No. 20-5874

In the Supreme Court of the United States

JERRY LARD,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition for Writ of Certiorari To the Supreme Court of Arkansas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether capital defendants may voluntarily dismiss postconviction proceedings when their postconviction counsel claims they are ineligible to be sentenced to death under *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. Whether a claim that a capital defendant is mentally incompetent to be executed is ripe for review before his execution date is set.

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JURISDICTION

The judgment of the Arkansas Supreme Court was entered on March 12, 2020; that court denied the petitioner's petition for rehearing on April 30, 2020. The petitioner filed his petition on September 23, 2020. This Court has jurisdiction under 28 U.S.C. 1257 to review the Arkansas Supreme Court's judgment.

STATEMENT

On April 12, 2011, the petitioner Jerry Lard was riding in the back seat of a vehicle through Trumann, Arkansas, with three of his acquaintances. *Lard v. State*, 431 S.W.3d 249, 255-56 (Ark. 2014). When local police stopped the car for traffic violations, they learned there was an outstanding warrant for the driver's arrest. *Id.* at 256. After arresting the driver, one of the two officers on the scene, Officer Jonathan Schmidt, asked Lard for his name and date of birth. *Id.* Upon relaying that information to the dispatcher, Officer Schmidt was advised that Lard had an outstanding arrest warrant for unpaid child support. *Id.* at 256, 259 & n.4. Officer Schmidt then returned to the back of the car to arrest Lard. *Id.* at 256.

When Officer Schmidt opened the car door, Lard shot him in the chin, exited the car, and began firing at Officer Schmidt's partner, Sergeant Corey Overstreet. *Id.* Sergeant Overstreet escaped to the safety of his cruiser, but Officer Schmidt, who had dropped his gun and was wounded, could not manage to get into his patrol car. *Id.* Rather than flee, Lard followed Officer Schmidt and continued to shoot, exclaiming "What you got now, what you got, bitch? Huh? What you got, bitch?" *Id.* Though Officer Schmidt begged for his life, Lard shot Officer Schmidt four times, once in the

head from less than two feet away. *Id.* Officer Schmidt died an hour later from his wounds. *Id.*

These events were captured by the officers' dash cameras, and at Lard's murder trial, Lard did not deny that he killed Officer Schmidt. *Id.* at 255, 257. Instead, he claimed that as a result of brain damage, either caused by childhood injuries or chronic methamphetamine abuse, he lacked the mental capacity to appreciate that what he did was criminal or to conform his conduct to the law. *Id.* at 257. The jury rejected Lard's defense, accepting instead the State's theory that Lard shot Officer Schmidt in an attempt to avoid arrest for unpaid child support. *Id.* at 258-59. It found Lard guilty of the capital murder of Officer Schmidt and the attempted murder of Sergeant Overstreet. *Id.* at 257. The court sentenced Lard to death for the murder of Officer Schmidt. *Id.* at 255. On direct appeal, Lard continued to press his mental-capacity defense, but did not argue that he was ineligible for the death penalty. The Arkansas Supreme Court affirmed his conviction and sentence, *id.* at 271, and this Court denied certiorari. *Lard v. Arkansas*, 574 U.S. 836 (2014).

In 2015, Lard, through counsel, filed a petition in state court for postconviction relief. Pet. App. A-2. Relying on the same evidence of brain damage that was unavailing when offered as evidence of incapacity, postconviction counsel claimed trial counsel was ineffective for failing to argue that Lard was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Pet. App. A-2. Counsel did not, however, make a substantive *Atkins* claim. R. Vol. I. at 32-40.

After filing that petition, Lard's postconviction counsel withdrew from the case, citing an "irreparably harmed" relationship between himself and Lard. Pet. App. A-2. Lard received new appointed counsel, who advised the court that Lard wished to waive his postconviction remedies, including his pending petition. *Id.* In his motion for a hearing on whether Lard was competent to waive those remedies, counsel stated that there was a substantive *Atkins* claim before the trial court, notwithstanding its absence from Lard's postconviction petition. R. Vol. I at 103. The trial court responded in a letter ruling that the *Atkins* claim was not before it. Because it could have been—but was not—raised at trial or on direct appeal, the trial court reasoned it could only take up Lard's ineffectiveness claims and his competency to waive them. Pet. App. B-8; *see also* R. Vol. I at 236 (noting at competency hearing that Lard's postconviction petition did not raise an *Atkins* claim).

The trial court ordered competency testing by a disinterested doctor. Pet. App. A-3. That doctor evaluated Lard and testified at his competency hearing that Lard was competent to knowingly and intelligently waive his postconviction remedies. Pet. App. A-3-4. Though he found that Lard had IQ scores in the low 70s, he concluded that Lard suffered only from borderline intellectual functioning, not intellectual disability. Pet. App. A-3. A second doctor who had not evaluated Lard in three years testified for Lard's counsel. *Id.* That doctor opined that Lard was intellectually disabled on the basis of the same IQ scores, but he did not give an opinion on Lard's competency to waive his postconviction remedies. *Id.*

Finally, Lard testified at length in support of his request to waive further postconviction proceedings. In plain but clear terms, Lard thoughtfully and intelligently spoke about his reasons for waiving his postconviction remedies and his understanding of the claims his counsel asserted and the relief they might afford. Lard said that in his view, "[e]verybody that's out there right now," whether "it's the victim's family or whether it's my family," were "victims" of his crime. Supp. App. 7. Rather than make his family "have to deal with me being in the penitentiary," or make "the victim's family . . . drag this out down the line for ten, fifteen, twenty years before they can even get a peace of mind," Supp. App. 9, Lard wanted to "at least stand up as a man and accept my responsibility." Supp. App. 7.

Lard comprehended, and comprehensively disparaged, his counsel's postconviction theories, testifying that he did not believe his trial counsel was ineffective, but that his postconviction counsel "want[ed] to claim ineffective assistance of counsel [because] their strategy that they went on before didn't work, so now they want to say that they messed up. That way, they can sit right there and say 'well, this right here, we should've done this, we should've done that.'" Supp. App. 13. He specifically dismissed his counsel's *Atkins* claim, perceptively describing his current counsel's "mental retardation" theory and his former counsel's "mental disease defect" theory as two sides of "a double-faced coin," and remarked that "when you're trying to use a double-faced coin to get the verdict the way you want to get, no, that don't sit right with me, man. It don't sit well at all." Supp. App. 13-14. Asked whether he under-

stood that he could potentially be released from prison, Lard scoffed at counsel's suggestion, reminding his counsel that he murdered a police officer and that "the only two options that they're going to offer" were "life without" parole or death. Supp. App. 19. "My freedom," Lard averred, "is when I'm dead and gone. That's my freedom." *Id.*

In a written order, the trial court held that Lard was competent to waive his postconviction remedies and dismissed his petition. Pet. App. C-9-12. The court found that Lard understood the difference between life and death, understood the likely consequences of his decision to waive his remedies, and gave a rational explanation for his waiver that encompassed his belief that he deserved the death penalty, his desire to avoid a sentence of life without parole, and his wish to provide relief to his family and that of the victim. Pet. App. C-10. It found that the medical testimony confirmed the court's own evaluation of Lard's competency, and it credited the court-ordered evaluation over that of Lard's counsel's witness, explaining that the court-ordered evaluation was more recent and specifically addressed Lard's competency to waive, unlike that procured by Lard's counsel. Pet. App. C-11.

Lard's *counsel* appealed. With respect to Lard's supposed *Atkins* claim, counsel argued that *Atkins* claims both could be raised for the first time in postconviction proceedings and were unwaivable. Rather than reach either of those questions, the Arkansas Supreme Court simply held that Lard's waiver of postconviction proceedings—which it held later in its opinion was competent—foreclosed review of his counsel's "post-conviction arguments," including counsel's *Atkins* argument. Pet. App. A-2; *see also* Pet. App. A-5 (Wynne, J., concurring) ("The intellectual-disability claim

could have been raised in Lard's [postconviction] petition, but he has waived his right to pursue that petition."). Turning to an "[a]dditional[]" intellectual-disability claim it understood Lard's counsel to make—that Lard "is ineligible for execution" because of his "current mental status"—the Arkansas Supreme Court held that that claim was unripe because Lard's execution date had not been set. Once it was, the courts could adjudicate "whether Lard's current mental status is such that he cannot be executed." Pet. App. A-2. The court then proceeded to hold that the trial court's competency determination was not clearly erroneous, reasoning that the trial court reasonably placed greater weight on the evaluation of the two before it that specifically addressed competency to waive postconviction remedies. Pet. App. A-3-4.

Justice Wynne concurred, but wrote separately on the ripeness question. In his view, Lard only raised one intellectual-disability claim: a claim under *Atkins*. That claim, he argued, was ripe. Pet. App. A-4-5. Justice Hart dissented, arguing that Lard was powerless to dismiss his postconviction petition, because, under her interpretation of state law, "the State's clearly articulated public policy" against sentencing to death the intellectually disabled overcame Lard's mere "*interest* in the [postconviction] proceeding." Pet. App. A-6.

Lard petitioned for rehearing. Only Justice Hart voted to grant his petition. Pet. App. D-13.

REASONS FOR DENYING THE PETITION

I. The first question presented does not merit review.

A. This case does not present the first question presented.

Lard's counsel principally asks this Court to grant certiorari to decide whether *Atkins* claims can be waived. Pet. 10-15. Arkansas agrees that question would merit review if it were properly presented here. *See Kentucky v. White*, No. 20-240 (filed Aug. 24, 2020) (presenting that question). But this case does not present that question and the Arkansas Supreme Court did not decide it. Accordingly, the Court should not grant review on the first question presented; and in the event the Court grants the petition in *White*, it need not hold the Petition pending its decision in that case.

Lard's counsel seeks review of "[w]hether a death-sentenced inmate is permitted to waive a viable [*Atkins*] claim." Pet. i. But Lard did not simply waive an *Atkins* claim; he waived the postconviction proceedings in which his counsel sought to raise that claim altogether. "Because . . . Lard ha[d] waived his postconviction remedies," the Arkansas Supreme Court held he waived "any . . . post-conviction arguments," his counsel's *Atkins* argument included. Pet. App. A-2. Thus, for this case to present the question of whether capital defendants can waive *Atkins* claims, it would have to be true that raising an unwaivable issue in a proceeding bars waiving or voluntarily dismissing the proceeding itself. If that is not the law, the Arkansas Supreme Court correctly held Lard's waiver of postconviction proceedings barred further review of his counsel's *Atkins* argument—*whether or not Atkins* claims are unwaivable.

Contrary to Lard's counsel's implicit premise, it is emphatically not the law that litigants cannot waive or dismiss proceedings if those proceedings present unwaivable issues. Consider the paradigmatic unwaivable issue: subject-matter jurisdiction. As every first-year law student learns, a "lack of federal subject-matter jurisdiction cannot be waived." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1956 (2015). In concrete terms, that means two things: (1) a litigant can raise a lack of jurisdiction for the first time on appeal, *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); and (2) even if the parties do not dispute jurisdiction or affirmatively disclaim challenges to it, "courts must consider them *sua sponte*." *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019).

It does not follow, however, that if an appellant initially challenges jurisdiction and later seeks to dismiss his appeal, appellate courts must charge ahead and decide the jurisdictional question *sua sponte*. Parties are free to settle and dismiss jurisdictional appeals no less than appeals raising only waivable arguments. *See, e.g.*, *United States v. State of Wash., Dep't of Fisheries*, 573 F.2d 1117, 1117-18 (9th Cir. 1978) (Kennedy, J.) (granting leave to dismiss jurisdictional appeal over appellee's objection); *see also Blue Cross & Blue Shield Ass'n v. Am. Express Co.*, 467 F.3d 634, 637-38 (7th Cir. 2006) (Easterbrook, J.) (recounting panel's prior grant of leave to dismiss jurisdictional appeal over appellee's objection). A contrary rule would not only be bizarre but (at least in the federal system) possibly unconstitutional; courts would not merely be deciding issues the parties no longer raised, but cases the parties no longer pursued. *Cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1716-17 (2017)

(Thomas, J., concurring in the judgment, joined by Roberts, C.J. & Alito, J.) (observing that voluntary dismissal of a case vitiates the requisite adversity to exercise jurisdiction under Article III).

Because even unwaivable issues are not properly before courts if litigants dismiss the cases in which they are raised, this case does not present the question of whether *Atkins* claims are waivable; whether they are or not makes no difference to the result. Indeed, the Arkansas Supreme Court did not even hold—because it did not have to—that *Atkins* claims are waivable. Instead, it merely held that Lard's competent waiver of his postconviction remedies barred review of any "post-conviction arguments" his counsel made, irrespective of their waivability in a live proceeding. Pet. App. A-2. That obviously correct holding does not merit this Court's review.

B. The decision below does not conflict with the decisions of any court.

In addition to not presenting the question Lard's counsel raises, the Arkansas Supreme Court's holding does not conflict with the decisions of any court of appeals or state court of last resort. Lard's counsel cites *White v. Commonwealth*, 600 S.W.3d 176 (Ky. 2020), the subject of the pending certiorari petition in *White*, as the chief case in conflict with the decision below. Pet. 11. But in *White*, the defendant merely sought to "waive the intellectual disability claim before [the Kentucky Supreme] Court" in an otherwise ongoing direct appeal. *White*, 600 S.W.3d at 179. In *Rogers v. State*, 575 S.E.2d 879 (Ga. 2003), a pre-*Atkins* case Lard's counsel cites, Pet. 11, the defendant moved to dismiss a trial on the issue of mental retardation, but not the larger state habeas proceedings in which that issue was raised. *Rogers*, 575 S.E.2d at 881. And in *Commonwealth v. Robinson*, 82 A.3d 998 (Pa. 2013), also cited by

Lard's counsel, Pet. 11, the Pennsylvania Supreme Court merely held that a defendant did not waive his *Atkins* claim by omitting it from a postconviction brief, though it was raised in his postconviction petition. *Id.* at 1020. None of these decisions involved a defendant's dismissal of his direct appeal or postconviction proceedings, or held that if a defendant raises an *Atkins* claim, he may not dismiss the proceeding in which that claim is raised. There is no conflict. Review of the first question presented should be denied.

II. The second question presented does not merit review.

A. This case does not present the second question presented.

Lard's counsel secondarily seeks certiorari on whether *Atkins* claims only ripen when an execution date is set. Pet. i. Like his first question presented, that question is not presented by this case, because the Arkansas Supreme Court did not render the holding that the question assumes it did. Rather, it merely (and uncontroversially) held that claims that a defendant isn't currently competent to be executed only ripen when an execution date is set.

Atkins claims and execution-incompetency claims raise distinct issues at separate points of time in the sentencing process. *Atkins* forbade sentencing to death "mentally retarded offenders," 536 U.S. at 317, reasoning that those offenders are both less culpable and less subject to deterrence by the risk of execution than other offenders. *See id.* at 319-20. This Court's execution-incompetency jurisprudence, by contrast, "precludes executing a prisoner who has 'lost his sanity' after sentencing," *Madison v. Alabama*, 139 S. Ct. 718, 722 (2019) (quoting *Ford v. Wainwright*, 477 U.S. 399, 406 (1985)), or can no longer "'reach a rational understanding of the reason for his

execution." *Id.* at 723 (alteration omitted) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)). In short, *Atkins* forbade imposition of death sentences on a class of offenders defined by their intellectual disability at the time of their crimes; execution-incompetency doctrine forbids execution of lawfully imposed death sentences on a class of prisoners defined by their mental disabilities at the time of execution.

When the Arkansas Supreme Court held that Lard's counsel's argument was not ripe because Lard's execution date had not been set, it plainly understood Lard's counsel to be making an execution-incompetency argument—distinct from counsel's *Atkins* argument that it rejected on the ground of Lard's waiver of postconviction review. The court began its discussion of Lard's counsel's intellectual-disability arguments with the observation that counsel "*[f]irst* . . . argued that . . . [Lard] could not *have been sentenced* to death because of his intellectual disability," in the past tense. Pet. App. A-2 (emphasis added). It disposed of that argument on the ground that by "waiv[ing] his postconviction remedies, Lard also has waived this argument." *Id.* It then wrote that "*[a]dditionally*, Lard argues that he *is* ineligible for *execution*" in the present tense, "because his expert diagnosed him with mild intellectual disability." *Id.* (emphasis added). It then proceeded to dispose of that argument on the ground of ripeness, explaining that the claim could not be adjudicated until Lard's execution was scheduled and his "current mental status" at the time of that execution could be evaluated. *Id.*

Two features of the court's characterization of the argument it dispensed with on ripeness grounds bear note. First, it would make no sense to describe it as an "additional" argument if it were the same argument the court had just disposed of a sentence above. Second, the court described the argument in tellingly different terms from its description of Lard's counsel's *Atkins* argument, switching from a claim that Lard "could not have been sentenced to death" in the past to a claim that Lard "is ineligible for the execution" of that sentence in the present. That describes an execution-incompetency claim, not an *Atkins* claim, and the court's shift in tenses and terms indicates unmistakably that it was describing a different claim from the *Atkins* claim addressed above. That is further confirmed by the authority the court relied on to hold Lard's counsel's argument was unripe, Pet. App. A-2, which all dealt with "claim[s] of incompetency to be executed." *Roberts v. State*, 592 S.W.3d 675, 685 (Ark. 2020); *see also Isom v. State*, 462 S.W.3d 638, 650 (Ark. 2015); *Nooner v. State*, 438 S.W.3d 233, 249 (Ark. 2014). The Arkansas Supreme Court, then, simply held the obvious: that a claim of mental incompetency to be executed can only be evaluated near the time of a scheduled execution.

The only basis Lard's counsel offers to conclude the Arkansas Supreme Court rejected an *Atkins* claim on ripeness grounds, rather than a competency claim, is its stray citation to *Atkins* in its discussion of counsel's "additional" argument. Pet. 8 (quoting Pet. App. A-2). But that stray citation is not nearly as telling as Lard's counsel supposes. Inapposite though the citation may be, the Arkansas Supreme Court has frequently cited *Atkins* in its discussions of execution-incompetency claims,

including in two of the three competency cases it cited for its ripeness holding below. *See Roberts*, 529 S.W.3d at 685; *Isom*, 462 S.W.3d at 650. And even its citation to *Atkins* below suggests it was citing *Atkins* with respect to competency. *See* Pet. App. A-2 ("The Supreme Court in *Atkins v. Virginia* categorically prohibited the *execution* of mentally disabled individuals.") (emphasis added). In sum, Lard's counsel's second question presented attacks a holding the Arkansas Supreme Court never rendered.

B. Even if this case presented the second question, that question would not merit review.

The Arkansas Supreme Court did not hold that *Atkins* claims are unripe until an execution date is set. But even if it had, that holding would not merit review because it would be an unrepresentative outlier in that court's jurisprudence. The Arkansas Supreme Court routinely entertains *Atkins* claims before a defendant's execution date has been scheduled, and there is no ground to conclude the decision below marks a shift in that practice. Nor is the question of any importance in Lard's case; had it held that Lard's *Atkins* claim was unripe, that holding would merely delay, not deny, review. Indeed, if Lard's counsel is correct that the Arkansas Supreme Court's ripeness holding regarded Lard's *Atkins* claim, that would only show that that court rejected Lard's *Atkins* claim on *two* alternative grounds that do not merit review, forcing this Court to grant certiorari on a non-cert-worthy question to reach the first question presented.

As Lard's counsel correctly states, with the supposed exception of the decision below, "no decision of any court post-*Atkins* has held that the issue of intellectual disability is only ripe after an execution date is set." Pet. 16. That statement is just

as true of the Arkansas Supreme Court as it is of other courts. As Justice Wynne noted in his concurring opinion, Pet. App. A-4-5, none of the Arkansas ripeness cases the court cited involved *Atkins* claims. And the Arkansas Supreme Court has long entertained *Atkins* claims before an execution date is set. Only a month before issuing the decision below, the Arkansas Supreme Court rejected an execution-incompetency claim as unripe for lack of an execution date, *Roberts*, 592 S.W.3d at 685, but rejected the same defendant's *Atkins* claim on the ground that it was previously rejected on direct appeal. *Id.* And the decision below did not overrule that decision; it cited it *in support* of its ripeness holding. Pet. App. A-2. Likewise, in both *Miller v. State*, 362 S.W.3d 264, 276-78 (Ark. 2010), and *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004), the Arkansas Supreme Court extensively entertained *Atkins* claims on direct appeal—in the latter instance doing so in a case where federal habeas proceedings concluded some fifteen years later. *See Anderson v. Kelley*, 938 F.3d 949 (8th Cir. 2019). Even if, then, the Arkansas Supreme Court held below that *Atkins* claims are unripe until an execution date is set, that holding is not representative of the court's jurisprudence, but a onetime outlier that is highly unlikely to be repeated and unworthy of this Court's review.

That supposed holding is also unimportant in the context of Lard's case. Lard's counsel claims that unless this Court grants certiorari and reverses, "there will be nothing to prevent the State . . . from executing him." Pet. 20. But if Lard's counsel is correct that the Arkansas Supreme Court's discussion of ripeness concerned his *Atkins* claim, its opinion says just the opposite: that "[w]hen 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." Pet. App. A-2. Under Lard's own counsel's construction of the court's opinion, Lard remains free to bring an *Atkins* claim in the future, unimpeded by his previous waiver of postconviction remedies. And under the State's interpretation, Lard remains free to raise a competency claim when that claim becomes ripe.

Lastly, if Lard's counsel's interpretation of the Arkansas Supreme Court's opinion is correct, it merely offers a further reason to deny certiorari on the first question presented. On his interpretation, the Arkansas Supreme Court rejected Lard's *Atkins* claim on two distinct grounds: waiver, and ripeness. Even if that court truly decided the question of *Atkins*'s waivability, its supposed ripeness holding would not merit review for the reasons just discussed, and would require this Court to grant certiorari on an issue of pure error-correction in order to reach the first question. Further, on Lard's counsel's interpretation, the Arkansas Supreme Court's waiver holding is ultimately of no consequence—neither the reason for that court's refusal to review Lard's *Atkins* claim, nor a bar to review of his *Atkins* claim at a later date. If, then, this case does present Lard's counsel's second question, that is only further reason to deny the Petition altogether.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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