No._____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LARD,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ of Certiorari to the
Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

LEE D. SHORT
SHORT LAW FIRM
425 W. Broadway, Suite A
North Little Rock, AR 72114
(501) 766-2207
LeeDShort@gmail.com
Counsel for Petitioner

Capital Case

QUESTIONS PRESENTED

1. Whether a death-sentenced inmate is permitted to waive a viable claim for an Eighth Amendment categorical probation against the execution of persons with intellectual disability.

2. Whether a claim of intellectual disability as a categorical prohibition to execution only ripens once an execution date is set.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitutional Amendments

Federal Statutes

PETITION FOR WRIT OF CERTIORARI

Jerry Lard respectfully petitions this Court for a writ of certiorari to review the decision of the Arkansas Supreme Court.

OPINIONS AND JUDGMENTS BELOW

The order of the trial court granting Jerry Lard's motion to waive post-conviction relief and refusing to address his Eighth Amendment claim regarding mental retardation was not published, but it is reproduced in the appendix. App. 7-12. The opinion of the Arkansas Supreme Court on March 12, 2020, affirming the trial court's order is published at *Lard v. State*, 595 S.W.3d 355 (Ark. 2020), and reproduced in the appendix. App. 1-6. The decision was made final by denial of the timely filed petition for rehearing on April 30, 2020. App. 13.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides in pertinent part,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The opinion of the Arkansas Supreme Court affirming Lard's conviction, death sentence, and waiver of post-conviction relief was delivered on March 12, 2020. The decision was made final by denial of the timely filed petition for rehearing on April 30, 2020. Based on this Court's COVID-19 Order on March 19, 2020, this Petition is due by September 27, 2020.

STATEMENT OF THE CASE

1. Trial and Direct Appeal.

On April 12, 2011, Jerry Lard shot and killed Jonathan Schmidt of the Trumann Police Department during a traffic stop. *Lard v. State*, 431 S.W.3d 249, 255-56 (Ark. 2014). An accurate summation of the trial defense is as follows:

> Lard did not deny that he committed the offenses. As his defense, Lard asserted that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law as a result of mental disease or defect. As support for this defense, Lard presented expert testimony that he had brain damage, possibly caused by head injuries he received as a child or induced by chronic methamphetamine abuse. Lard also introduced into evidence the results of his PET scan showing mildly decreased activity bilaterally in his mesial lobes. In rebuttal, the State

> offered the testimony of experts who disputed that Lard suffered from brain damage. As opposed to Lard's witnesses, the State's experts concluded that Lard's behavior was consistent with antisocial personality disorder, not a mental disease or defect.

Id. at 257.

The jury convicted Lard of capital murder and sentenced him to death. *Id.* at 255. His direct appeal was affirmed by the Arkansas Supreme Court with two justices dissenting. *Id.*

2. Ineffective Assistance of Counsel Claim.

On March 12, 2014, Patrick Benca was appointed to represent Lard pursuant to Arkansas Rule of Criminal Procedure 37.5. R.[1] 28. Benca raised the issue of whether Lard received ineffective assistance of counsel in the investigation of a claim of intellectual disability. R. 32-42.

On November 18, 2014, Lard's trial counsel testified at a hearing that her expert on Lard's adaptive functioning, Dr. Karen Salekin, incorrectly looked at Lard's strengths instead of his weaknesses as well as depended on poor historians to detail the history of Lard. R. 139-41. Trial counsel admitted her mistake in failing to recognize the error. R. 140-41, 149, 150-51, 162-63. Trial counsel admitted the error should have been plain and obvious based on the case law and authoritative

[1] Record citation for Arkansas Supreme Court case number CR-19-351. This is the record for post-conviction litigation in this case.

sources. R. 162-63. Thus, according to trial counsel, Lard would have been intellectually disabled in light of his qualifying IQ score of 70. R. 142.

The defense also put forth the testimony and report of Dr. Daniel Reschly. Dr. Reschly was a professor emeritus at Vanderbilt University with a title of Professor of Education in Psychology Emeritus. R. 183. Dr. Reschly spent forty-three years as a college professor involved in the graduate education and supervision of school psychologists at three different universities R. 184. Dr. Reschly's Doctor of Philosophy degree was in School Psychology. R. 184. Dr. Reschly worked with persons with Mild Intellectual Disability with a particular interest throughout his career. R. 184. He served in a number of leadership positions in the area of school psychologists, including President of the National Association of School Psychologists and editor of the Journal of the National Association of School Psychologists. R. 185. Dr. Reschly served on three National Academy of Sciences panels that advised the federal government on policies related to persons with disabilities. R. 185. He chaired a National Academy of Sciences panel for the Social Security Administration that was created by Congress. R. 185. The final report, for which he was the senior editor, was determination of Mental Retardation for Social Security benefits. R. 185.

Dr. Reschly testified that Lard had a full-scale IQ of 70 on a prior exam and a full-scale IQ of 72 on Dr. Reschly's examination. R. 198. Lard qualified as

intellectually disabled. R. 199. Dr. Reschly testified that Lard had significant limitations in the conceptual, social, and practical domains of the adaptive functioning prong. R. 215. According to the AAIDD and DSM-V, prong two only requires a significant limitation of one domain. R. 215. Lard had significant limitations in all three. R. 215. Dr. Reschly also testified Lard had those limitations prior to age eighteen. R. 221. Dr. Reschly opined that Lard was intellectually disabled. R. 221. At the end of his direct testimony, the trial court granted the State a continuance for an extended period of time to obtain a competing expert and to prepare for cross-examination of Dr. Reschly. R. 224.

3. Waiver of Post-Conviction Relief.

On August 30, 2017, while still awaiting the conclusion of Dr. Reschly's testimony, Lard's post-conviction counsel filed a motion to be relieved. R. 55-56. On September 12, 2017, Lee Short was appointed to represent Lard. R. 71-73. Lard filed a motion for an evaluation to determine whether he could waive his right to pursue post-conviction relief. R. 79-80. The trial court ordered an examination of Lard by the Arkansas State Hospital for purposes of determining whether Lard was competent to waive his post-conviction rights. R. 81-82. After the evaluation, but prior to the hearing, Lard requested that the trial court first determine whether Lard was intellectually disabled because it was a categorical bar to execution under the Eighth Amendment and could not be waived. R. 102-05. The trial court denied

the request and ruled that the issue of competency to waive would be the only issue the court would hear. App. 7-8; R. 109-10. At the hearing on the request to waive post-conviction relief, the trial court began by noting that the court would not address the issue of whether Lard was intellectually disabled. R. 235-36.

Dr. John Casey testified about his evaluation of the competency of Lard. Dr. Casey was a forensic psychiatry fellow at the time of his evaluation of Lard. R. 254, 257. Dr. Casey diagnosed Lard with Borderline Intellectual Functioning. R. 271. Dr. Casey did not dispute that Lard's IQ fell within a range that can qualify for a diagnosis of Mild Intellectual Disability. R. 273. Dr. Casey agreed Lard's diagnosis would turn on his adaptive functioning. R. 273-74. Dr. Casey did not find significant deficits in the conceptual domain because "they could be explained by other issues." R. 286. Dr. Casey attempted to blame Lard's failures on drugs, fights, attendance, and a learning disability; however, Dr. Casey conceded there was no information Lard got into fights, used drugs, had a learning disability, or missed school when he was failing classes at an early age. R. 275-87. Ultimately, Dr. Casey attributed his failures in school to "social issues" based on his "rough childhood." R. 287. Dr. Casey

then found deficits in the social domain but attributed those to Lard's antisocial personality disorder instead of his intellectual disability.[2]

Dr. Reschly testified again at this hearing. Dr. Reschly stated that Lard had significant limitations in the conceptual domain. R. 342. According to Dr. Reschly, the deficits in Lard's conceptual domain along with his low IQ would alone qualify him to be diagnosed with an intellectual disability. R. 346. Dr. Reschly found that Lard also had significant deficits in the social domain. R. 352. Responding to Dr. Casey, Dr. Reschly stated that both the DSM-V and AAIDD strongly recommend that you diagnose both intellectual disability and antisocial personality disorder if both exist as mental disorders are commonly co-occurring with intellectually

---

[2] This is in direct conflict with this Court's decision in *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017), stating,

> The CCA also departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to "a personality disorder." 470 S. W. 3d, at 488; *see id.*, at 526 (Moore's problems in kindergarten were "more likely cause[d]" by "emotional problems" than by intellectual disability). As mental-health professionals recognize, however, many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism. DSM-5, at 40 ("[c]o-occurring mental, neurodevelopmental, medical, and physical conditions are frequent in intellectual disability, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population"); see AAIDD-11, at 58-63. Coexisting conditions frequently encountered in intellectually disabled individuals have been described in clinical literature as "[c]omorbidit[ies]." DSM-5, at 40. *See also* Brief for AAIDD et al. as Amici Curiae 20, and n. 25. The existence of a personality disorder or mental-health issue, in short, is "not evidence that a person does not also have intellectual disability." Brief for American Psychological Association, APA, et al. as Amici Curiae 19.

disabled individuals. R. 348-49. Dr. Reschly also found that Lard had significant deficits in the practical domain. R. 353.

On January 22, 2019, the trial court filed an order granting Lard's request to waive his post-conviction rights. App. 9-12; R. 113-16. The trial court did not address whether Lard was intellectually disabled.

3. Arkansas Supreme Court Opinion.

The decision of the trial court was appealed to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed the decision of the trial court in stating,

> Additionally, Lard argues that he is ineligible for execution because his expert diagnosed him with mild intellectual disability. The Supreme Court in *Atkins v. Virginia* categorically prohibited the execution of mentally disabled individuals. 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (forbidding imposition of the death penalty on persons who are intellectually disabled). After Lard asked the circuit court to dismiss his Rule 37.5 petition, Lard filed a "Motion for Post-Conviction Hearing" asserting, "there exists credible evidence . . . that Defendant is not eligible to be executed." Lard similarly argues on appeal that, "This Court should . . . reverse and remand the case for a hearing on the issue of Lard's intellectual disability as a bar to his execution." The circuit court also refused to address this argument and limited the hearing to the issue of competency to waive. Lard claims the circuit court's refusal to consider this issue was erroneous. However, this argument is not currently ripe for our review because Lard's execution date has not been set. *See Isom v. State*, 2015 Ark. 219, 462 S.W.3d 638; *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233; *see also Roberts v. State*, 2020 Ark. 45. When an execution date has been scheduled, the issue will be ripe as to the experts' disagreement whether Lard's current mental status is such that he cannot be executed. Therefore, as a matter of law, we find that the circuit court correctly refused to decide whether Lard can be executed due to an intellectual disability.

Lard v. State, 595 S.W.3d 355, 356-57 (Ark. 2020)

While the majority found the issue not ripe, the concurring opinion noted the cases cited concern insanity not intellectual disability, stating,

> While I fully join the majority's opinion on the second point, I write separately to express my concern with the majority's disposition of point one on ripeness grounds. The majority holds that Lard's claim that he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), because he is intellectually disabled is not ripe for this court's review because his execution date has not been set. However, the cases the majority cites do not support this position.

Id. at 359. (Wynne, J., concurring)

Lard then filed a petition for rehearing and asserted the Arkansas Supreme Court erred on several grounds, including the ripeness holding. The response from the State agreed that the Arkansas Supreme Court erred. State Resp. Pet. Rehrg. at 4 fn. 1 ("As Justice Wynne explains in his concurrence, the majority opinion incorrectly concludes that *Atkins* claims become ripe only after an execution date is set.") The Arkansas Supreme Court denied the petition for rehearing. It is from the decision of the Arkansas Supreme Court that a petition for writ of certiorari is filed.

REASONS FOR GRANTING THE PETITION

1. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE ARKANSAS SUPREME COURT CONFLICTS WITH OTHER STATE COURTS OF LAST RESORT REGARDING WHETHER A DEATH-SENTENCED INMATE IS PERMITTED TO WAIVE A VIABLE CLAIM FOR AN EIGHTH AMENDMENT CATEGORICAL PROBATION AGAINST THE EXECUTION OF PERSONS WITH INTELLECTUAL DISABILITY.

A. Conflict

This Court has forbidden the execution of persons with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304 (2002). The ban against executing intellectual disabled persons is premised on the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 321. The Eighth Amendment's prohibition against cruel and unusual punishment has been made applicable to the states. *Robinson v. California*, 370 U.S. 660 (1962).

The Arkansas Supreme Court permitted Jerry Lard to forfeit his viable claim of intellectual disability as a part of his waiver of post-conviction relief. The Arkansas Supreme Court specifically stated,

> "To the extent Lard now argues that he should not have been sentenced to death because of his intellectual disability, the circuit court had to determine whether Lard was competent to waive before considering this and any other

> post-conviction arguments. Because, as discussed below, Lard has waived his postconviction remedies, Lard also has waived this argument."

Lard v. State, 595 S.W.3d 355, 356 (Ark. 2020).

The other court to recently address this identical issue is the Kentucky Supreme Court, which decided to the contrary. In *White v. Commonwealth*, the court dealt with the issue of whether White, a death-sentenced inmate, could waive his right to contest a prior finding that he was not intellectually disabled. *White v. Commonwealth*, 600 S.W.3d 176 (Ky. 2020). Contrary to Arkansas, the Kentucky Supreme Court reasoned that, "[T]his Court cannot allow him to pro se waive this issue, as that would impose the death penalty on a potentially intellectually disabled defendant—something the Commonwealth is without power to do." *Id.* at 180. In addition to Kentucky, the Georgia Supreme Court addressed a closely related issue and ruled that once an inmate has "adduced sufficient credible evidence of such retardation" to require a "hearing on the issue," the inmate could not waive his right to a trial on the issue. *Rogers v. State*, 575 S.E.2d 879, 882 (Ga. 2003). Finally, the Pennsylvania Supreme Court held that *Atkins* claims are not waivable as related to the legality of the sentence itself. *Commonwealth v. Robinson*, 82 A.3d 998 (Pa. 2013).

There is a clear conflict between the Arkansas Supreme Court and other high courts that have addressed this issue. The matter has not been decided by this

Court previously. This case presents a proper vehicle to address this issue.

B. Merits

The plain language of this Court's prior rulings makes it clear that the government may not execute intellectually disabled citizens. This Court has held that there is a "substantive restriction" on the ability of the government to take the life of an intellectually disabled offender. *Atkins*, 536 U.S at 321; *see also Herrera v. Wyoming*, 139 S. Ct. 1686, 1708 (2019) ("this Court ruled that an intellectually disabled individual cannot be executed"). The holding in *Atkins* emanating from the Eighth Amendment is not a shield that an intellectually disabled inmate must obtain to stop the government's murderous intent; rather, it is prohibition against the government's desire to wield the sword. If the government will not control its own urges, then the court system must take up the task. While this may seem hyperbolic or fanciful, this is the powerful opinion in *Brown v. Plata*, 563 U.S. 493 (2011). In *Brown*, this Court held, "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'" *Id.* at 510 (*citing Atkins*, 536 U.S. at 311). In discussing the responsibility prisons have to respect the Eighth Amendment, "If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Id.* at 511.

This Court went even further to require intervention, stating, "Courts nevertheless must not shrink from their obligation to 'enforce the constitutional rights of all persons, including prisoners.' Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* (internal citation omitted). While the aforementioned dealt specifically with prison conditions, it dealt generally with the courts responsibility to protect the Eighth Amendment rights of all inmates. That is the issue here. The obligation of the court system to prevent the government from doing what it is not permitted to do to protect the dignity of all persons including those who are intellectually disabled and housed on death row.

While these concerns and prohibitions attend and protect all citizens, intellectually disabled death-row inmates that are traditionally held in solitary confinement and have volunteered for execution are certainly the most vulnerable group. This Court has recognized the limitations by finding intellectually disabled individuals "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. These deficits by nature render intellectually disabled death row inmates the most susceptible to waive a valid Eighth Amendment categorical prohibition. Thus, it is imperative that this Court recognize it is up to

the courts to enforce the categorical prohibitions in this instance regardless of whether the death row inmate seeks to waive them. Whether the government can violate the Constitution in a life-taking manner should not depend on the valor of an intellectually disabled death row inmate.

C. Importance

First, Jerry Lard will be executed if this Court does not intervene. Without this Court overturning the Arkansas Supreme Court, there will be nothing to prevent the State of Arkansas from executing him. Thus, the importance of this Court granting certiorari and permitting a briefing on the merits is of the utmost.

Second, this issue is capable of repetition and avoiding review for persons to be executed. Instances where individuals are permitted to waive their post-conviction rights, including an *Atkins* claim, are unlikely to make further appeals to this Court. In addition, the times where the lower court rules in favor of the State are unlikely to have the same sense of urgency or importance because there is no threat of an unjust execution as a result of such a ruling.

Third, the number of persons waiving their rights to post-conviction relief are high due to the long periods of time spent in isolation on death row. "Approximately 12% of those executed between 1977 and 2003 have been willing volunteers." *Smith v. Mahoney*, 611 F.3d 978, 1004 n.7 (9th Cir. 2010) (citing John H. Blum, Killing the Willing: "Volunteers," Suicide and Competency, 103 Mich. L. Rev. 939, 939-940

(2005)). The need for clearer guidelines about permissible waivers is growing as well. Issues of volunteering for execution bring about the most intense ethical problems for courts and defense attorneys. These ethical dilemmas are considerably relaxed by every clarification, ruling, and guideline posited by this Court. Here, the permissibility of assisting a death row inmate in hastening his execution in violation of the Eighth Amendment should be adjudicated by this Court for the benefit of the many inmates, attorneys, and judges consistently wrecked in the current hazy status of the case law.

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE ARKANSAS SUPREME COURT CONFLICTS WITH MULTIPLE FEDERAL CIRCUIT COURTS OF APPEAL REGARDING WHETHER A CLAIM OF INTELLECTUAL DISABILITY AS A CATEGORICAL PROHIBITION TO EXECUTION ONLY RIPENS ONCE AN EXECUTION DATE IS SET.

A. Conflict

As aforementioned, this Court prohibited the execution of persons who are intellectually disabled. *Atkins*, *supra*. Other than the decision by the Arkansas Supreme Court in *Lard*, all jurisdictions to address the matter have permitted *Atkins* challenges prior to an execution date being set. Perhaps a better way of

stating it, no decision of any court post-*Atkins* has held that the issue of intellectual disability is only ripe after an execution date is set, except *Lard*.

Contrary to every decision prior, the Arkansas Supreme Court held,

> However, this argument is not currently ripe for our review because Lard's execution date has not been set. *See Isom v. State*, 2015 Ark. 219, 462 S.W.3d 638; *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233; *see also Roberts v. State*, 2020 Ark. 45. When an execution date has been scheduled, the issue will be ripe as to the experts' disagreement whether Lard's current mental status is such that he cannot be executed. Therefore, as a matter of law, we find that the circuit court correctly refused to decide whether Lard can be executed due to an intellectual disability.

Id. at 357.

The concurring opinion correctly recognized the majority's mistake in conflating intellectual disability and incompetency. *Id.* at 359 (Wynne, J., concurring). In the State's response to the petition for rehearing, the State admitted, "As Justice Wynne explains in his concurrence, the majority opinion incorrectly concludes that Atkins claims become ripe only after an execution date is set." State Response Pet. For Rehrg., p. 4, fn. 1 (April 6, 2020). The Arkansas Supreme Court is the only court to conclude that an *Atkins* claim ripens only after an execution date is set.

The conflation of intellectual disability challenges (*Atkins*) and incompetency/insanity challenges (*Ford*) has been previously addressed by federal courts of appeal with well-reasoned decisions in contrast to *Lard*. In *Davis v. Kelley*, 854 F.3d 967 (8th Cir. 2017), the Eighth Circuit wrote a thorough analysis of the

issue. The court began, "We decline to treat Davis's *Atkins* claim as though it were a *Ford* claim." *Id.* at 972. "'*Ford* claims are unique among ineligibility arguments in that they are habeas relief issues based only on a prisoner's status at the time of a potential execution.' Lee Kovarsky, Death Ineligibility and Habeas Corpus, 95 Cornell L. Rev. 329, 356 (2010) (*citing Martinez—Villareal*, 523 U.S. at 644-45)." *Id.* at 972. "In summary, *Ford* and its progeny focus on the inmate's competency at the time of execution. This makes sense because competency can be lost or regained over time. As stated in *Moore*, and cited in Davis's own motion, a core element of intellectual disability is 'the onset of these deficits while still a minor.' 137 S. Ct. at 1045." *Id.* at 971. "The issue of intellectual disability, therefore, does not suddenly become ripe when the execution date is imminent." *Id.* at 973; *see also Bowles v. Sec'y, Fla. Dep't of Corr.*, 935 F.3d 1176 (11th Cir. 2019) (holding that an *Atkins* claim cannot be brought by successive habeas petitions immediately before an execution like a *Ford* claim).

B. Merits

As aforementioned, the Eighth Circuit in *Davis* gave a thorough analysis of how this Court's decision in *Ford* differs from an analysis of *Atkins*. The essence of the issue is that a *Ford* claim of sanity to be executed does not become ripe until an execution date is imminent because sanity fluctuates and deteriorates. *See Panetti v. Quarterman*, 551 U.S. 930 (2007). Conversely, intellectual disability is an

infirmity with inception during one's youth. *See Atkins*, 536 U.S. at 318. Thus, raising an *Atkins* claim prior to an execution date being set makes judicial sense to prevent last second stays or challenges. Ford claims are the exception because it wastes judicial resources to litigate them repeatedly until an execution date is set. *Panetti*, 551 U.S. at 946.

Unlike the Eighth Circuit Court of Appeals, the Arkansas Supreme Court did not provide any reasoning for its opinion that an intellectual disability claim only ripens after an execution date is set. Without commentary, the Arkansas Supreme Court cited as precedent to *Isom v. State*, 462 S.W.3d 638 (Ark. 2015), *Nooner v. State*, 438 S.W.3d 233 (Ark. 2014), *and Roberts v. State*, 592 S.W.3d 675 (Ark. 2020). None of these three cases were decided based on intellectual disability claims; rather, each of the three cases concerned competency for execution, which ripened only after an execution date was set. Specifically, in *Isom v. State*, 462 S.W.3d 638, 650 (Ark. 2015), the court stated, "Although we acknowledge Isom's contention that he has reached his maximum recovery and that he will not regain any additional functioning, we decline to evaluate his competency for execution in the absence of an execution date because Isom's condition could change, positively or negatively, before Isom's execution date is set." In *Nooner*, the Arkansas Supreme Court summarized the issue as:

> As for Nooner's claim that he suffers from a severe case of Schizophrenia, we acknowledge his counsel's concession that such an issue is not yet ripe for our consideration until a date for execution is set. We acknowledge further that counsel intends to seek a stay of execution, should one be set, based on the contention that Nooner is incompetent for execution under *Panetti*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662, and Arkansas Code Annotated section 16-90-506(c)-(d) (Repl. 2006). We are aware of no authority under which justice would demand that Nooner's claim of incompetency to be executed be heard prematurely by granting the instant motion to recall the direct-appeal mandate.
>
> Because Nooner has had his day in court on his claim of actual innocence based on the confession of his accomplice, we conclude that the interests of justice do not weigh in favor of recalling the mandate; rather, they weigh in favor of the profound interests of repose that attach to an appellate court's mandate. In addition, the interests of justice do not weigh in favor of recalling Nooner's direct-appeal mandate to hear his not-yet-ripe claim of incompentency to be executed.

Nooner v. State, 438 S.W.3d 233, 249 (Ark. 2014).

Finally, in *Roberts*, the Arkansas Supreme Court correctly summarized this Court's decision in *Ford* and the aforementioned state cases of *Isom* and *Nooner* as:

> We note that the law prohibits the execution of the "insane," *see Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), and *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), but this court has held that a petitioner's claim of incompetency to be executed is not ripe when no date had been set for his execution. *Isom v. State*, 2015 Ark. 219, 462 S.W.3d 638 (citing *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233).

Roberts v. State, 592 S.W.3d 675, 685 (Ark. 2020).

None of the Arkansas Supreme Court decisions cited in Lard address intellectual disability claims or *Atkins*. Regardless, none of them are binding on this Court but

do serve as future precedent that *Atkins* claims will be reserved until an execution date is set. This will cause future problems, roadblocks, and litigation at the time of execution for this Court and other courts to resolve.

C. Importance

First, Jerry Lard will be executed if this Court does not intervene. Without this Court overturning the Arkansas Supreme Court, there will be nothing to prevent the State of Arkansas from executing him. Thus, the importance of this Court granting certiorari and permitting a briefing on the merits is of the utmost.

Second, undersigned counsel and the members of this Court have been through the harrowing nature of litigation after an execution date is set. Adding *Atkins* claims to the already voluminous list of issues that ripen once a death warrant is signed is problematic for courts at every level, death row inmates, prosecuting attorneys, and defense counsel who are litigating administrative, state court, and federal court claims simultaneously. This Court granting certiorari or granting summary reversal on this issue would do wonders to keep the litigation from expanding to include a giant body of contention in the form of intellectual disability claims.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

LEE D. SHORT
SHORT LAW FIRM
425 W. Broadway, Suite A
North Little Rock, AR 72114
(501) 766-2207
LeeDShort@gmail.com
Counsel for Petitioner

September 22, 2020