

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*

**BRIEF FOR AMICI CURIAE THE STATES OF
ARIZONA, ARKANSAS, IDAHO, INDIANA,
KANSAS, LOUISIANA, MISSISSIPPI,
NEBRASKA, OHIO, SOUTH DAKOTA, AND
TEXAS IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amici curiae, the States of Arizona, Arkansas, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nebraska, Ohio, South Dakota, and Texas file this brief in support of Petitioner in furtherance of the interest each Amici State has in advancing the interests of crime victims, defending the ability of States to enforce constitutional restrictions, and ensuring the timely administration of justice in state criminal cases.

SUMMARY OF ARGUMENT

This case is important—beyond the split amongst state high courts on the question present—because it represents part of a broader problem: interminable delay in proceeding to finality and execution in capital cases.

Capital cases typically feature the most repugnant crimes, and are perhaps the most deserving of the timely administration of justice, especially from the perspective of family members and others who are protected by state victims' rights measures. Yet, as is too common, the conviction here came six years ago (in 2014). And the Kentucky Supreme Court's decision will only further the delay here by sending Larry Lamont White—who has been convicted already of rape and murder in this case—back to the trial court for evidentiary proceedings that he does not want, which will undoubtedly produce additional appeals.

The Court should grant review here to resolve the split in authority over whether a capital defendant

¹ Counsel for Amici Curiae provided timely notice of the intent to file this brief to all parties' counsel of record.

can waive a claim of intellectual disability under the *Atkins* line of cases; hold that such claims can be waived; and in doing so help alleviate the lingering harm that comes from the lengthy delays that hamper the effective execution of capital sentences.

BACKGROUND

In 2014, Defendant Larry Lamont White was convicted and sentenced to death for the 1983 rape and murder of Pamela Armstrong. App. 16–17. DNA recovered from Ms. Armstrong’s underwear matched White’s DNA “with certainty—one in 160 trillion people.” *Id.* at 43.

At the trial court, defense counsel requested an evidentiary hearing to determine whether White suffered from an intellectual disability based on White having scored 76 on an IQ test. *Id.* at 100. The trial court denied the motion and the Kentucky Supreme Court unanimously affirmed. *Id.* at 67, 82–83, 85. The Kentucky Supreme Court reasoned that White’s IQ score of 76 was “higher than the 70-point minimum threshold” from *Hall v. Florida*, 572 U.S. 701 (2014). App. 60. In the alternative, the court found that “there [was] ample evidence of [White’s] mental acumen.” *Id.* at 61. For example, White “often advocated for himself through numerous *pro se* motions,” one of which was specifically highlighted for its persuasiveness. *Id.*

After defense counsel filed a petition for a writ of certiorari, this Court vacated the judgment and remanded for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017), which concerned the execution of intellectually disabled defendants. It was only after this case was remanded back that White became aware that defense counsel had filed

the certiorari petition raising an *Atkins* issue. White wrote to the then-Attorney General of Kentucky: “I was never apprised of existent litigation and had not until here lately received any copies of this litigation about me being retarded, this news was very astonishing to me.” *Id.* at 107. White also stated his agreement with the Commonwealth’s position that he is not intellectually disabled. *Id.* at 108. Instead of wasting time on “this ‘retarded foolishness,’” White expressed the desire to move on to the post-conviction stage of the case so he could have “a fair opportunity” to “prove [his] innocence.” *Id.* White also filed several *pro se* motions making absolutely clear that he did not wish to pursue an *Atkins* claim. Pet. at 7–8.

Despite the repeated requests of White to waive any *Atkins* claim, the Kentucky Supreme Court held that it could not “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.” App. 6–7. The court thought itself powerless to grant White’s request because of the statement in *Moore* that “the Constitution ‘restrict[s] ... the State’s power to take the life of any intellectually disabled individual.’” *Id.* at 5–6 (quoting *Moore*, 137 S. Ct. at 1048).

ARGUMENT

I. Delay In Proceeding To Finality And Execution In Capital Cases Is Already Too Common, Which Harms Family Members And Other Victims

Forcing a capital defendant to be subject to an evidentiary hearing about mental disability when the defendant clearly does not wish to pursue this claim is just another delay mechanism that undermines the important interests in proceeding to finality and execution in capital cases.

A. Delay Compounds Harm To Victims

In the federal Crime Victims' Rights Act, 18 U.S.C. § 3771, Congress codified the right of crime victims to "proceedings free from unreasonable delay" and to "be treated ... with respect for [their] dignity." And, recognizing that surviving family members are also victims of the murderer where the victim is deceased, Congress made sure that "the crime victim's estate [or] family members ... may assume the crime victim's rights." 18 U.S.C. § 3771(e). The rights of victims have also been recognized in states across the country. *See, e.g.*, Ariz. Const. art. II, § 2.1 (victims' bill of rights).

These rights are assaulted each time proceedings are delayed or the finality of judgments is jeopardized, leading to secondary victimization that exacerbates the wounds of the initial criminal act. Ulrich Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Soc. Just. Res. 313, 321 (2002) (secondary victimization can be more harmful than the crime itself).

Repeated appeals and delays that jeopardize the finality and completion of the sentence in a death penalty case can have devastating effects on the surviving family members, who must relive the murder of their loved one with each new proceeding. Dan S. Levy, *Balancing the Scales of Justice*, 89 *Judicature* 289, 290 (2006). The murder of a loved one can cause post-traumatic stress disorder (PTSD) for the survivor at up to twice the rate for that of victims of other types of trauma. Heidi M. Zinzow, et al., *Examining Posttraumatic Stress Symptoms in a National Sample of Homicide Survivors: Prevalence and Comparison to Other Violence Victims*, 24 *J. Trauma Stress* 743, 744 (December 2011). Healing can be prevented and PTSD or other pain aggravated by a victim's experience with the criminal justice system, especially where delays and other difficulties in achieving finality give victims the perception that the offender is going unpunished. Dr. Joel H. Hammer, *The Effect of Offender Punishment on Crime Victim's Recovery and Perceived Fairness (Equity) and Process Control*, University Microfilms International 87, Ann Arbor, MI (1989) (victim recovery generally improves with the perception of punishment of the offender).

The harm inflicted on victims through delay in the administration of justice has been repeatedly recognized in the law. "Only with an assurance of real finality can the State execute its moral judgment and can victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 539 (1998). "Unsettling these expectations inflicts a profound injury to the 'powerful and legitimate interest in punishing the guilty,' ... an interest shared by the

State and crime victims alike.” *Id.* (quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O’Connor, J., concurring)). The lengthening of these proceedings and delay in the final implementation of the sentence creates recognizable pain in victims and postpones their own ability to heal their wounds—closure for victims being inextricably linked with finality in sentencing and judgment. *Id.* at 556.

B. Delay Undermines States’ Interests In Enforcing The Law

States have interests in the timely finalization and execution of sentences in capital cases, which fosters respect for the rule of law and helps protect the well-being of citizens who have been victimized by criminal offenders. The vast majority of States (including all Amici States) have adopted a crime victims’ rights act or amendment to their respective constitutions, underscoring their commitment to and important interest in ensuring victims’ rights to timeliness in the completion of proceedings, including enforcement of the sentence. *See, e.g.*, Ariz. Const. art. II, § 2.1; Ark. Code Ann. § 16-90-1101 *et seq.*; Idaho Const. art. I, § 22; Ind. Const. art. 1, § 13; Kan. Const. art. 15, § 15; La. Const. Ann. art. 1, § 25; Miss. Const. art. 3, § 26A; Neb. Const. art. I, § 28; Ohio Const. art. I, § 10a; S.D. Codified Laws § 23A-28C-1; Tex. Const. art. I, § 30. These protections add to the independent, compelling interest States have in finalizing and implementing judgments as sovereign entities. This interest in finality is put in jeopardy through cases, such as the underlying case, in which delays and never-ending appeals are allowed to thwart the finalization and implementation of lawful judgments.

States have expressed their commitment to bringing about timely justice to victims through their constitutions, laws, and court decisions. For example, “Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a ‘prompt and final conclusion of the case after the conviction and sentence.’” *State v. Towery*, 204 Ariz. 386, 391, ¶ 14 (2003) (quoting Ariz. Const. art. II, § 2.1(A)(10)). Further, the Arizona Constitution requires that “all rules governing criminal procedure ... in all criminal proceedings protect victims’ rights” and the legislature is empowered to ensure this goal is met. *Id.* at § 2.1(A)(11). These provisions are mandatory. *See id.* at § 32. And Arizona courts recognize the State’s independent interest in finality. *See, e.g., City of Phoenix v. Geyler*, 144 Ariz. 323, 328 (1985) (“there is a ‘compelling interest in the finality of judgments’ which should not lightly be disregarded”) (citation omitted); *State v. Granados*, 172 Ariz. 405, 407 (Ct. App. 1991) (“finality, as a general matter, is desirable in criminal prosecutions”); *State v. Waldrip*, 111 Ariz. 516, 518 (1975) (the “function of courts is to put an end to litigation”).

Delays in finalizing and implementing capital punishment also undermine the interest of States and their citizens in seeing that the deterrence function of the criminal law is given effect. The compelling interest each State has in carrying out its own criminal sentences is undermined when interminable delays prevent the finalization and execution of capital sentences. This leads to disrespect for the rule of law, which may in turn lead to an increase in violence in response to the

diminishing potential for fitting punishment. “Numerous studies published over the past few years, using panel data sets and sophisticated social science techniques, are demonstrating that the death penalty saves lives,” including an Emory University study finding “that each execution, on average, results in 18 fewer murders.” Dr. David B. Muhlhausen, Testimony Before the Senate Judiciary Committee (June 27, 2007); Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 *Am. L. & Econ. Rev.* 344–376 (2003). But this deterrent effect requires that would-be murderers believe their execution will actually be carried out.

II. *Atkins* Does Not Prohibit States From Crafting Rules Regarding The Waiver Of Intellectual Disability Claims

The decision below would also prevent States from developing appropriate ways to enforce *Atkins* and its progeny. In *Moore v. Texas*, the Court reiterated—while setting forth the background from *Atkins v. Virginia*—that States lack the power “to take the life’ of *any* intellectually disabled individual.” 137 S. Ct. 1039, 1048 (2017) (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). From the italicized word “*any*,” the court below gleaned that *Atkins* and its progeny impose “an absolute bar” that prohibits capital defendants from waiving a claim of intellectual disability. App. 5.

But *Atkins* and its progeny held no such thing. To the contrary, *Atkins* left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of

sentences.” 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). And later cases have affirmed that *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*, 536 U.S. at 317).

States are equal to the task of developing procedural and substantive guides to enforce the constitutional restriction from *Atkins*. For example, Arizona has chosen to “appoint a prescreening psychological expert in order to determine the defendant’s intelligence quotient” whenever the State files a notice of intent to seek the death penalty “unless the defendant objects.” Ariz. Rev. Stat. § 13-753(B). Assuming that the defendant does not “waive[] the right to a pretrial determination of status,” Arizona also provides a number of additional safeguards, which are both time consuming and costly, ensuring that there is a fair opportunity to assess whether the defendant has an intellectual disability. *See id.* § 13-753 (setting forth procedures for appointing additional experts and conducting an evidentiary hearing). In the end, however, Arizona has placed the option to waive these safeguards and the burden to prove an intellectual disability upon the capital defendant. *Id.* § 13-753(B), (G).

The Court should reject the Kentucky Supreme Court’s “absolute,” one-size-fits-all approach. It threatens the ability of States to craft “appropriate ways to enforce” *Atkins*. It strips capital defendants of the flexibility to try their case as they see best. And, because it forces courts to conduct intellectual disability hearings over the objection of capital

defendants, it effectively shifts the burden to States to disprove an intellectual disability.

Nothing in *Atkins* or its progeny require such a result. As set forth in the Petition (at 11–17), the Court has long recognized that constitutional rights can be waived, including under the Eighth Amendment. The constitution does not require States to go on a wild-goose chase to hunt down whether “any” intellectual disability might exist when a capital defendant insists that he is not disabled and waives his rights under *Atkins*. Such an approach is not only unwise, it would waste limited resources and compound delays already present in capital cases.

III. The Court Should Grant Review To Resolve The Split And Help Alleviate The Harm From Delay By Confirming That *Atkins* Claims Are Waivable

As set forth above, the interminable delay in proceeding to finality and execution in capital cases harms victims and undermines States’ interests in enforcing the law. Further, as set forth in the Petition (at 17–25), State courts of last resort are divided on whether capital defendants can waive *Atkins* claims. The Court should grant the Petition, resolve the split in the courts below, and allow the death penalty process to proceed in cases where capital defendants have waived their rights under *Atkins*.

* * *

The decision below undermines States’ interest in finality and promotes litigation aimed at ensuring that lawful capital sentences are never actually

carried out. The people of the State in which a crime occurs, the victims of that crime, “and others like them deserve better” than the “excessive” “delays that now typically occur between the time an offender is sentenced to death and his execution.” *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (quotes omitted). A State’s interests in enforcing its own sentences, protecting its citizens, and maintaining confidence in the integrity of the legal system support the position of the Commonwealth of Kentucky.

CONCLUSION

The Court should grant the Petition and reverse the decision below.

September 28, 2020	Respectfully submitted.
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