No. 19-1191

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

SHAWN FORD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE – NO EXECUTION DATE SET

QUESTION PRESENTED

What is the test for determining whether someone is "intellectually disabled" for purposes of the Eighth Amendment?

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REPLY

The Court should grant review in this case to definitively announce the test for determining whether someone is "intellectually disabled" for purposes of the Eighth Amendment.

I. The question presented is certworthy.

This Court's cases interpret the Eighth Amendment to prohibit executing the intellectually disabled. *See, e.g.*, *Atkins v. Virginia*, 536 US. 304 (2002); *Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas (Moore I)*, 137 S. Ct. 1039 (2017); *Moore v. Texas (Moore II)*, 139 S. Ct. 666 (2019). *Atkins* itself left the States to figure out on their own a test for determining whether a defendant is intellectual disabled. 536 U.S. at 317. Since then, the Court has repeatedly reversed state courts for *improperly* assessing intellectual disability without ever explaining what a proper assessment consists of.

This lack of clarity presents a serious problem. "Although *Atkins* recognized the possibility of varying state standards of mental retardation, the grounding of the prohibition in the Federal Constitution implies that there must be at least a nationwide minimum." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005). If *Atkins* is to be used to invalidate state sentences, the States deserve an answer regarding what that minimum is. And to date, they have not received anything even approximating an answer. Each "articulation of how courts should enforce the requirements of *Atkins*" has "lacked clarity," *Moore II*, 139 S. Ct. at 672 (Roberts, C.J., concurring), and left States without meaningful "guidance." *Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting). State courts have bemoaned "the difficult position that [they] are placed in due to

the Supreme Court's lack of clear guidance." *Wright v. State*, 256 So. 3d 766, 776 n.9 (Fla. 2018); *accord, e.g.*, *Carr v. State*, 196 So. 3d 926, 944 (Miss. 2016) (Maxwell, J., specially concurring). A coalition of fourteen States filed an *amicus* brief echoing these concerns. *See* Br. of Texas and *Amici* States. And six justices of this Court—Chief Justices Rehnquist and Roberts, and Justices Scalia, Thomas, Alito, and Gorsuch—have either written or joined opinions lamenting that confusion. *See, e.g.*, *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting); *Hall*, 572 U.S. at 731–33 (Alito, J., dissenting); *Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting); *Moore II*, 139 S. Ct. at 672 (Roberts, C.J., concurring); *id.* at 673 (Alito, J., dissenting). Such prolonged confusion on so important an issue touching so significantly on the States' sovereign authority to punish criminals demands resolution.

Ford argues that the issue is not deserving of the Court's review for three principal reasons. None is persuasive.

A. Ford first insists that the Court *has* provided meaningful guidance to lower courts. BIO.10–15. He is correct that the Court has provided *some* guidance. It has, for example, identified "three core elements" of intellectual disability: "(1) intellectual-functioning deficits"; (2) "adaptive deficits"; and (3) "the onset of these deficits while still a minor." *Moore I*, 137 S. Ct. at 1045. It has said that courts do not have "unfettered discretion to define" intellectual disability, and that they must "consult the medical community's opinions." *Hall*, 572 U.S. at 710, 719. And the Court has said that, while States need not adhere "to everything in the latest medical guide," they may not "disregard … current medical standards." *Moore I*, 137 S. Ct. at 1049.

What Ford fails to grapple with is the fact that no one knows what this guidance means. For example, what does the obligation to "consult" the most up-to-date clinical standards mean? The "line between the permissible—consideration, maybe even emphasis [of factors outside these standards]—and the forbidden 'overemphasis'—is not only thin, but totally undefined." *Moore I*, 137 S. Ct. at 1059 (Roberts, C.J., dissenting). While some courts have responded by just applying the most up-to-date standards in every case, BIO.10–12, their doing so out of an abundance of caution—potentially upsetting lawful sentences simply to avoid Supreme Court reversal—just highlights the need for clarification.

Anyway, and contrary to Ford's view, some States have held that they may depart from the most up-to-date clinical guidelines to some undefined extent. *See, e.g.*, *Rodriguez v. State*, 219 So. 3d 751, 756 (Fla. 2017); *State v. Escalante-Orozco*, 241 Ariz. 254, 267–68 (2017). Ford dismisses the relevance of *Escalante-Orozco*, saying the Arizona Supreme Court rejected it in *State v. Gates*, 243 Ariz. 451, 453 (2018). BIO.12. Ford is wrong. His argument turns on *Gates*'s quoting *Moore I* in a parenthetical that follows a "see also" citation. That parenthetical quoted *Moore I* for the uncontroversial proposition that "states do not have unfettered discretion to reject medical community standards." *Gates*, 243 Ariz. at 453. But that quote is consistent with *Escalante-Orozco*'s recognition that "Arizona's failure to precisely align its definition of adaptive behavior with the prevailing medical definition does not violate the Eighth Amendment." 241 Ariz. at 268. *Gates* does not indicate any disagreement with *Escalante-Orozco*.

B. Ford next insists there is no split in the lower courts. That would be irrelevant even if it were true: the confusion is reason enough to grant *certiorari*. Regardless, Ford is wrong.

Ohio's petition identified at least four, very real splits. *First*, as just discussed, courts disagree regarding their freedom to depart from the most up-to-date clinical guidelines. *Second*, though Ford's brief does not address this disagreement, courts are split regarding whether the first two core elements of intellectual disability (intellectual functioning and adaptive deficits) must be separately assessed or considered together. *See* Pet.24 (contrasting *Carr*, 196 So. 3d at 943 and *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016)). *Third*, whereas the Ohio Supreme Court (contrary to Ford) held that the trial court in this case erred by failing to expressly discuss the Flynn effect, Pet.App.30a, other courts require no such express discussion or even consideration of the Flynn effect. Pet.25 (collecting cases). *Finally*, the courts disagree regarding the point at which permissible consideration of adaptive strengths crosses the line into "overemphasis." *Compare In re Lewis*, 4 Cal. 5th 1185, 1202 (2018) *with State v. Blackwell*, 420 S. C. 127, 143 n.11 (2017). Ford insists the decisions from these courts are "not inconsistent." BIO.16. The reader can judge for him or herself whether these courts place equal emphasis on adaptive strengths.

C. Ford faults Ohio's two proposed definitions of "intellectual disability." Both, however, would go a long way to clarifying this area of law.

First, the Court could cabin *Atkins*, *Hall*, *Moore I*, and *Moore II* to their precise holdings. Under that test, States would comply with *Atkins* whenever they:

(1) assess intellectual disability using the three core elements outlined above; (2) make that assessment without regard to considerations that have "*no* relation to clinical guidelines existing at the time of *Atkins* or at some point afterward"; and (3) avoid imposing strict IQ-score cutoffs that automatically deny *Atkins* relief to some offenders whose standard-error-of-measurement ranges include scores less than 70. Pet.27–28. Announcing this test would not amount to a pointless command to "keep following *Atkins*, *Hall*, and *Moore* after all." BIO.20. Instead, it would establish that these cases reflect the outermost bounds of the "intellectual disability" analysis, and that any intellectual-disability finding not squarely contrary to their holdings passes constitutional muster. And, contrary to Ford, BIO.26–27, Ohio would prevail under this test: the trial court assessed intellectual disability using the three core elements, relied heavily on post-*Atkins* clinical guidelines, and imposed no IQ-score cutoff.

Second, this Court could define "intellectual disability" to include anyone whose intelligence "keeps him from appreciating the criminality of his conduct or conforming his behavior to law." Pet.29. That does not require overruling *Atkins*. It simply requires refining the *Atkins* inquiry to bring it more in line with the original intent of *Atkins*, in much the same way that this Court, in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019), refined the doctrine of *Auer* deference to bring it more in line with *Auer*'s intended scope.

Of course, these are just two options. If the Court grants *certiorari*, the parties and *amici* will have ample opportunities to suggest alternative tests for assessing "intellectual disability."

* * *

Whether this Court affirms or reverses the decision below, it must first explain what "intellectual disability" means for *Atkins* purposes. So the question presented is squarely before the Court. It should grant *certiorari*, announce a test for "intellectual disability," and end the confusion.

II. The Court has jurisdiction over this case.

Ford argues that the Court *cannot* hear the case because it lacks jurisdiction. He is wrong. At the very least, the jurisdictional question is close enough and important enough that, if "the Court has doubts" about its jurisdiction, it should consider the jurisdictional question "together with the merits." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 346 n.* (2019) (Alito, J., dissenting from denial of certiorari).

A. The Supreme Court of Ohio's decision is "final" for purposes of §1257.

This Court has jurisdiction to review "final" decisions by state courts. 28 U.S.C. §1257(a). The Ohio Supreme Court's decision is "final" even though it remanded the case for further *Atkins* proceedings. Pet. 30–33. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified "at least" four circumstances in which an interlocutory decision is "final" for purposes of §1257. Two are relevant here.

First, the decision is final because the question presented will otherwise evade review. If the State prevails on remand, the federal issue (the meaning of "intellectual disability") will be mooted. But if the State *loses* on remand, there is no mechanism for appealing the trial court's decision under state law—Ohio law does not permit prosecutors to appeal adverse *Atkins*

decisions. Because "later review" of the issue "cannot be had, whatever the ultimate outcome of the case," the decision below is final. *Cox*, 420 U.S. at 481.

Second, and in the alternative, the case is "final" because the "federal issue"—the meaning of "intellectual disability" under *Atkins*—"will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. No matter what happens on remand, one of the parties will be aggrieved by the definition of "intellectual disability." Ford will be able to bring his grievances to this Court (at which point the State would again seek a test for "intellectual disability," as either respondent or cross-petitioner). And the State can do the same, assuming there is some mechanism for it to appeal an adverse ruling in trial court. Either way, the question of what "intellectual disability" means is finally decided and sure to come back.

Most fundamentally, the Court has jurisdiction even if this case does not precisely fit any of *Cox*'s categories. Pet.32–33. The finality doctrine is "pragmatic." *Cox*, 420 U.S. at 486. Here, the practicalities militate in favor of immediate review. After all, a remand will produce one of two results. The first possibility is that the validity of the Ohio Supreme Court's definition of "intellectual disability" is either certain or very likely to evade this Court's review, making the decision below "final" in every practical sense. The second possibility is that the proper definition *will not* evade the Court's review; either the State or Ford will come back to this Court, where the State will again ask the Court to announce a test for "intellectual disability." Under this possibility, allowing the state proceedings to continue without a definition "would not only be an inexcusable delay of the benefits Congress

intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in [a] judicial system[] already troubled by delays due to congested dockets." *Mills* v. *Alabama*, 384 U.S. 214, 217–18 (1966).

Regardless, any uncertainty regarding this Court's jurisdiction strengthens the case for *certiorari*. Section 1257 is a vitally important statute about which this Court has said relatively little. The Court's last sustained look at the statute came back in 2006. *Kansas v. Marsh*, 548 U.S. 163, 165–69 (2006). This would be a good candidate for ending the drought because the circumstances of this case are identical to those presented in every *Atkins* case remanded for a hearing from which the State has no right to appeal. Thus, any §1257 decision here is likely to provide guidance on this Court's jurisdiction to review decisions that issue with some frequency.

B. Ford's arguments against jurisdiction all fail.

Ford makes three counterarguments, all of them unavailing.

1. Begin with Ford's argument that the Court has no jurisdiction because the ultimate question of his intellectual disability remains to be decided on remand. BIO.30. While that *fact* question may be open, the *legal* question of what qualifies as an "intellectual disability" for Eighth Amendment purposes is settled. *That* is the issue that, if the State can appeal an adverse decision below, is guaranteed to "survive and require decision regardless of the outcome of future state-court proceedings." *Cox,* 420 U.S. at 480. And *that* is the issue that, if the State cannot appeal an

adverse decision below, cannot be reviewed later, "whatever the ultimate outcome of the case." *Id.* at 481.

2. Ford additionally argues that the State's supposed ability to appeal an adverse decision by the trial court—either in state court or through a direct petition to this Court—means the decision below is nonfinal. BIO.31. This argument is both irrelevant and legally incorrect. The argument is irrelevant because, even if the State had a viable route to appealing an adverse decision to this Court, that would establish only that the Court *has* jurisdiction on the ground that the issue will survive and require decision regardless of the outcome below. *Cox*, 420 U.S. at 480. It is legally incorrect because the State does not have any relevant right to appeal.

For starters, Ford is incorrect that Ohio law permits the State to appeal an adverse *Atkins* decision in state court. Ohio explained why in its petition, and the association that represents Ohio's eighty-eight county prosecutors concurred in an *amicus* brief. Pet.31; Ohio Prosecutor's Ass'n Br.6. In arguing otherwise, Ford does not identify *any* statute or state supreme court decision creating a right to appeal. Instead, his only authority is a decision from an intermediate appellate court that entertained the prosecution's appeal of an adverse *Atkins* decision *without considering* its jurisdiction to do so. BIO.31–32 (citing *State v. Deloney*, 2017-Ohio-9282 (Ohio Ct. App.)). So, in addition to being non-binding, that case contains the sort of drive-by jurisdictional ruling that has "no precedential effect" in Ohio. *Ohio High Sch. Ath. Ass'n v. Ruehlman*, 157 Ohio St. 3d 296, 300 (2019) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). In the end, neither the Attorney

General, Ford, nor the Ohio Prosecuting Attorneys Association has identified any lawful means that the State could use to appeal an adverse *Atkins* ruling in state court.

Ford next says the case is not "final" because, even if there is no route to appeal an adverse decision in state court, Ohio could always file a *certiorari* petition directly from the trial court. BIO.31. This argument fails because the option to petition directly is irrelevant. *Kansas v. Marsh* held that a decision is "final," under the exception for interlocutory appeals in which "later review" of the issue "cannot be had, whatever the ultimate outcome of the case," *Cox*, 420 U.S. at 480, when an adverse decision on remand would not be appealable *in state court*. *See Marsh*, 548 U.S. at 168. Regardless, the option to petition this Court directly from the trial court does not, in pragmatic terms, make the decision below any less final: because this Court is not likely to review a decision that "lacks significant value as precedent," *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., respecting denial of certiorari), review is almost certainly now or never.

3. Finally, Ford attacks this Court's jurisdiction by invoking precedent. He focuses, in particular, on *Florida v. Thomas*, 532 U.S. 774 (2001). BIO.31. That case is not helpful here. In *Thomas*, the Court initially granted review to decide whether evidence seized without a warrant could be considered under one particular exception to the warrant requirement. *Id.* at 776. But after granting review, the Court determined that it lacked jurisdiction. The Florida Supreme Court, in the decision under review, had remanded the matter for the trial court to consider the evidence's admissibility. But Florida state law—unlike the Ohio law relevant here—allowed the State to

appeal an adverse decision on remand, meaning the case was not one in which "later review" could not be had "whatever the ultimate outcome of the case." *Id.* at 779 (quoting *Cox*, 420 U.S. at 481). Further—and again, unlike this case—there was no guarantee that the issue would "survive and require decision regardless of the outcome of future state-court proceedings." *Thomas*, 532 U.S. at 778. Instead, the record showed that the State may have been able to win the evidence's admission under a *separate* exception to the warrant requirement. As this discussion shows, *Thomas*'s logic has no bearing on this case.

Next, there is *California v. Ramos*, 463 U.S. 992 (1983). In that case, this Court granted *certiorari* to review a decision in a posture materially indistinguishable from this case: the California Supreme Court held unconstitutional a set of capital sentencing instructions, and remanded for resentencing. *Id.* at 996. As Ford notes, *Ramos* did not address its jurisdiction, and its *sub silentio* jurisdictional ruling is non-binding. *See* BIO.32. But Ohio has never claimed otherwise; it cited *Ramos* in its petition only because it appears to reflect the "pragmatic" approach the Court has taken to jurisdictional questions. Pet.33. And as explained above, any version of pragmatism deserving of the name would deem the decision below "final" for purposes of §1257.

CONCLUSION

The Court should grant Ohio's petition for a writ of *certiorari*.

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