No. 20-240

In the
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

LARRY LAMONT WHITE,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

DANIEL CAMERON
Attorney General

BARRY L. DUNN
Deputy Attorney General

OFFICE OF THE KENTUCKY ATTORNEY GENERAL
700 Capitol Ave.
Suite 118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov
* *Counsel of Record*

S. CHAD MEREDITH
Solicitor General

MATTHEW F. KUHN*
JEFFREY A. CROSS
Deputy Solicitors General

EMILY B. LUCAS
Assistant Attorney General

Counsel for Petitioner

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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This case presents the important and recurring question of whether a capital defendant can waive a claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). The Commonwealth's petition demonstrated the many errors made by the Supreme Court of Kentucky in holding that Larry Lamont White cannot waive his *Atkins* claim. Pet. at 10–17. The petition also explained that the decision below deepened a split of authority about this issue among state courts of last resort. *Id.* at 17–25. The Court should grant the petition for these reasons.

The brief in opposition provides no convincing reason for the Court to deny certiorari. White's counsel offer almost no defense of the Supreme Court of Kentucky's holding. As the Commonwealth's petition explained, constitutional rights, even those arising under the Eighth Amendment, are presumptively waivable. *Id.* at 11–13. White's counsel do not dispute this general rule, but nevertheless insist that the Eighth Amendment right protected by *Atkins* is somehow different.

This Court's case law cuts against this position. *Atkins*, this Court has held, only grants a defendant a "*fair opportunity* to show that the Constitution prohibits [his or her] execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014) (emphasis added). A "fair opportunity" to present a claim presupposes a decision by the defendant in the first instance to take advantage of that opportunity. More to the point, a "fair opportunity" does not equate to the *forced* opportunity that the court below thrust upon White by refusing to

allow him to waive his *Atkins* claim. White's counsel have no answer to this simple point. In fact, the brief in opposition ignores it.

The only actual defense of the lower court's holding that White's counsel offer is to cite *Moore v. Texas*, 137 S. Ct. 1039 (2017). BIO at 1, 7, 15. True, the Supreme Court of Kentucky believed *Moore* to be significant—in particular, *Moore*'s decision to italicize the word "any" in explaining that *Atkins* "'restricts the State's power to take the life of' *any* intellectually disabled individual." *Moore*, 137 S. Ct. at 1048 (cleaned up) (quoting *Atkins*, 536 U.S. at 321). But *Moore*'s italicization of a single word comes nowhere close to establishing the far-reaching rule that the Supreme Court of Kentucky divined from *Moore*.

Rather than dispute these key points, White's counsel maintain that the Commonwealth waived its right to argue that White can waive his *Atkins* claim. BIO at 9–11. White's counsel also contend that there is no split of authority about the question presented. *Id.* at 11–18. White's counsel further claim that this case is not a good vehicle for deciding whether an *Atkins* claim can be waived. *Id.* at 22–27. For the reasons explained in the Commonwealth's petition and those that follow, none of these arguments justify denying certiorari.

I. The Commonwealth has not waived its argument.

White's counsel attempt to flip the script by contending that the Commonwealth waived its argument that White can waive his *Atkins* claim. BIO

at 9–11. For support, White's counsel cite the Commonwealth's briefing on remand before the Supreme Court of Kentucky, which acknowledged that court's earlier conclusion that the protection against executing the intellectually disabled "endures to the very moment of execution." *Karu White v. Commonwealth*, 500 S.W.3d 208, 215 (Ky. 2016) ("*Karu White*"), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). This statement, the Commonwealth explained, meant that if White waived his *Atkins* claim, he could raise it later. According to White's counsel, the Commonwealth's mere discussion of *Karu White* waived its argument that White can waive his *Atkins* claim.[1]

This confusing argument provides no reason to deny certiorari. In the decision below, the court did not view *Karu White* as an impediment to addressing whether White can waive his *Atkins* claim. Instead, the court resolved this legal issue without even mentioning *Karu White*. Pet. App. 1–12. Consequently, whatever the Supreme Court of Kentucky meant in *Karu White*, the court did not believe that decision stood in the way of deciding the question presented here.

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[1] White's counsel also claim that "the Commonwealth did not raise the issue of waivability below that it presents now." BIO at 10. The Commonwealth, however, argued that White "should be permitted to waive the pending intellectual disability claim lodged by his counsel" after the Supreme Court of Kentucky ordered supplemental briefing about the topic. Commonwealth's Supp. Br. at 19 (filed Sept. 11, 2019). And based upon that supplemental briefing, the court below decided the question presented. Pet. App. 5–7.

There are good reasons that the court below did not discuss *Karu White*. Although *Karu White* said that the protection against executing the intellectually disabled "endures to the very moment of execution," *Karu White*, 500 S.W.3d at 215, it does not follow that allowing White to waive his *Atkins* claim at this stage is meaningless. This matter is part of White's direct appeal from his convictions and sentences. Thus, if White's counsel press an *Atkins* claim on remand over White's objection, White's counsel will have to prove that their client is intellectually disabled by a preponderance of the evidence. *See Woodall*, 563 S.W.3d at 6 n.29. By contrast, if White waives his *Atkins* claim now, his ability to secure relief under *Atkins* in the future will be more limited.

For example, if White seeks state post-conviction relief under *Atkins* after waiving his claim, his argument will be reviewed under a different standard of review.[2] As discussed in the Commonwealth's petition, Pet. at 21–22, prior to the decision below, the Supreme Court of Kentucky had held that an *Atkins* claim can be waived. *Bowling v. Commonwealth*, 163 S.W.3d 361, 371–72 (Ky. 2005), *abrogated on other grounds by Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018). After reaching this conclusion, the court held that a "clear and convincing" standard applies when reviewing a waived *Atkins* claim. *Id.* at 372–73, 384. Consequently, if White waives his *Atkins* claim and then raises it in state post-conviction proceedings,

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[2] White's counsel concede this point. BIO at 11 (acknowledging that rules of procedural default "appl[y] to intellectual disability claims").

his claim will be reviewed under a less favorable standard of review.

For these reasons, *Karu White* does not provide a reason for the Court to deny certiorari.

II. White's counsel cannot avoid the split of authority about the question presented.

White's counsel next contend that there is no split of authority about the question presented. BIO at 11–18. But the disagreement among state courts of last resort about this issue is too deeply entrenched to paper over.

White's counsel argue that the courts that allow an *Atkins* claim to be waived do so where counsel "fail[] to adequately develop and present the claim in a manner that allows the state court's [sic] to reach the merits." *Id.* at 11. Here, by contrast, there allegedly is a "fully preserved claim with sufficient evidence of intellectual disability to proceed further." *Id.* at 12.

This argument is at odds with the very notion of waiver. According to White's counsel, a court considering an argument that an *Atkins* claim can be waived must first take a peek at the merits to determine whether the claim is viable. But this Court has held that "the Constitution affords *no protection* to a defendant who waives [his or her] fundamental rights." *Peretz v. United States*, 501 U.S. 923, 937 (1991) (emphasis added). More to the point, allowing criminal defendants to waive their constitutional rights necessarily means that they sometimes will forfeit a winning argument. *See Yakus v. United States*, 321 U.S. 414, 444 (1944) ("Courts may for that reason

refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken.").

Even setting this aside, the courts that have permitted an *Atkins* claim to be waived (Pet. 17–22) did not apply a merits-driven view of waiver. That is to say, the courts that disagree with the decision below have found an *Atkins* claim to be waivable without regard to whether the defendant offered adequate proof of an intellectual disability.

For example, in *Winston v. Commonwealth*, 604 S.E.2d 21 (Va. 2004), Virginia's high court found parts of the defendant's *Atkins* claim to be waived simply "because [the defendant] deliberately declined to raise a claim of mental retardation under the statutory provisions that apply to him and his trial." *Id.* at 51. Important for present purposes, the court did not condition its holding on the quantum of *Atkins* evidence offered by the defendant. *See id.*; *see also Head v. Hill*, 587 S.E.2d 613, 618, 620 (Ga. 2003) (finding an *Atkins* claim to be waived because the defendant "did not seek a jury determination of his alleged mental retardation at trial").

The same is true of *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007). That case dealt with a defendant who failed to raise an *Atkins* claim in his first state habeas application. *Id.* at 153. The court held that "having afforded the applicant one opportunity to raise his *Atkins* claim in a post-conviction setting, the Texas Legislature may legitimately limit *any second chance* it may afford him to raise it again, notwithstanding the absolute nature of the prohibition

against executing the mentally retarded." *Id.* at 154 (emphasis added). Consequently, under *Blue*, a capital defendant is not constitutionally entitled to "any second chance" to prove an intellectual disability, no matter the defendant's proof. As *Blue* further held, it does not violate the Eighth Amendment to "deny a particular applicant review of an allegation of facts that, if true, might impose a fundamental bar to execution."[3] *Id.* at 156.

The Supreme Court of Kentucky previously agreed with this conclusion. In *Bowling*, the court held that "Appellant was afforded both the opportunity to assert his mental retardation claim and the expert witness necessary to prove it (if it was provable). He chose not to assert the claim at trial and thereby waived it." *Bowling*, 163 S.W.3d at 372. This holding in no way depends on the viability of the defendant's *Atkins* claim.

An analogous rule prevailed in *State v. Frazier*, 873 N.E.2d 1263 (Ohio 2007). The Supreme Court of Ohio noted that "a constitutional right can be waived in criminal cases by the failure to make timely assertion

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[3] White's counsel argue that *Blue* has been "called into question" by the Fifth Circuit. BIO at 17. Two responses: *First*, the Fifth Circuit merely held that Texas's post-conviction process for reviewing *Atkins* claims is ineffective under AEDPA in one limited circumstance. *Sorto v. Davis*, 859 F.3d 356, 364–65 (5th Cir. 2017). *Second*, even if this conclusion somehow undercuts *Blue*'s constitutional holding, the Fifth Circuit has since withdrawn its opinion and remanded the case for further consideration in light of intervening precedent from this Court. *Sorto v. Davis*, 881 F.3d 933 (5th Cir. 2018) (per curiam); *Sorto v. Davis*, 716 F. App'x 366 (5th Cir. 2018) (per curiam).

of it" and that "other jurisdictions have held that the failure to raise an *Atkins* claim results in waiver." *Id.* at 1291. Absent from this discussion is any suggestion that an *Atkins* claim cannot be waived if the defendant has offered some proof that he might be suffering from an intellectual disability.[4] *See id.*

As this summary shows, the merits-driven view of waiver urged by White's counsel finds no support in the decisions that disagree with the decision below.

White's counsel also downplay the split in authority by arguing that, where courts have found an *Atkins* claim to be waived, counsel, not the client, effected the waiver. BIO at 15–16, 18. However, because an attorney serves as the client's agent, this is a distinction without meaning. *See Comm'r of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005).

This point nevertheless brings into focus the fact that, to this day, White's counsel persist in making an argument that their client does not wish to pursue. It has been more than two years since the Supreme Court of Kentucky rejected White's direct appeal, Pet. App. 16–68, yet litigation over what White describes as "intellectual disability foolishness," Pet. App. at 116, continues through this case's second trip to this Court.

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[4] Although White's counsel do not raise this point, *Frazier* reviewed the defendant's *Atkins* argument under plain-error review. *Frazier*, 873 N.E.2d at 1291 ("Absent plain error, Frazier has waived his *Atkins* claim."). However, that decision was not a function of *Atkins*, given that *Frazier* accorded plain-error review to many other waived arguments. *See id.* at 1278, 1284, 1286–88, 1293–95, 1297.

This is not the first time this Court has faced a client who disagrees with his lawyer. As the brief in opposition acknowledges, BIO at 27, in *Rees v. Payton*, 384 U.S. 312 (1966) (per curiam), a death-row inmate desired to withdraw his petition for certiorari. His counsel, however, "could not conscientiously concede to these instructions without a psychiatric evaluation of [the defendant] because evidence cast doubt on [his] mental competency." *Id.* at 313. The Court kept jurisdiction over the matter, but ordered the district court to ascertain whether the defendant was competent. *Id.* at 313–14. After the district court found the defendant incompetent, the Court held the petition "without action" for several decades and ultimately dismissed it after the defendant died. *Rees v. Payton*, 386 U.S. 989 (1967); *Rees v. Superintendent of Va. State Penitentiary*, 516 U.S. 802 (1995); *see also Ryan v. Gonzales*, 568 U.S. 57, 69 & n.7 (2013) (discussing this sequence of events). The Court's decision to hold the petition in *Rees* "without action" for so long demonstrates the primacy of the client's wishes.

This Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), makes this point even more forcefully. The Court there held that "it is the defendant's prerogative, not counsel's, to decide on *the objective* of his defense." *Id.* at 1505 (emphasis added). The Court applied this rule to hold that an attorney must follow the client's wishes about whether to maintain his or her innocence during a criminal trial. *Id.* at 1508. As the Court explained, "[p]resented with express statements of the client's will to maintain innocence . . . counsel may not steer the ship the other way." *Id.* at 1509.

So too here. As White's letter and filings explain, his objective is *not* to get off death row—what a successful *Atkins* claim will secure for him—but to walk out of prison as an innocent man. Pet. App. 108, 109, 114. Establishing this objective belongs to White alone. It is not a "strategic choice[] about how best to achieve [his] objectives," but instead a "choice[] about what [his] objectives in fact are." *See McCoy*, 138 S. Ct. at 1508 (emphasis omitted). White's counsel have no answer for *McCoy*. *See* BIO at 24.

III. This case is an exemplary vehicle to decide the question presented.

Because the court below clearly resolved the question presented, this case is an ideal vehicle to decide this important federal issue. White's counsel counter by pointing out that there has not been a hearing to determine whether White actually waived his *Atkins* claim. BIO at 22. The court below, however, never reached the need for such a hearing in light of its holding that White cannot make such a waiver. If the lack of a hearing is reason enough to deny certiorari, this Court will never review a decision like that below.

Of course, the lack of a hearing does not prevent the Court from deciding the question presented and remanding for further proceedings as necessary. Stated differently, the Court can resolve whether White *can* waive his *Atkins* claim without deciding whether he *did* waive it under the circumstances. On remand, Kentucky's courts, if necessary, can examine "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused." *See Johnson v. Zerbst*, 304 U.S.

458, 464 (1938). By way of example, those courts can weigh White's letter and filings discussing his desire not to press his *Atkins* claim. Pet. App. 107–20. They also can consider the "ample evidence of [White's] mental acumen," Pet. App. 61—for example, that White filed a pro se motion "written so persuasively that defense counsel specifically asked the trial court to rule on its merits," *id.*, and that White "was able to comport himself well in the courtroom, conveyed his thoughts without difficulty, and demonstrated a thorough understanding of the charges he faced," *id.* at 63. As a reminder, the Supreme Court of Kentucky made these statements in its unanimous opinion initially affirming White's convictions and sentences.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DANIEL CAMERON
Attorney General

S. CHAD MEREDITH
Solicitor General

BARRY L. DUNN
Deputy Attorney General

MATTHEW F. KUHN*
JEFFREY A. CROSS
Deputy Solicitors General

OFFICE OF THE KENTUCKY ATTORNEY GENERAL
700 Capitol Ave., Ste.118
Frankfort, KY 40601
(502) 696-5300
Matt.Kuhn@ky.gov

EMILY B. LUCAS
Assistant Attorney General

* *Counsel of Record*

Counsel for Petitioner