

Capital Case

Case No. 17-7145

October Term, 2017

**IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA**

WARREN WADDY, PETITIONER,

V.

STATE OF OHIO, RESPONDENT.

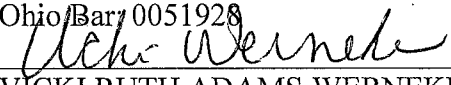
**On Petition for Writ of Certiorari to
The Supreme Court of Ohio**

**PETITIONER WADDY'S REPLY TO
RESPONDENT'S BRIEF IN OPPOSITION**

STEPHEN C. NEWMAN

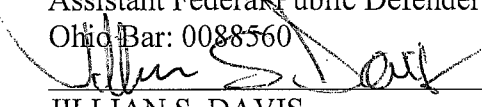
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Reply to Respondent's Brief in Opposition

Throughout Respondent's Brief in Opposition, Respondent asserts Ohio Criminal Rule 33 is not the appropriate procedure for Mr. Waddy to raise his constitutional claims. However, both the trial court and the Tenth District Court of Appeals rejected that same argument when the State asserted it below. (A-11 - A-12). The Ohio courts refused to review the underlying claim because the courts refused to recognize the ineffective assistance of *Atkins* counsel as a viable claim worthy of review.

Respondent asserts several flaws with Mr. Waddy's petition for writ of certiorari, none of which are sufficient to defeat the need for this Court to grant certiorari.¹ Those errors alone are not cause for this Court to deny this petition.

Further, whether the petition for certiorari should be directed to the Tenth District Court of Appeals rather than Ohio Supreme Court does not defeat the jurisdiction of this Court to review and grant the petition for certiorari. The petition should be granted to the appropriate Ohio court.

Respondent makes many incorrect assumptions about facts from the case to suggest that there is no merit to an *Atkins* claim for Mr. Waddy. That is precisely why the state court should have allowed the ineffective assistance of *Atkins* counsel claim to go forward with a full evidentiary hearing. The Court's decisions in *Hall v. Florida*, __ U.S. __, 134 S.Ct. 1986 (2014), and *Moore v. Texas*, __ U.S. __, 137 S.Ct. 1039 (2017), are relevant to the underlying claim for Mr. Waddy as they demonstrate that the proceedings that occurred in state court in 2009 did not comport with best practices. Dr. Smalldon admitted the same in his affidavit that his evaluation of Mr. Waddy was not a proper evaluation for intellectual disability. (A-80).

¹ The petition inadvertently cited to the incorrect statute for the jurisdiction of the Court to review this petition. The correct statute is 28 U.S.C. §1257(1). Counsel for Mr. Waddy apologize for the oversight.

While the Respondent claims a successor post conviction petition is the proper forum by which Mr. Waddy should have brought the IAC-*Atkins* claim, Respondent then asserts the issue is not cognizable in state post conviction review because it does not meet the stringent successor post conviction standards. And that is precisely the point of this petition for a writ of certiorari – Ohio does not provide a forum by which this claim can be litigated. This Court should recognize that capital defendants such as Mr. Waddy – convicted and sentenced to death before *Atkins v. Virginia* was decided – can bring such a claim in state court, as the Oklahoma Court of Criminal Appeals recognized in *Hooks v. State*.

This Court's decision in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), is not applicable in this unique circumstance. While the Court in *Finley* held that there was no right to the effective assistance of post conviction counsel because post conviction was civil in nature, that reasoning does not hold for retrospective *Atkins* determinations. Because Mr. Waddy's case required the retroactive application of *Atkins*, Mr. Waddy's *Atkins* post conviction proceedings were the first opportunity to raise that claim. Going forward from *Atkins*, those claims would be raise at the trial level. Following this Court's directives to the states, the Ohio Supreme Court labeled the retrospective *Atkins* procedures as successive post conviction proceedings, although in reality they were similar in nature to a pre-trial hearing. See *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002). Essentially, there exists in Ohio a two-tiered system for intellectually disabled defendants to assert their *Atkins* claims. Those whose convictions are not finalized may raise them pre-trial and invoke the Sixth Amendment's guarantee of the effective assistance of counsel, yet those who were forced to raise the claims retrospectively do not have those protections based simply on chronology.

Further, the same counsel represented Mr. Waddy at the *Atkins* hearing and on that appeal. Therefore, any challenge to what *Atkins* counsel did or did not do effectively would have to be

raised in a post conviction proceeding such as under Ohio Crim Rule 33. *Pennsylvania v. Finley* does not even contemplate this scenario and therefore is not relevant. Mr. Waddy is not requesting that this Court overrule *Pennsylvania v. Finley*; he only asserts that it is not applicable to his unique situation.

A remanded *Atkins* proceeding should not be viewed as a strictly civil procedure. The Court recognized in *Atkins*, as in *Ford v. Wainwright*, 477 U.S. 399 (1986), that the state must provide adequate procedures that comport with due process, although the Court left it to the states to define those procedures. In order to comport with due process protections, the State of Ohio was required to provide counsel for Mr. Waddy to litigate his *Atkins* claim. That requirement is rooted in the due process clause of the Fourteenth Amendment and the Eighth Amendment. Therefore, Mr. Waddy was constitutionally entitled to an effective attorney at his *Atkins* hearing under the Sixth Amendment.

Respondent claims also Mr. Waddy was not unavoidably prevented from bringing the claim because Mr. Waddy did not demonstrate that trial counsel was ineffective. That is not the proper inquiry. The state court of appeals also did not conduct an adequate analysis. The appropriate inquiry was whether current counsel for Mr. Waddy was diligent in bringing the new *Atkins* claim and facts forward for judicial review. The state court insisted its review of the request for leave to file required an examination of whether prior counsel for Mr. Waddy were effective or not. At the least, the trial court should have conducted a hearing on the issue of whether current counsel was diligent. The analysis by the state court of appeals was flawed in that it found because prior counsel was not ineffective, Mr. Waddy was not unavoidably delayed. The correct inquiry was whether current counsel was diligent.

In its opinion, the state court of appeals recognized there had been considerable debate in Ohio, in both state and federal court, about whether petitioners such as Mr. Waddy should be afforded the constitutional right to effective assistance of *Atkins* counsel in state court. (A-16 – A-20). The federal district court in Mr. Waddy’s case acknowledged the need for this Court to decide this important issue. *Waddy v. Robinson*, 2015 WL 46209 *3 (SD Ohio January 2, 2015) (“[Right to effective assistance in a post-*Atkins* post conviction proceeding] can only be recognized by the United States Supreme Court.”). It is time for this Court to address this issue and find that there is a constitutional right to the effective assistance of counsel in a post-*Atkins* proceeding.

Conclusion

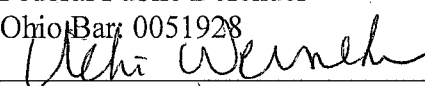
Ohio does not provide a forum by which Petitioners such as Mr. Waddy can litigate their constitutional claim. This Court needs to address the issue of whether Mr. Waddy has a constitutional right to effective state *Atkins* counsel. For these reasons and those expressed in the Petition for Writ Certiorari, Mr. Waddy requests that this Court grant this petition for writ of certiorari.

Respectfully submitted,

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Federal Public Defender

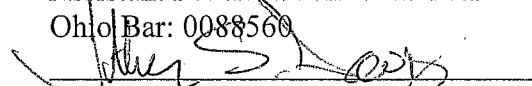
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