

No. 17-7145

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

WARREN WADDY,
Petitioner,

-vs-

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT’S BRIEF IN OPPOSITION

RON O’BRIEN
Franklin County Prosecuting Attorney
STEVEN L. TAYLOR
(Counsel of Record)
Chief Counsel, Appellate Division
373 South High Street – 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
E-mail: staylor@franklincountyohio.gov
COUNSEL FOR RESPONDENT
STATE OF OHIO

QUESTIONS PRESENTED
(as formulated by Respondent)
(Capital Case)

Whether petitioner was denied a meaningful opportunity to present a claim of ineffectiveness regarding his post-conviction *Atkins* counsel when, despite significant procedural irregularities, the Ohio courts assumed that petitioner was using a proper procedural vehicle and still rejected the ineffectiveness claim by concluding that there was no deficient performance by *Atkins* counsel?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	3
ARGUMENT	10
EVEN IF THE CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL EXTENDS TO POST-CONVICTION REVIEW OF AN <i>ATKINS</i> CLAIM, SUCH COUNSEL WOULD BE ACTING REASONABLY IN NOT REQUESTING FURTHER FUNDING OR INVESTIGATING FURTHER AFTER THE EXPERT RETAINED BY COUNSEL REJECTED THE INTELLECTUAL- DISABILITY CLAIM.	10
CONCLUSION	36

TABLE OF AUTHORITIES

CASES

<i>American Railway Express Co. v. Levee</i> , 263 U.S. 19 (1923)	2
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	passim
<i>Black v. Carpenter</i> , 866 F.3d 734 (6th Cir. 2017)	20
<i>Bobby v. Bies</i> , 556 U.S. 825 (2009).....	12
<i>Brumfield v. Cain</i> , 135 S.Ct. 2269 (2015)	33
<i>Davila v. Davis</i> , 137 S.Ct. 2058 (2017).....	11, 25
<i>Ex parte Cathey</i> , 451 S.W.3d 1 (Tex.Crim.App. 2014).....	21
<i>Frazier v. Jenkins</i> , 770 F.3d 485 (6th Cir.2014).....	27
<i>Green v. Johnson</i> , 515 F.3d 290 (4th Cir. 2008)	14
<i>GTE Automatic Electric, Inc. v. ARC Industries</i> , 47 Ohio St.2d 146, 351 N.E.2d 113 (1976)	26
<i>Hall v. Florida</i> , 134 S.Ct. 1986 (2014).....	14, 33
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	10, 25
<i>McManus v. Neal</i> , 779 F.3d 634 (7th Cir. 2015)	20
<i>Michel v. Louisiana</i> , 350 U.S. 91 (1955).....	36
<i>Moore v. Texas</i> , 137 S.Ct. 1039 (2017)	32, 33
<i>Pennsylvania v. Finley</i> , 481 U.S. 551 (1987)	25, 26
<i>Scott v. Houk</i> , 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835 (2010).....	36
<i>Smith v. Duckworth</i> , 824 F.3d 1233 (10th Cir. 2016).....	20
<i>State v. Ambartsoumov</i> , 2013-Ohio-3011, 2013 WL 3488186 (10th Dist. 2013).....	35
<i>State v. Berry</i> , 2007-Ohio-2244, 2007 WL 1377036 (10th Dist. 2007)	33

<i>State v. Glover</i> , 2014-Ohio-322, 2014 WL 3697686 (8th Dist. 2014)	25
<i>State v. Golden</i> , 2010-Ohio-4438, 2010 WL 3641550 (10th Dist. 2010).....	26
<i>State v. Jackson</i> , 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414 (2016).....	11, 25
<i>State v. Jama</i> , 2012-Ohio-2466, 2012 WL 1997042 (10th Dist. 2012).....	26
<i>State v. Lott</i> , 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011 (2002)	passim
<i>State v. Maxwell</i> , 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930 (2014).....	16
<i>State v. Mayle</i> , 2002-Ohio-2089, 2002 WL 756864 (10th Dist. 2002)	27
<i>State v. Reynolds</i> , 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997).....	21
<i>State v. Schiebel</i> , 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).....	24, 26
<i>State v. Schrock</i> , 2008-Ohio-3745, 2008 WL 2875690 (11th Dist. 2008).....	27
<i>State v. Waddy</i> , 2006-Ohio-2828, 2006 WL 1530117 (10th Dist. 2006)	8
<i>State v. Waddy</i> , 2011-Ohio-3154, 2011 WL 2536366 (10th Dist. 2011)	9
<i>State v. Waddy</i> , 63 Ohio St.3d 424, 588 N.E.2d 819 (1992)	3
<i>State v. Walden</i> , 19 Ohio App.3d 141, 483 N.E.2d 859 (10th Dist. 1984).....	24, 25
<i>State v. Were</i> , 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263 (2008)	13
<i>State v. Wilson</i> , 1993 WL 460572 (10th Dist. 1993).....	27
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	27
<i>Trevino v. Thaler</i> , 569 U.S. 413 (2013).....	25

STATUTES

28 U.S.C. 1254(1).....	2
28 U.S.C. 2254(i).....	25
O.R.C. 2929.04(A)(7)	5

O.R.C. 2953.21	22
O.R.C. 2953.21(A)(4)	22
O.R.C. 2953.21(J)(2)	25
O.R.C. 2953.21(K).....	22
O.R.C. 2953.23	10, 29
O.R.C. 2953.23(A)(1)(a).....	22, 23
O.R.C. 2953.23(A)(1)(b)	23

OTHER AUTHORITIES

1994 DSM-IV	15
1992 AAMR.....	15
2002 AAMR.....	15, 28, 31, 32
2010 AAIDD.....	28, 32

RULES

Oh.Crim.R. 33(B)	10, 11, 24, 28
Oh.Crim.R. 33(D)	24

REASONS FOR DENYING THE PETITION

Petitioner presents no compelling reason for this Court to grant the petition for writ of certiorari. His “Question Presented” is inapt to the present case, since, despite significant procedural irregularities, the Ohio courts reached his argument that his filing of a second *Atkins* claim should be allowed because his post-conviction *Atkins* counsel had been ineffective. The Ohio courts ultimately rejected that argument because there was no deficient performance by *Atkins* counsel. Petitioner cannot claim he was denied “any meaningful opportunity,” since the Ohio courts gave him the opportunity and it was meaningful, and the ineffectiveness argument was nevertheless rejected. The Ohio courts’ fact-laden rejection of ineffectiveness does not present this Court with any reason to address the more basic predicate question of whether post-conviction *Atkins* counsel can be considered “ineffective” in the absence of a constitutional right to such counsel at that stage.

In any event, the procedural irregularities come to the forefront and make this case a poor vehicle to address petitioner’s attempt to renew his previously-rejected *Atkins* claim. Petitioner is simply incorrect in claiming that there is “no forum” under Ohio law to seek to raise a successive *Atkins* claim. Ohio law would allow capital defendants to file a successive post-conviction petition raising “newly discovered” *Atkins* evidence. But Ohio rightly places restrictions and limits on successive post-conviction review, and petitioner in this particular case would have been unable to meet those standards in major part because the evidence was not really newly discovered. Instead of seeking post-conviction review again, petitioner engaged in an end-run around those limits by attempting to invoke the inapt procedural vehicle of a motion for leave to file a motion for new trial, which, for various reasons, is an inappropriate vehicle by which to renew an *Atkins* claim already rejected on

post-conviction review. It is an especially inappropriate vehicle in which to review the supposed ineffectiveness of the *Atkins* counsel as a basis for a renewed *Atkins* claim. Given that petitioner filed the wrong motion to begin with, petitioner has created fundamental doubts about the ability of the Ohio courts to grant relief pursuant to the motion he filed, and those doubts follow the case here.

Another significant factor weighing against granting review arises from a lack of candor in petitioner's filing. For example, in the "Questions Presented" discussion, petitioner attempts to blame his original trial counsel for failing to raise an intellectual-disability claim in the 1987 mitigation hearing. Unmentioned by petitioner is the fact that petitioner refused to cooperate in any psychological evaluation, despite trial counsel's repeated efforts. Trial counsel cannot be blamed for petitioner's obstinance.

Petitioner also fails to mention that his *Atkins* counsel retained an expert, Dr. Daniel Grant, who engaged in an extensive evaluation of petitioner before the 2009 post-conviction hearing. *Atkins* counsel then decided not to call Grant to testify at the hearing, an obvious indicator of tactical decision-making on counsel's part. While these facts can be gleaned from the lower court decisions, it is still unfortunate that the petition fails to engage those significant weaknesses in the ineffectiveness argument that petitioner wishes to raise here.

The petition also has notable technical flaws. The petition asks for a writ of certiorari to issue to the Ohio Supreme Court, but that court merely declined discretionary review and therefore would be the wrong court to be issued the writ. *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

Petitioner also invokes the wrong jurisdictional statute, 28 U.S.C. 1254(1), which governs certiorari review from federal courts of appeal, not state courts.

Petitioner is even mistaken as to the name of the state appellate court. The three judges assigned to the case by the Ohio Chief Justice were sitting as a panel of the *Tenth* District Court of Appeals, not as a panel of the Twelfth District Court of Appeals, as petitioner asserts on page 1.

Given these errors, and for the other reasons stated herein, petitioner's arguments fall far short of demonstrating any need for review so as to justify the expenditure of this Court's scarce judicial resources to review his case.

STATEMENT OF THE CASE

The factual history behind petitioner's crimes is set forth in *State v. Waddy*, 63 Ohio St.3d 424, 588 N.E.2d 819 (1992). That history serves as a necessary counterpoint to the warm-and-fuzzy portrayal of petitioner in the report by Dr. Cynthia Hartung, which is included in the petitioner's appendix. Hartung's report went out of its way to detail petitioner's "warm greeting" and hugging of his counsel and his agreement to put forth his "best effort." The report notably took no account of the facts surrounding petitioner's crimes and did not mention the toxic cocktail of psychological traits that would explain many of the adaptive-functioning "deficits" found by Hartung and would explain why he would not do his "best."

The facts demonstrate that petitioner is a malevolent recidivist with sociopathic tendencies who is capable of manipulation and planning of his crimes and capable of "tanking" any IQ test.

Petitioner had previously served two stints in prison before he broke into the home of Carolyn Wilson on May 18, 1986. He threatened to kill her if she said anything. He blindfolded her, tied her up, and raped her twice. He then robbed her of her bankcard,

being smart enough to demand the card's secret code number and threatening to come back and stab her to death if it was wrong. Five unauthorized withdrawals were made the next day with the card.

Petitioner broke into the home of Julie Jackson on June 23, 1986. Petitioner held a knife to her neck, saying "Bitch, if you say anything, I will kill you." Petitioner tied her up and threw a sheet over her head. When she partly sat up, petitioner began to beat her and then pushed her down and strangled her until she passed out.

Petitioner broke into Paula Mason's home sometime on the morning of July 18, 1986. Petitioner beat and strangled Mason to death. Police found Mason lying on her stomach on the bed with her hands tied behind her back and her feet tied together. Petitioner stole Mason's Visa card, and, knowing the value of it, tried to give the card to his friend Allen Russell, Jr., but Russell refused it. So petitioner gave it to another friend, Greg Jefferson, who could use it to get some money, which petitioner said they would split. (T. 2140)

On July 25th, one week after petitioner murdered Mason, Michael Milligan found a window screen in his house split open. His black nylon briefcase had been stolen. Milligan thereafter received several phone calls from petitioner (showing he knows how to use a phone). Petitioner identified himself as "the burglar" and demanded money for the return of the briefcase. When Milligan balked, petitioner threatened him with torture and death.

In a call occurring on July 28th, petitioner asked Milligan if he knew what had happened at Jefferson and Broad. Petitioner said: "Real pretty, 23, all tied up and strangled. And who do you think did it? * * * Me." Petitioner bragged "that he had done

her, and all of those other bitches.” In a later call, petitioner warned Milligan that the police “can’t protect you forever.”

Petitioner was a street-smart criminal; when police were conducting surveillance during petitioner’s extortion attempts against Milligan, petitioner engaged in counter-surveillance. (T. 2395, 2401, 2458-59) Other evidence indicated that petitioner is able to read, (T. 2708, 2920), that he knew how to make a collect call, (T. 2696), and that he attended a business school and a welding school, albeit without graduating. (T. 2920, 2922) Petitioner had been employed in various jobs, including as a cab driver. (T. 2925) Petitioner also kept a separate apartment for the purpose of his dope-selling efforts. (T. 2712, 2918)

The grand jury first indicted petitioner in the Wilson, Jackson, and Milligan crimes. (No. 86CR-2754) The grand jury later returned an indictment charging petitioner with aggravated burglary, kidnapping, and two counts of aggravated murder for the killing of Mason. (Case No. 86CR-3182)

In a single trial, petitioner was convicted of both aggravated murder counts and two O.R.C. 2929.04(A)(7) death specifications (burglary-murder and kidnap-murder) as to each. He was convicted of all but two other counts and then sentenced to death. The Ohio Tenth District and the Ohio Supreme Court affirmed in 1989 and 1992.

In June 1995, petitioner filed a post-conviction petition, raising fifteen claims for relief and requesting a hearing. (R. 258) The petition was later supplemented in March 1996 with the affidavits of Dr. Jeffrey Smalldon and James Crates. (R. 268) One of petitioner’s claims was that he is mentally retarded and that the death penalty was therefore constitutionally barred. The State opposed. (R. 259, 271)

The court sustained the State's motion to dismiss, (R. 272), and the Ohio Tenth District affirmed. (R. 285) The Ohio Supreme Court declined review.

In 2002, this Court concluded that it is unconstitutional to execute the mentally retarded (hereinafter "ID" for "intellectual disability"). *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* delegated the task of crafting definitions and procedures to the States. *Id.* at 317. In *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011 (2002), the Ohio Supreme Court set forth standards and procedures for *Atkins* ID claims.

On May 30, 2003, petitioner filed a successive post-conviction petition based on *Atkins* and *Lott*, claiming that he is ID and therefore his death sentence should be vacated. (R. 302) Attached to the petition were: (1) materials from the 2002 publication by the American Association of Mental Retardation ("AAMR"); (2) the 1969 psychiatric evaluation that had been introduced into evidence at the mitigation hearing in 1987 as Defense Exhibit AA; (3) the 1969 "social history" that had been introduced at the mitigation hearing as Defense Exhibit BB; (4) the same Smallldon affidavit and report that had been submitted in supplemental support of the 1995 petition; and (5) the same Crates affidavit that had been submitted in supplemental support of the 1995 petition. Attorney Carol Wright represented petitioner for purposes of filing this ID petition.

The State filed an answer and motion to dismiss, contending that res judicata applied because the same evidentiary materials had been found insufficient in 1996, and further contending that the materials were insufficient to support ID. (R. 306)

The defense had requested the appointment of counsel, (R. 303), and the trial court appointed the Ohio Public Defender. (R. 309) The defense thereafter filed a memorandum opposing the State's answer and motion. (R. 315) The defense also sought

funding for an ID expert, (R. 317), which was denied. (R. 323)

On June 9, 2004, the Ohio Public Defender (through Assistant Public Defender Linda Prucha) filed on petitioner's behalf a "motion to suspend adjudication," asking the trial court to hold the case in abeyance because the Ohio Public Defender had retained an ID expert, Dr. Luc Lecavalier, an assistant professor at the Ohio State University. (R. 324) Prucha asked the court to hold the case in abeyance until July 15, 2004, to allow Lecavalier "to review Mr. Waddy's records and offer a professional opinion as to Mr. Waddy's mental retardation claim."

By entry filed June 14, 2004, the court granted the motion and gave the defense until July 15, 2004, to submit any additional facts to support the *Atkins* claim. (R. 325)

Instead of submitting additional evidence by July 15th, however, Prucha filed "Petitioner's Notice of Voluntary Dismissal" on that date voluntarily dismissing the petition. (R. 326)

Five days after the notice of voluntary dismissal, attorney Carol Wright reentered the picture, filing a "motion to withdraw the Notice of Voluntary Dismissal" on July 20, 2004, on behalf of petitioner. (R. 328) The motion asserted that Prucha filed the notice of voluntary dismissal without Waddy's consent.

The State filed a memorandum on August 2, 2004, opposing the motion to withdraw voluntary dismissal. (R. 329)

On August 5, 2004, Prucha filed a motion to withdraw as appointed counsel. (R. 330) Prucha's motion confirmed the State's view that she had consulted with petitioner and that Lecavalier had completed an evaluation. Prucha stated, as follows:

Prior to filing the response to the State's motion to dismiss the post conviction petition, undersigned counsel

met with Mr. Waddy and discussed his Atkins claim and his options. The evaluation by Dr. Luc Lecavalier was undertaken at the request of Mr. Waddy.

On June 14, 2004, this Court granted Petitioner's motion to suspend adjudication on the petition until Dr. Lecavalier could complete his evaluation. Dr. Lecavalier completed his evaluation on July 7, 2004.

The trial court disposed of the post-conviction litigation in two entries filed on July 20, 2005. (R. 334-35, 336) In one of the entries, the court construed the "notice" of voluntary dismissal as a motion for voluntary dismissal and allowed the defense to withdraw said motion. In the same entry, the court allowed the Public Defender to withdraw and appointed Wright as counsel for petitioner. The trial court found no evidence of impropriety on Prucha's part and held that her motion was "based on her belief that the petition lacked arguable merit after Lecavalier's evaluation."

In the second entry of July 20, 2005, the trial court dismissed the petition without an evidentiary hearing. (R. 336, 338) The court found merit in the State's contention that res judicata barred the defense from relying on the same documentation that had been found insufficient in 1996 to support the ID claim then. The court also determined that the evidentiary documentation did not support a finding of ID under *Atkins* and *Lott*.

The Ohio Tenth District reversed in June 2006 and remanded so that the trial court would grant funds for expert assistance and hold an evidentiary hearing. *State v. Waddy*, 2006-Ohio-2828, 2006 WL 1530117 (10th Dist. 2006). The Tenth District emphasized, however, that it was not deciding whether petitioner is ID. "[T]hat is a question we do not address at this time," as "we offer no opinion whether petitioner is mentally retarded." *Id.* at ¶¶ 40, 48. The Ohio Supreme Court declined review.

On remand, funding of \$7,500 was granted for a new expert, (see R. 354), and an evidentiary hearing was conducted over two days in January 2009. (Evid. T. 4 et seq.) The only witness was Smalldon, who was called as a court's witness at the request of the defense. There was plentiful evidence in the 2009 hearing indicating that petitioner was not ID, including several indicators conceded by Smalldon at that time, the vast majority of which he did *not* recant in his latest affidavit. (7-7-09 Post-Hearing Brief, at 3-7; *State v. Waddy*, 2011-Ohio-3154, 2011 WL 2536366, ¶¶ 13-15, 25, 27, 28, 29-31, 36, 40-48 (10th Dist. 2011))

On November 25, 2009, the trial court issued a decision and entry denying relief. (R. 407) The Ohio Tenth District affirmed. *Waddy*, 2011 WL 2536366. The Ohio Supreme Court declined review.

On July 18, 2013, petitioner filed a request for leave to file a delayed motion for new trial. (R. 427-30) On July 31, 2013, the State filed a memorandum opposing the request, (R. 433), and the defense replied on August 7, 2013. (R. 435)

On August 7, 2013, petitioner filed a request for an oral hearing, (R. 434), which the State opposed, (R. 438), and the defense replied. (R. 439)

On September 9, 2013, the defense filed a motion to supplement the July 18th request with the affidavit of Dr. Stephen Greenspan. (R. 440) The State opposed the motion, (R. 443), and the defense replied. (R. 444)

Several months later, the trial court denied the motion for leave on March 13, 2015, (R. 446), concluding in pertinent part that there was no demonstration of ineffectiveness on counsel's part in the handling of the earlier *Atkins-Lott* proceedings.

The Ohio Tenth District affirmed, and the Ohio Supreme Court declined

discretionary review.

ARGUMENT

EVEN IF THE CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL EXTENDS TO POST-CONVICTION REVIEW OF AN *ATKINS* CLAIM, SUCH COUNSEL WOULD BE ACTING REASONABLY IN NOT REQUESTING FURTHER FUNDING OR INVESTIGATING FURTHER AFTER THE EXPERT RETAINED BY COUNSEL REJECTED THE INTELLECTUAL-DISABILITY CLAIM.

Petitioner's "Question Presented" initially fails because petitioner pursued the wrong procedural vehicle in the Ohio trial court by attempting to use the inapt delayed-motion-for-new-trial procedure under Oh.Crim.R. 33(B) to reopen the issue of ID, which had already been rejected in an earlier post-conviction petition. Post-conviction petitions are the approved method of litigating post-judgment claims of ID in Ohio, and a successive post-conviction petition would have been the sole avenue to revisit an issue already rejected in an earlier petition.

As the Ohio Tenth District determined, however, it makes no difference in the end. Under both the delayed-motion procedure under Oh.Crim.R. 33(B) and the successive post-conviction framework under O.R.C. 2953.23, petitioner would have been required to show unavoidable prevention, and the defense simply failed to make any such showing. While petitioner attempted to contend that his *Atkins* counsel for the prior ID hearing had been ineffective, petitioner relied on *Martinez v. Ryan*, 566 U.S. 1 (2012), for that contention, and Ohio courts in other cases have properly determined that *Martinez* only applies in the narrow context of excusing a procedural default for purposes of federal habeas review. "*Martinez* is directed toward federal habeas proceedings and is

intended to address issues that arise in that context.” *State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, 73 N.E.3d 414, ¶¶ 103-104 (2016). Otherwise, the general rule applies that defendants possess no constitutional right to effective assistance of counsel in post-conviction proceedings. *Id.* ¶¶ 103-104.

This Court has agreed that “a prisoner does not have a constitutional right to counsel in state postconviction proceedings * * *.” *Davila v. Davis*, 137 S.Ct. 2058, 2062 (2017).

In any event, the claim of ineffectiveness was frivolous, as three experts had already been involved in the case, including two who had engaged in extensive mental examinations of petitioner. None of them reached an ID conclusion. Indeed, the defense chose not to call the expert Grant at the 2009 hearing, who the defense specially hired for the *Atkins* petition, which was a sure sign his conclusion was not favorable. The issue had been repeatedly assessed in one way or another, and *Atkins* counsel was not ineffective in failing to go fishing for more experts on the issue.

In addition, there were problems with the reports of the new experts the defense would now seek to present in the renewed *Atkins* claim.

A.

As shown in Parts G, H, I, and K below, petitioner’s motion for leave under Oh.Crim.R. 33(B) was simply the wrong vehicle to relitigate or renew his ID claim, since it did not present a basis for granting a “new trial” of a post-conviction hearing, and it was barred under Ohio law because of unreasonable delays. And, overall, petitioner’s allegations on their face failed to support any contention that his *Atkins* counsel had been “ineffective” in failing to go fishing for a fourth or fifth expert after the first three had

rejected ID.

B.

The outlines for determining ID are set forth in *Atkins*.

The American Association of Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992).

The American Psychiatric Association’s definition is similar: “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). * * *

Atkins, 536 U.S. at 308 n. 3. “[B]etween 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” *Id.* at 309 n. 5. “Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.” *Id.* at 317.

Atkins “did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation ‘will be so impaired as to fall [within *Atkins*’ compass].” *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*;

brackets in *Bobby*). As stated by the Ohio Supreme Court in ¶ 12 of *Lott*:

{¶ 12} Clinical definitions of mental retardation, cited with approval in *Atkins*, provide a standard for evaluating an individual's claim of mental retardation. [*Atkins*] at fn. 3, citing definitions from the American Association of Mental Retardation and the American Psychiatric Association. These definitions require (1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18. Most state statutes prohibiting the execution of the mentally retarded require evidence that the individual has an IQ of 70 or below. [Citations omitted] While IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue. [Citation omitted] We hold that there is a rebuttable presumption that a petitioner is not mentally retarded if his or her IQ is above 70.

“[D]iagnosis for mental retardation is approximately two standard deviations below the mean, which is an IQ of 70 on the Wechsler scale and an IQ of 68 on the Stanford-Binet.”

State v. Were, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 180 (2008).

“Nothing in *Lott* * * * states that a capital petitioner must be found mentally retarded [even] if his IQ scores are below 70, regardless of the testing method used * * *.” *Id.* ¶ 179.

C.

The *Atkins* Court emphasized that it was barring the death penalty for those petitioners who are “so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.” *Atkins*, 536 U.S. at 317. Most states barring execution require an IQ of 70 or below. *Lott*, ¶ 12. Thus, the “consensus” to be applied should be one that requires a showing of IQ of 70 or below. *Lott* recognizes a rebuttable presumption of “no ID” for those above IQ 70.

This Court has recognized that courts must consider the usual plus/minus 5-point margin of error in assessing the IQ prong. *Hall v. Florida*, 134 S.Ct. 1986 (2014). But while IQ scores up to 75 might support an ID diagnosis, they do not necessarily require an ID diagnosis.

D.

Dr. Smalldon evaluated petitioner in 1995. (Evid. T. 15) Based on his review of numerous materials and numerous assessment sessions with petitioner and his IQ testing of petitioner, Smalldon testified in the 2009 hearing that petitioner is not ID. (Evid. T. 104) Smalldon cited several specific indicators as supporting the view that petitioner is not ID, including that petitioner had been the primary caregiver for a young child for a number of years, that petitioner had achieved a GPA of 2.3 (B-/C+) in a business college he had attended, and that petitioner had a full-scale IQ of 83 on the test Smalldon administered in 1995. (*Id.* 104-105)

Smalldon emphasized an “autobiography” that petitioner had handwritten for the defense. (Evid. T. 106) While it had grammar and punctuation errors, it was “pretty well written” and “well organized” and was a “pretty cogent overview” of his background. (*Id.* 148) “[I]t is pretty well written in a way that I would not have expected of someone who is mentally retarded.” (*Id.* 148)

As for petitioner’s IQ test result of 72 in 1968, Smalldon noted that “you can’t score higher than you are capable of scoring, but you can score lower than you are capable of scoring for a wide variety of different reasons.” (Evid. T. 33, 105; *Green v. Johnson*, 515 F.3d 290, 300 (4th Cir. 2008) – higher score cannot be faked; lower score can be) Given the various behavioral observations of petitioner during his 1968-69

evaluation, such observations “could reasonably lead to an inference that the examiners didn’t view Mr. Waddy as a real motivated test subject.” (Evid. T. 106) He was “distractible” and had “emotional problems.” (*Id.* 106) Petitioner’s 83 score in the mid-1990’s is more accurate than the 72 score on the 1968 test. (*Id.* 157) The 11-point difference between the 1968 and 1995 scores is consistent with lack of motivation or other factors on the 1968 test. (*Id.* 164)

In terms of adaptive functioning, Smalldon testified that petitioner was “poorly adjusted” in a lot of different ways, but that is not necessarily indicative of ID because many criminals have such problems, and they are not all ID. (*Id.* 106-107) To be significant for ID purposes, the adaptive limitations must be related to intellectual deficits, not just to emotional problems or antisocial features. (*Id.* 107-108, 149) The 2002 AAMR emphasizes that maladaptive or problem behavior is not a dimension of ID. (*Id.* 149) Smalldon viewed only one adaptive-functioning area – academic achievement – as related to intellectual deficits, and even that adaptive limitation is only partially related, as a number of other factors contributed to low academic achievement, including being expelled from school and truancy. (*Id.* 119-20) Smalldon would tend to blame factors other than IQ deficits as primarily responsible for petitioner’s adaptive deficits. (*Id.* 162-63)

Although Smalldon had done his evaluation in 1995, he specifically testified in 2009 that nothing about *Atkins* or *Lott* changed his opinion. (Evid. T. 108-109) The 1992 AAMR standard, and the 1994 DSM-IV standard, which Smalldon would have been aware of in 1995, were the same as those mentioned in those cases. (*Id.* 108-109) In his comprehensive evaluation of petitioner, Smalldon looked at ID and rejected it,

even though he was not specifically tasked with addressing ID. (*Id.* 18, 109-10) It would have been a “very important” issue if petitioner was ID. (*Id.* 110) But, based on Smalldon’s testing and review, “there wasn’t really a question of” ID. (*Id.* 112)

Smalldon testified in the 2009 hearing that, while the WAIS-R test has a standard error of measurement of plus or minus five points, (Evid. T. 123), the SEM assumes a motivated test taker. (*Id.* 124) It also is a plus *or* minus criterion, which means that the observed score can be lower than it should have been. (*Id.* 126) The clinician does not just willy nilly subtract five points from the observed score; the clinician makes an overall assessment of whether this “wobble factor” should apply. (*Id.* 126)

Smalldon saw no basis to apply a five-point deduction to the full-scale IQ score of 83. (Evid. T. 127) In fact, Smalldon viewed petitioner as functioning in the low average or average range:

Based on everything I know about Mr. Waddy, everything I have learned in the course of doing my evaluation, reviewing all of these background records, prior testing, educational history, and so on, my best estimate of Mr. Waddy’s IQ, if he was functioning at his best, motivated, trying his best, is that he would fall towards the lower end of the average range.

* * *

The lower end of the average range. Probably, mid-80s, mid- to high 80s would be my best estimate.

(*Id.* 127) “[83] is a good number; maybe a slightly low estimate of his full scale IQ.”

(*Id.* 128) Given all of the information known to Smalldon, the 83 score from 1995 is the more accurate and more reliable score. (*Id.* 157, 182; *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 176 (2014) – “Maxwell’s IQ score was 84, which is significantly higher than the *Lott* cutoff”).

On the other hand, the IQ 72 score from 1968 “looks like a low estimate to me.” (Evid. T. 128) It was not indicative of petitioner’s true IQ. (*Id.* 157) Petitioner was being evaluated in the juvenile-court system, and so the reasonable inference is that petitioner was not happy to be there. (*Id.* 128-29) Smalldon saw during his own evaluation that petitioner exhibited “a somewhat passive aggressive approach to the formal testing,” tending to drag his feet and being slow to engage in structured tasks. (*Id.* 129) For example, petitioner complained that his meetings with Smalldon interfered with soap-opera viewing. (*Id.* 129)

Petitioner has other character traits that could have contributed to low testing in 1968. (Evid. T. 131-36) Petitioner is immature, listless, apathetic, whiny, self-absorbed, lazy, aloof, antisocial, and narcissistic, and he engages in passive-aggressive avoidance. (Evid. T. 131-36) Petitioner is “often moody and resistant to any demands placed upon him by other people.” (*Id.* 134) He is “an emotionally immature, impulsive, highly self-absorbed individual whose tendency is to try and manage interpersonal conflict through an assortment of passive-aggressive means.” (*Id.* 134-35) Petitioner bristles under the demands of others. (*Id.* 135)

Smalldon viewed the antisocial features as prominent. (Evid. T. 137) Petitioner’s history includes: committing burglaries starting at age 12; committing two break-ins as a juvenile in an effort to victimize two teenage girls; being expelled from school; two prior stints in prison before his 1986 crimes; and then committing a series of crimes in 1986, including tying up three victims, raping one of them, and killing another. (*Id.* 137-38) Antisocial features could have contributed to a low score in 1968. (*Id.* 138)

Smalldon testified that the evaluators in 1968-69 themselves opined that petitioner

was capable of more. (Evid. T. 139) Elementary school records showed that petitioner had achieved five Bs, seven Cs, and three Ds in third grade, which suggests functioning in the low average range before expulsion. (Id. 140)

Although petitioner at one point complained to Smalldon that he had been placed in a school for ID children when he was younger, Smalldon testified in 2009 that there was no corroboration for that claim and petitioner's own say-so was not credible on this point. (Evid. T. 145)

The State notes that, in the later 2013 filings, the defense claimed that the Richmond Public Schools had placed petitioner in "special education classes" and that he was "referred to a school for the mentally retarded". But the declaration of Rosalyn Ramsey on which the defense relied did not support those claims. Ramsey never met or interviewed petitioner and had no idea what diagnosis anyone was given in order to be in one of the classes in that building. Ramsey Declaration, ¶¶ 4, 10. The "social history" in fact indicated that he attended an ETC "daycare program" for "only a few days" in September 1966 and that a "[d]iagnosis was not established." The "social history" also indicated that a probation officer referred him to the ETC in 1968-69 for a juvenile-court evaluation related to attempted rape.

E.

At the time of the initial ID hearing in 2009, petitioner had never been diagnosed as ID. An evaluator in 1968-69 only opined that petitioner was borderline ID. And even that evaluator noted that petitioner appeared to be capable of doing more. Moreover, Smalldon testified as to why petitioner is not ID, including his IQ 83 score in the 1990s.

Two other experts had been involved in the case after Smalldon, and the defense

coily avoided disclosing their information at the time of the hearing. Dr. Luc Lecavalier was retained by the Ohio Public Defender and evaluated petitioner in 2004, although the scope of that evaluation was unclear. Another expert, Dr. Daniel Grant, was retained by petitioner's post-conviction counsel pursuant to the trial court's allowance of funding after remand by the Ohio Tenth District. (Evid. T. 5-8) What Grant did in the case was unclear at the time of the 2009 hearing, as the defense did not call Grant as a witness and would not disclose what actions Grant took. The defense produced no evidence regarding any further testing or evaluation(s) or any additional outcomes/results.

F.

When petitioner sought to raise the ID issue again in 2013, what initially stood out was the one-sided nature of the Hartung report and new Smalldon affidavit. Neither considered the information contained in the now-disclosed Lecavalier affidavit/report and the Grant affidavit, even though the defense no doubt was aware of such information. The Grant affidavit disclosed the occurrence of two IQ tests performed in 2008, the WAIS-IV and Stanford-Binet, both resulting in IQ 76 scores. The State did not know which version of Stanford-Binet was administered by Grant and cannot argue further in that regard. But, in regard to the WAIS-IV, Hartung conceded that there is an approximate IQ 70 cut-off for ID. So it is hardly surprising that previous *Atkins* counsel failed to disclose the 2008 WAIS-IV result prior to the 2009 hearing and failed to introduce Grant's overall opinion on ID (which *still* remained hidden). And neither Hartung nor Smalldon had considered the WAIS-IV result or the Stanford-Binet result (both of which were above the IQ 73 score found by Hartung).

Capital petitioners seeking exemption from the death penalty based on ID try to

apply an automatic deduction for the margin of error, which is approximately +/- 5 points on the WAIS-IV. They use the margin of error as a one-way street for deduction when it could equally support *an addition* to the observed score. They also sometimes seek a double-deduction by trying to employ the margin of error in addition to using an IQ 75 cut-off, which *already* takes into account the margin of error (a point Hartung conceded at page one of her report).

The defense might argue for the same automatic deduction in relation to the 2008 WAIS-IV result. But, even after an automatic 5-point deduction (which the State opposes), the 2008 WAIS-IV score of 76 *still exceeded* the IQ 70 cut off.

Capital defendants also seek automatic deductions from the observed IQ score for the “Flynn effect” (“FE”). According to the FE theory, the mean IQ of the general population increases by .3 IQ points per year so that, if an individual takes a particular IQ test several years after it was normed against the general population, the individual’s IQ score will be “inflated” because it does not take into account the changes in the population-wide IQ.

The State opposes any deduction for FE for many reasons, including the fact that it would mean the IQ 70 cut-off is itself “inflated.” (7-7-09 Post-Hearing Brief, at 10-15) “[N]othing in *Atkins* suggests that IQ test scores *must* be adjusted to account for the Flynn Effect in order to be considered reliable evidence of intellectual functioning.” *McManus v. Neal*, 779 F.3d 634, 653 (7th Cir. 2015); *Black v. Carpenter*, 866 F.3d 734, 738 n. 1 (6th Cir. 2017) (“no legal or scientific consensus that *requires* an across-the-board downward adjustment of IQ scores” for FE); *Smith v. Duckworth*, 824 F.3d 1233 (10th Cir. 2016). “The preferred solution to an outdated IQ score is not to start

subtracting from that score, it is to retest with a more recently normed IQ test.” *Ex parte Cathey*, 451 S.W.3d 1, 5 (Tex.Crim.App. 2014). “[T]he Court’s decisions in no way *require* a reviewing court to *make a downward* variation based on the SEM in *every* IQ score, let alone to do the same with the Flynn Effect.” *Black*, 866 F.3d at 746 (emphasis *sic*). In fact, considerable doubt exists whether FE even applies to more-recent tests starting with the WAIS-III. *Cathey*, 451 S.W.3d at 17 n. 44.

But even taking FE into account, the 2008 WAIS-IV result of 76 *still sat above* the IQ 70 cut off. Hartung conceded on page 7 of her report that the WAIS-IV was normed in 2008, and so there would be no deduction for FE on petitioner’s same-year 2008 WAIS-IV test result. In short, the 2008 WAIS-IV result – the “gold standard” according to Hartung – *still* cut against an ID diagnosis, even after a flawed automatic deduction for margin of error. But neither Hartung nor Smalldon took the 2008 WAIS-IV result (or the 2008 Stanford-Binet result) into account.

G.

Beyond these basic flaws in petitioner’s renewed ID claim, petitioner was pursuing the wrong vehicle in which to relitigate that claim. As stated in *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), “Where a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.” The Ohio Supreme Court directly relied on *Reynolds* in *Lott* when it stated that “[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework for reviewing Lott’s *Atkins* claim.” *Lott*, ¶ 13. The Ohio Supreme Court in

Lott noted that an *Atkins* claim would fall within the exception allowing untimely/successive filing because it was a new retroactive right of constitutional dimension. *Id.* ¶ 17. And “[b]ecause *Lott*’s claim is in the nature of a postconviction relief claim filed for the first time since *Atkins* established the new standard for mental retardation, *Lott*’s petition is more akin to a first petition than a successive petition for postconviction relief.” *Id.* For *first-time Atkins* petitions, the clear-and-convincing standard for untimely/successive post-conviction petitions did not apply. *Id.*

In light of *Lott* and *Reynolds*, petitioner should have been proceeding, if at all, under the suitable post-conviction framework in O.R.C. 2953.21 et seq., which is the “exclusive remedy by which a person may bring a collateral challenge” to his death sentence. O.R.C. 2953.21(K). Because petitioner’s motion practice was proceeding under the wrong framework, the “motion for leave” was a non-starter.

Petitioner could not satisfy the standards for untimely/successive filing of a post-conviction petition under Ohio law. This would have been petitioner’s second *Atkins-Lott* petition, and so the standards for untimely/successive filing fully applied. “Petitions filed more than 180 days after [the *Lott*] decision must meet the statutory standards for untimely and successive petitions for postconviction relief.” *Lott*, ¶ 24. Indeed, the filing of the first *Atkins-Lott* petition constituted a waiver of all claims that were not asserted therein. O.R.C. 2953.21(A)(4).

Petitioner could not validly invoke the narrow exceptions that allow untimely/successive filing. The first exception allows untimely/successive filing if “the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely * * *.” O.R.C. 2953.23(A)(1)(a). But

petitioner only claimed his post-conviction *Atkins* counsel was ineffective, which does not amount to “unavoidable prevention” under Ohio law. See Part I, *infra*.

Nor could petitioner satisfy the second exception by showing that, “subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right.” O.R.C. 2953.23(A)(1)(a). *Atkins* was decided before the 2003 petition, and so it could not justify the filing of a second *Atkins* petition in 2013.

Even if petitioner could satisfy one of these exceptions, he would be further required to show “by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.” O.R.C. 2953.23 (A)(1)(b). Petitioner’s materials fell far short of showing that *all* reasonable factfinders would accept his ID claim even now.

H.

Petitioner’s motion for leave was a non-sequitur for another reason. Ohio Criminal Rule 33 does not provide a basis for reopening a prior post-conviction evidentiary hearing. That rule is designed solely to address the availability of a new “trial” after a “verdict” was rendered. Oh.Crim.R. 33(B). When a new trial is ordered, “the accused shall stand trial upon the charge or charges of which he was convicted.”

Oh.Crim.R. 33(D). The rule is designed to afford a “new trial” on the merits of the criminal charge(s), not a new evidentiary hearing on a post-judgment motion or petition. Such hearings are not “trials”; courts do not render “verdicts” therein; and having a new evidentiary hearing is not a “new trial” on the charges. Ohio Criminal Rule 33 was entirely inapt to petitioner’s attempted renewal of his ID claim. Again, post-conviction review is the lone means to present a renewed *Atkins* claim, and petitioner did not invoke such review.

I.

Even if the “new trial” framework did apply to the *Atkins-Lott* claim, petitioner could not show “unavoidable prevention” so as to excuse the untimely nature of the “motion” under Oh.Crim.R. 33(B). To avoid the 120-day time limit, petitioner would be required to obtain leave of court by showing by clear and convincing proof that he was “unavoidably prevented from discovering the evidence within the one hundred twenty day period.” Oh.Crim. R. 33(B).

Given the clear-and-convincing standard of proof, petitioner would be required to provide evidence that would induce the firm belief or conviction that he was “unavoidably prevented.” *State v. Schiebel*, 55 Ohio St. 3d 71, 74, 564 N.E.2d 54 (1990). “[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.” *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist. 1984). The defendant must demonstrate, and the court must find, unavoidable prevention first before the defendant is

allowed to file the motion for new trial. *Id.* at 145-146.

Petitioner did not claim that witnesses were unavailable or that the defense was affirmatively prevented from learning of the supposed “new” evidence. The same relatives consulted after the 2009 hearing could have been (and were) consulted before, and the same experts consulted afterward could have been consulted before. No “prevention” occurred, period.

Instead, petitioner claimed that the ineffectiveness of his *Atkins* post-conviction counsel was to blame for his “unavoidable prevention.” But there is no constitutional right to counsel on post-conviction review and no fundamental unfairness in precluding collateral litigation over the effectiveness of post-conviction counsel’s actions. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In *Martinez v. Ryan*, *supra*, and *Trevino v. Thaler*, 569 U.S. 413 (2013), the claimed ineffectiveness of post-conviction counsel was used solely in *federal habeas* litigation to excuse a procedural default that occurred in an initial state-court collateral review. These cases do not demand that state courts themselves recognize such an excuse or recognize a constitutional right to counsel on collateral review, and, in fact, this Court recently agreed that “a prisoner does not have a constitutional right to counsel in state postconviction proceedings * * *.” *Davila*, 137 S.Ct. at 2062. Ohio courts have concluded that *Martinez* is directed to federal habeas litigation only. *Jackson*, 149 Ohio St.3d 55, ¶ 104; *State v. Glover*, 2014-Ohio-322, 2014 WL 3697686, ¶ 28 (8th Dist. 2014). O.R.C. 2953.21(J)(2) also provides that a post-conviction counsel’s ineffectiveness is *not* grounds for relief in Ohio. *See* 28 U.S.C. § 2254(i) (same). A state’s creation of a statutory mechanism for providing counsel in post-conviction review does not require that it also imbue that statutory right with a

concomitant ability to engage in litigation over the effectiveness of that counsel. *Finley*, 481 U.S. at 559.

Nor should a new constitutional right to counsel be recognized for the first time in a collateral attack on whatever judgment is being challenged.

In any event, ineffectiveness does not equate to “unavoidable prevention” under Ohio law. The very nature of an IAC claim is that the error was “avoidable,” not “unavoidable.” And under Ohio law addressing new-trial motions and “unavoidable prevention”, a defendant cannot draw a line between himself and his attorney in this way. The attorney is his agent, see *GTE Automatic Electric, Inc. v. ARC Industries*, 47 Ohio St.2d 146, 152, 351 N.E.2d 113 (1976), and the actions or inactions of the attorney extend to the client, regardless of whether the attorney was being “ineffective.”

In *State v. Schiebel*, *supra*, the Court refused to find that unavoidable prevention had been shown because the defense attorneys had failed to ask the right questions when interviewing jurors. The attorneys’ failure to act and to investigate was found to be a ground for *rejecting* a claim of unavoidable prevention, not a basis for sustaining it.

The Ohio Tenth District has similarly recognized that the issue of unavoidable prevention is judged in terms of what the defense as a whole could have done, including the attorneys. *State v. Golden*, 2010-Ohio-4438, 2010 WL 3641550 (10th Dist. 2010).

In *State v. Jama*, 2012-Ohio-2466, 2012 WL 1997042, ¶ 20 (10th Dist. 2012), the defense attempted to blame the delay in filing the motion for new trial on trial counsel ineffectiveness. The Tenth District disagreed, stating “any purported ineffectiveness on the part of trial counsel in not filing a motion for new trial within 14 days of the verdict counts *against* the defense in establishing unavoidable prevention.” *Id.* (emphasis

added); *see also State v. Wilson*, 1993 WL 460572 (10th Dist. 1993); *State v. Mayle*, 2002-Ohio-2089, 2002 WL 756864 (10th Dist. 2002); *State v. Schrock*, 2008-Ohio-3745, 2008 WL 2875690, ¶ 20 (11th Dist. 2008).

In the final analysis, petitioner cannot show “unavoidable prevention” by claiming that his *Atkins-Lott* counsel could have gathered and should have gathered additional information or additional expert opinion(s).

Finally, the claim of ineffectiveness in the *Atkins* proceeding is frivolous. Petitioner had already had the benefit of expert assistance through Smalldon during the 1990’s. Then, during the *Atkins* proceeding, the post-conviction attorneys obtained reviews from Lecavalier and Grant. In effect, petitioner is contending that post-conviction counsel was duty-bound to retain yet a *fourth* and *fifth* expert. But Smalldon had already rejected ID, as did Lecavalier and apparently Grant. The concept of reasonable assistance did not compel the hiring of a fourth expert. *Frazier v. Jenkins*, 770 F.3d 485, 501 (6th Cir. 2014) (“Lawyers are permitted to rely upon qualified experts * * * and in this case, Frazier’s own expert found him not to be mentally retarded. Fairminded jurists could find that counsel’s reliance upon Dr. Smalldon’s opinion was consistent with professional norms.”). And it is extremely unlikely that the trial court would have funded yet another expert, and so counsel could not have obtained another expert anyway even if counsel had wanted to do so.

The evidentiary materials tendered by the defense fell far short of indicating any ineffectiveness by *Atkins* counsel. Petitioner could not satisfy either prong of the standard of ineffectiveness. *Strickland v. Washington*, 466 U.S. 668 (1984). There would be a strong presumption that counsel acted competently in addressing the ID

issues, and courts must avoid the distorting effects of hindsight in assessing the actions of counsel. *Id.* Given the involvement of multiple experts and tests, including an expert specifically funded and hired for purposes of the *Atkins* proceeding, counsel was acting reasonably in failing to seek a fourth expert.

Nor could the defense show a reasonable probability of a different outcome. There is no reasonable probability that the defense would have been able to justify more funding for an additional expert after expending thousands of dollars toward an expert who conducted a full evaluation and did not support the ID claim.

J.

After the initial round of briefing on the motion for leave in the trial court, petitioner filed a “motion to supplement request for leave to file motion for new trial pursuant to Ohio Crim.R. 33(B),” seeking to add an affidavit from Dr. Greenspan to his previously-filed motion. Given the basic threshold problems with the “motion for leave,” the State opposed the motion to supplement.

Even so, the State also noted that the Greenspan affidavit actually *confirmed* what the State had already argued. Greenspan touted himself as “an established national expert” who was the “most cited” in the 2002 AAMR and 2010 AAIDD manuals. The defense provided his CV, which showed that he had been available for years, and he was apparently very eager to participate in such proceedings. The defense could not show “unavoidable prevention” as to the thoroughly-available Greenspan, and the defense made no effort to show unavailability. In the absence of unavoidable prevention, a motion for leave under Oh.Crim.R. 33(B) simply failed, even if such a motion were proper in relation to a successive *Atkins-Lott* claim. A successive *Atkins-Lott* claim under

O.R.C. 2953.23 would also fail in the absence of any unavoidable prevention. And, as argued herein, a claim that post-conviction counsel was “ineffective” does not qualify as “unavoidable prevention” under Ohio law.

The Greenspan affidavit did not materially advance any claim of ineffectiveness anyway. Petitioner’s *Atkins-Lott* counsel was provided funds to hire an expert. Counsel did hire such an expert – Grant. That expert engaged in an apparently-exhaustive 28-hour examination of petitioner, including the administration of two IQ tests. The defense made no showing as to what expert Grant advised counsel. It must not have been good for petitioner’s ID claim, given counsel’s decision not to call Grant. Indeed, petitioner has made no claim that it was ineffective not to call *Grant*; instead, the claim was that the defense should have swept Grant under the rug and gone fishing again for yet another expert, after Smalldon, Lecavalier, and Grant had all rejected ID. There was zero indication that counsel would have been able to justify the court granting funds to hire another expert. There was zero indication that counsel had any reason to think that another fishing expedition would have been more fruitful anyway after going 0-for-3.

Thus, even in light of the Greenspan affidavit, it continued to be true that there was no “unavoidable prevention” so as to allow an untimely motion for new trial or a successive post-conviction petition. There was no “ineffectiveness” either.

The Greenspan affidavit also showed the perils of calling multiple experts. Greenspan *disagreed* with Hartung on what dates should be used when adjusting for FE. Hartung contended that the WAIS-IV was normed in 2008, which would mean that petitioner would receive no deduction for FE from the IQ 76 score he received on the WAIS-IV he was administered in that year by Grant. But Greenspan argued that Hartung

deviated from the “more usual procedure,” which would have used a norming date of “approximately two years before”, i.e., resulting in a WAIS-IV norming date of 2006. Greenspan, ¶ 36. Greenspan then used a norming date of 2006 to opine that petitioner should receive a full 1.0 deduction for FE in relation to the 2008 WAIS-IV result. According to Greenspan, “2 years times 0.3 equals 0.6, rounded to 1”. Greenspan, ¶ 35.

Greenspan criticized the prosecution for not accepting the “science” of FE. Greenspan, ¶ 57. But given the ham-handed way in which FE was being applied here, it was no wonder the State questioned such “science.” The two current defense experts did not even agree on the basic starting point of what constitutes the pertinent norming date for the WAIS-IV. And Greenspan used “rounding” in a way that increased the would-be deduction of 0.6 to 1.0, a 66% increase over what would be the true deduction. The State had good reasons to question such “science,” and a reasonable post-conviction counsel could see the wisdom in not trying to employ and call more experts who could contradict each other.

Greenspan also questioned the relevance of the State’s reference to petitioner having “sociopathic tendencies.” Greenspan contended that petitioner had “never been diagnosed as a sociopath * * *.” Greenspan, ¶ 57. But the State had noted petitioner’s sociopathic *tendencies*, a contention backed up by Smalldon’s 1996 report and 2009 testimony. According to the MMPI-2 profile, petitioner was “quite disturbed psychologically and emotionally,” demonstrating over time “a pattern of chronic maladjustment,” including engaging in “antisocial conduct.” Smalldon Report, at 21. Petitioner has a “severe character pathology,” which Smalldon diagnosed as a personality disorder “with antisocial and narcissistic features * * *.” *Id.* at 22; Evid. T. 131-36.

Greenspan also questioned the relevance of sociopathic tendencies in relation to “deficits” in adaptive functioning.

There is zero scientific evidence that having antisocial tendencies brings about deficits in adaptive functioning. One can have an antisocial personality disorder and have adequate levels of adaptive functioning. The two constructs are independent of each other.

Greenspan, ¶ 61(h). However, this paragraph was carefully tailored to avoid the State’s key point regarding petitioner’s character flaws.

A person asserting an ID claim must go beyond merely showing a low IQ and must additionally show related significant limitations in adaptive skills. *Atkins*, 536 U.S. at 308 n. 3. “Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives.” 2002 AAMR, at 73.

Care must be used in assessing adaptive skills. An assessment of adaptive skills focuses on the ability to function in everyday life. 2002 AAMR, at 73. “Problem behavior that is ‘maladaptive’ is not a characteristic or dimension of adaptive behavior * * *.” *Id.* at 75. “The presence of problem behavior is not considered to be a limitation in adaptive behavior * * *.” *Id.* at 75. “Adaptive behavior is considered to be conceptually different from maladaptive or problem behavior * * *.” *Id.* at 79. “There is general agreement that the presence of clinically significant levels of problem behavior found on adaptive behavior scales does not meet the criterion of significant limitations in adaptive functioning.” *Id.* “[B]ehaviors that interfere with a person’s daily activities, or with the activities of those around him or her, should be considered problem behavior rather than the absence of adaptive behavior.” *Id.* In short, a difference exists between the inability

to adapt to the demands of everyday life and the refusal or failure to adapt because of antisocial traits or character flaws.

The 2010 AAIDD carries forward this need to distinguish between “adaptive behavior” and “maladaptive or problem behavior.” 2010 AAIDD, at 46, 49. The AAIDD includes as “key factors” the following points: “[p]roblem or maladaptive behavior is not a characteristic or domain of adaptive behavior”; problem or maladaptive behavior “often influences the acquisition and performance of adaptive skills”; and it is important to distinguish between adaptive behavior and problem behavior in interpreting adaptive behavior scores for diagnosis. *Id.* 45-46. The 2010 AAIDD carries forward word-for-word the warning from the 2002 AAMR that “[t]here is general agreement that the presence of clinically significant levels of problem behavior found on adaptive behavior scales does not meet the criterion of significant limitations in adaptive functioning”. *Id.* at 49.

Thus, under the standards existing at the time of *Atkins*, and under the standards today in the 2010 AAIDD, it remains a critical issue whether deficits are owing to problem/maladaptive behaviors or owing to low intelligence. While this Court recently indicated that “[t]he existence of a personality disorder or mental-health issue * * * is not evidence that a person does not also have intellectual disability”, this is because there can be co-morbidities in which the defendant has both a disorder and ID. *Moore v. Texas*, 137 S.Ct. 1039, 1051 (2017) (quotation marks omitted). A disorder does not necessarily rule out an ID diagnosis. But it would also be true that the possibility of coexistence of ID with a disorder would not necessarily mean that there is actually such coexistence. Under the terms of the AAIDD itself, it is important for the ID diagnosis to distinguish

between adaptive deficits relevant to ID and deficits owing to problem or maladaptive behaviors that would not qualify for ID. And, as this Court emphasized in *Hall*, “[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment” like this. *Hall*, 134 S.Ct. at 2001. The prong assessing adaptive deficits is interrelated with the IQ prong, and, as stated in *Moore*, a court must “consider [the defendant’s] adaptive functioning in light of his IQ evidence”. *Moore*, 137 S.Ct. at 1050.

Petitioner had prominent antisocial traits and character flaws, as shown in Smalldon’s report and testimony. Although such traits and flaws do not necessarily rule out an ID diagnosis, see *Brumfield v. Cain*, 135 S.Ct. 2269, 2280 (2015), such traits and flaws nevertheless can explain adaptive difficulties petitioner faced and are therefore highly relevant to the issue of whether petitioner would be able to satisfy the requirements of the adaptive-functioning prong. Dr. Greenspan’s explanation was attempting to divert the trial court from this key problem acknowledged in multiple ID manuals through the years.

K.

Unreasonable delay in filing the motion for leave after the 120-day deadline expired also would have provided grounds for rejecting a motion for leave. *State v. Berry*, 2007-Ohio-2244, 2007 WL 1377036, ¶¶ 33-39 (10th Dist. 2007). In regard to the ID claim, petitioner’s “motion for leave” came 44 months after the trial court denied the claim. It came over 24 months after the Ohio Tenth District affirmed that denial. If petitioner’s former or current federal habeas counsel believed that *Atkins* counsel acted ineffectively in litigating the ID claim, they should have acted long before July 2013.

When the defense did finally get around to obtaining the Hartung report (dated

10-19-12), the Smalldon affidavit (dated 1-15-13), and the Ramsey and sibling affidavits (dated 11-2-12, 11-2-12, 10-16-12, 12-7-12, 11-15-12), even more delay ensued. The defense still waited another six months after the Smalldon affidavit before filing the “motion for leave,” over twice longer than if the defense had been granted a fresh 120-day clock for “newly discovered evidence” from the date when Hartung issued her report.

Petitioner raised the curious contention that petitioner’s habeas counsel needed permission of the federal district court to file something in state court. In fact, the declaration of Federal Public Defender Terez filed in the trial court by the defense (R. 436) conceded that no prior judicial authorization was needed to file “ancillary matters appropriate to the proceedings” and that it was only the “practice” in his office to seek prior judicial approval. In fact, concerns about the niceties of preapproval did not stop current habeas counsel from beginning to represent petitioner by requesting the Hartung evaluation well before counsel’s substitution as counsel was formally approved by the federal court in November 2012.

Whatever the reason for the lack of expedition, the delay was unreasonable in waiting 44 months to file the motion after the *Atkins* claim was denied in 2009. And, even in relation to the more recent delays, if the delays were owing to the desire to obtain preapproval from the federal court, then the defense should have filed the request sooner than April 2013 and/or should have requested more expedition by that court. But lack of expedition in federal court is no excuse in state court. There is no requirement that Ohio courts recognize such delays in federal court as an excuse in delaying the filing of legal documents in state court for months or years.

L.

Petitioner complained below that he was entitled to an evidentiary hearing on the unavoidable-prevention issue. But the decision whether to hold a hearing is discretionary under Ohio law, not mandatory, and such a motion can be summarily denied when neither the motion nor its supporting documentation embody a prima facie showing of unavoidable prevention. *State v. Ambartsoumov*, 2013-Ohio-3011, 2013 WL 3488186, ¶¶ 13, 25-29 (10th Dist. 2013). For the several reasons stated above, no such prima facie showing of unavoidable prevention was made. Indeed, there was no showing of “prevention” at all.

In addition, motion practice under Oh.Crim.R. 33 was entirely inapt in regard to trying to relitigate the *Atkins-Lott* ID issue. The motion failed at the threshold, and there was no basis to entertain any further proceedings in that regard under the rule. The sole mechanism to relitigate the ID issue would have been through a successive post-conviction petition, but petitioner never sought such relief.

Also, nothing tendered with the motion practice supported a finding of “unavoidable prevention” regarding the ID issue. There was no “prevention”, unavoidable or otherwise, and petitioner’s argument about post-conviction counsel being ineffective provided no basis for “unavoidable prevention” or for any “ineffectiveness” anyway. The motion practice initiated by petitioner did not warrant an evidentiary hearing under Ohio law.

M.

The defense erred in complaining below that the result of the State’s argument is that there is no adequate forum for litigating petitioner’s “compelling facts” for an *Atkins* claim. There *is* an adequate forum – post-conviction review – which the defense has already invoked unsuccessfully. And Ohio law also provided the opportunity to pursue the *Atkins*

claim again via untimely/successive post-conviction review, provided that the defense satisfied the standards for allowing such successive/untimely review. But the defense cannot prevail under those standards, which is why it did not pursue post-conviction review again and instead chose the inapt “new trial” procedure, which the defense cannot satisfy anyway.

The states can impose time limits on the assertion of federal constitutional rights. See *Michel v. Louisiana*, 350 U.S. 91, 97 & n. 4, 99 (1955). The opportunities for review in Ohio “more than satisfy petitioners’ ‘constitutional rights to due process and fair trials’ while also protecting Ohio’s ‘inherent power to impose finality on its judgments.’” *Scott v. Houk*, 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, ¶ 3 (2010) (quoting another case).

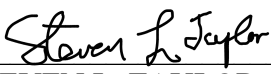
Petitioner’s single Question Presented does not warrant review.

CONCLUSION

\ For the foregoing reasons, respondent State of Ohio respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

RON O’BRIEN
Franklin County Prosecuting Attorney



STEVEN L. TAYLOR
(Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR RESPONDENT