectively litigating an *Atkins* claim following this Court's decision to categorically ban the execution of intellectually disabled persons, the Ohio Supreme Court chose to require capital petitioners such as Warren Waddy to litigate their post-trial *Atkins* claims in state post conviction. *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). That procedure entailed filing a successive state post-conviction petition within 180 days of the *Lott* decision. Currently, capital defendants who claim they are intellectually disabled raise the claim at the trial level, and therefore have the Sixth Amendment right to the effective assistance of counsel in presenting *Atkins* claims. No such right exists for the individuals like Mr. Waddy who, simply based on timing, must raise their claims in the post conviction forum. There is no forum for Mr. Waddy to raise a claim of ineffective assistance of *Atkins* counsel and show that he is subject to the categorical ban on the execution of intellectually disabled persons.

In the context of retrospective *Atkins* determinations, the post conviction process is the equivalent of a trial level proceeding. The only appellate review of that process is a direct appeal to the state court of appeals. However, the capital petitioner in that instance does not get an appeal as of right before the Ohio Supreme Court, as they would on direct appeal. Ohio S.Ct. Prac. R.

2.1(A)(1). By doing so, the Ohio court “significantly diminish[ed] the [capital petitioners’] ability” to litigate fully their *Atkins* claims. Ohio’s deliberate choice to make retrospective *Atkins* proceedings governed by the same rules as an initial post conviction review is a denial of those petitioners’ constitutional rights to due process and equal protection. *Martinez v. Ryan*, 566 U.S. at 13; *Davila v. Davis*, 137 S.Ct. 2058, 2068 (2017).

The trial “is the main event at which a defendant’s rights are to be determined.” *McFarland v. Scott*, 512 U.S. 849 (1994). The Court has held that the trial “is where the stakes for the defendant are the highest, not least because it is where a presumptively innocent defendant is adjudged guilty . . . and where the trial judge . . . makes factual findings that nearly always receive deference on appeal and collateral review.” *Davila v. Davis*, 137 S.Ct. at 2066. And in the *Atkins* context, the stakes are a matter of life or death.

Because of these concerns, this Court recognized in *Martinez* and *Trevino* that there must be a mechanism by which the federal courts may still review a strong claim on the merits even when initial post conviction counsel failed to raise the meritorious claim. In cases such as Mr. Waddy’s, a petitioner’s *Atkins* claim is virtually non-reviewable for any off the record deficiencies, including the ineffective assistance of *Atkins* counsel. Even where habeas review is available, the deference given to the state court record can be insurmountable, and therefore not provide an adequate remedy. The result could be that an intellectually disabled capital defendant could be executed, which would be contrary to *Atkins* and a miscarriage of justice.

A death-sentenced defendant who raises an *Atkins* claim in a state collateral proceeding has a clearly established constitutional right to the effective assistance of counsel. For those Ohio defendants who had not yet been convicted when the U.S. Supreme Court decided *Atkins*, their *Atkins* counsel and their trial counsel are one in the same, because *Atkins* claims must be raised

before the trial court in Ohio. *See State v. Were*, 890 N.E.2d 263, 290-93 (Ohio 2008). Therefore, the Sixth Amendment of the Constitution protects the rights of those Ohio defendants to receive effective assistance of counsel in asserting an *Atkins* claim. *See id.* at 301.

Those defendants convicted after the Supreme Court issued *Atkins* therefore may assert constitutional claims based on their counsel's ineffectiveness related to an *Atkins* claim along with all their other trial-counsel ineffectiveness claims, in either direct-review or post-conviction proceedings, as appropriate. *See id.*; *see also State v. Elmore*, No. 2005-CA-32, 2005 WL 2981797, at *7-8 (Ohio Ct. App. Nov. 3, 2005).

Because the Supreme Court's categorical ban on executing the mentally retarded in *Atkins* applies retroactively to mentally retarded defendants who were sentenced to death before that ruling, defendants eligible for this retroactive claim, like Mr. Waddy, must have the same Sixth Amendment rights to effective assistance of *Atkins* counsel as those defendants whose trial counsel functions as *Atkins* counsel by virtue of them being tried after the *Atkins* decision. But because Ohio defendants like Mr. Waddy are required to assert their *Atkins* claims in a state post-conviction proceeding, *see Lott*, 779 N.E.2d at 1015-16, they cannot raise an ineffective-assistance claim related to their *Atkins* counsel's representation through the normal channels for asserting such trial-counsel ineffectiveness claims, i.e., direct appeal or initial post-conviction proceedings. Nevertheless, Equal Protection and Due Process requires that these defendants be given a full and fair opportunity to realize their Sixth and Fourteenth Amendment rights to effective assistance from the counsel obligated to assert their *Atkins* claim.

At least one state court – Oklahoma - acknowledged the validity of an ineffective assistance of *Atkins* counsel claim. The Oklahoma Court of Criminal Appeals found that because the *Atkins* proceedings were the equivalent of a trial level case, the initial appeal from that proceeding was

the same as a direct appeal from a trial on the merits. *Lambert v. State*, 126 P.3d 646, 649 (Okla. Crim. App. 2005). The Oklahoma Court then held that “in the peculiar and narrow circumstances raised by retrospective capital mental retardation proceedings, a subsequent post-conviction claim is the appropriate way to raise claims of ineffective assistance of counsel arising from the mental retardation proceedings themselves.” (Attachment 5 at 4, *Hooks v. State*, Case No. PCD-2006-350 (Okla. Crim. App. October 10, 2006)).

In the subsequent review of Mr. Hooks’s habeas proceedings, the Tenth Circuit Court of Appeals endorsed this logic, explaining that an *Atkins* proceeding that challenges a pre-*Atkins* death sentence is “‘post conviction’ only in the strict chronological sense.” *Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012).¹ In such circumstances, the *Atkins* proceeding amounts to “‘part of the criminal proceeding itself’ and [is] not ‘civil in nature,’” notwithstanding the fact that it challenges a death sentence that has already become final on direct review. *Id.* at 1184 (quoting *Murray v. Giaratano*, 492 U.S. 1, 8 (1989) (further citations omitted)). Accordingly, “defendants in *Atkins* proceedings have the right to effective counsel secured by the Sixth and Fourteenth Amendments—a right that stems directly from, and is a necessary corollary to, *Atkins*.” *Id.* at 1185.²

¹ In *Hooks v. Workman*, the Tenth Circuit granted habeas relief with respect to the death sentence after finding original trial counsel (not *Atkins* counsel) was ineffective for failing to properly investigate and present mitigation evidence, including Mr. Hooks’s intellectual disability. 689 F.3d at 1207.

² While so far no other circuit court has ruled on whether there is a right to the effective assistance of *Atkins* counsel, the Southern District of Ohio has twice rejected the claim, including Mr. Waddy’s current habeas court. See *Bays v. Warden* 2014 WL 29564, Case No. 3:08-cv-076 (S.D. Ohio 2014); *Waddy v. Robinson*, 2014 WL 4674291, Case No. 3:98-cv-084 (S.D. Ohio 2014).

Four times now this Court has said what it meant, that Americans will punish but will no longer execute the intellectually disabled. This Court has been abundantly clear in *Atkins*, *Hall*, *Brumfield*, and *Moore* that, in determining intellectual disability, courts must be informed by the current practices of the medical and psychological community. In this steady and consistent line of cases from the Court spanning some fifteen years, the dignity of a human being's life can no longer be squelched on such unstructured methodologies by forensic experts. Yet these erroneous methodologies still persist, as they did in Mr. Waddy's case, and without an avenue to raise ineffective assistance of *Atkins* counsel claims, people will be executed based on these slipshod methodologies.

Conclusion

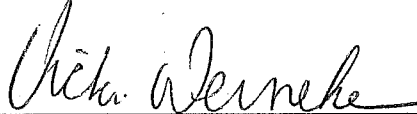
The Court should grant certiorari in this case to address the fundamental question of whether a capital defendant such as Mr. Waddy is constitutionally entitled to an effective attorney to represent him in the critical post-trial *Atkins* proceeding. While this case would affect a discreet set of capital defendants, the impact would be important and significant. Mr. Waddy requests that the Court grant this petition to allow full briefing and oral argument, ultimately granting the writ, or any other relief the Court deems appropriate.

Respectfully submitted,

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