[Cite as *State v. Bays*, 2015-Ohio-1935.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2014-CA-24
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 94-CR-30
v.	:	
	:	
RICHARD BAYS	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 15th day of May, 2015.

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HALL, J.

{¶ 1} Richard Bays appeals from the trial court's judgment entry overruling (1) his May 16, 2013 motion to withdraw a November 9, 2007 notice of voluntary dismissal of a

post-conviction relief petition pursuant to Civ.R. 41(A)(1), (2) his motion to amend or supplement the voluntarily-dismissed petition, and (3) his January 14, 2014 motion for Civ.R. 60(B) relief from his voluntarily-dismissed petition.

{¶ 2} Bays advances four assignments of error. First, he contends the trial court erred in overruling his motion to withdraw the notice of voluntary dismissal. Second, he claims the trial court erred in denying him relief under Civ.R. 60(B). Third, he asserts that the trial court erred in failing to rule on a successive petition for post-conviction relief that he filed and his motion for a hearing. Fourth, he maintains that the trial court erred in failing to grant him an evidentiary hearing.

{¶ 3} Bays' case has a lengthy procedural history that need not be repeated in detail here. *See generally State v. Bays*, 159 Ohio App.3d 469, 2005-Ohio-47, 824 N.E.2d 167 (2d Dist.). Briefly, he was convicted of aggravated murder and aggravated robbery in 1995 for robbing and killing a seventy-six-year-old man and using the stolen money to buy crack cocaine. *Id*. at ¶ 4. He received a death sentence for the aggravated murder and an additional ten to twenty-five years for the aggravated robbery. *Id*. He pursued direct appeals, which were unsuccessful. *Id*. Beginning in 1996, Bays also unsuccessfully pursued post-conviction relief under R.C. 2953.21, challenging his attorney's trial performance. *Id*. at ¶ 5-7.

{¶ 4} In April 2003, Bays filed a second post-conviction relief petition, this time seeking to vacate his death sentence based on *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011. Proceeding with the assistance of counsel, Bays alleged that he was mentally retarded and, therefore, could not be executed under *Atkins* and *Lott*. *Id*. at ¶ 7.

The trial court denied Bays funding to retain a mental-retardation expert, finding that he already had been examined in connection with the criminal case. *Id*. at ¶ 8. The matter proceeded to a hearing at which Bays presented no evidence. *Id*. at ¶ 11. Based on mitigation-phase trial testimony from two experts who stated that Bays' I.Q. was above 70, the trial court denied post-conviction relief to vacate his death sentence. *Id*. On appeal, this court found Bays entitled to the requested funding and reversed, reasoning:

> There is a significant difference between expert testimony offered for mitigation purposes and expert testimony offered for *Atkins* purposes. Although the expert testimony presented at Bays's mitigation hearing regarding his intellectual limitations is relevant to Bays's *Atkins* claim, it was not developed either to prove or to disprove the issue presented by his *Atkins* claim -- whether Bays is so impaired that his execution would constitute cruel and unusual punishment. *See State v. Carter*, 157 Ohio App.3d 689, 2004-Ohio-3372, 813 N.E.2d 78, at ¶ 22. The expert testimony offered at Bays's mitigation hearing was not presented or developed to establish Bays's mental retardation status for purposes of *Atkins*, using the test adopted in *Lott*. Nor can Bays fairly have been required to have used the vehicle of his guilt or punishment trials to have developed evidence on the issue of whether he meets the mental retardation test set forth in *Lott*, since his trials, conviction and sentence all predate the *Lott* decision.
>
> The three-part test set forth in *Atkins*, and adopted by the Ohio Supreme Court in *Lott*, requires that the following three criteria be met to establish mental retardation: "(1) significantly subaverage intellectual

> functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, at ¶ 12. Bays has the burden of proving, by a preponderance of the evidence, that he is mentally retarded under the three-part test. *See id.* at ¶ 21. There is a rebuttable presumption that Bays is not mentally retarded if his I.Q. is above 70, but he must be allowed access to the resources that might permit him to rebut this presumption, in view of the fact that he is an indigent defendant with significant, documented cognitive deficits, as shown by his school records and the testimony of Drs. Burch and Jackson.
>
> We conclude that the trial court abused its discretion when it denied Bays's request for funding for an expert on mental retardation for the purposes of attempting to prove his *Atkins* mental-retardation claim.

Bays, 159 Ohio App.3d 469, 2005-Ohio-47, 824 N.E.2d 167, at ¶ 23-25.

{¶ 5} On remand, the trial court granted Bays some funding. He retained Dr. David Hammer to evaluate him, and the State hired Dr. Barbara Bergman. Both experts evaluated Bays on October 1, 2007. Based on their evaluations, both experts opined that that he did not meet the criteria for a diagnosis of mental retardation. In light of these evaluations, Bays' counsel filed a Civ.R. 41(A)(1) notice of voluntary dismissal of the post-conviction *Atkins* petition on November 9, 2007. (Doc. # 452). The trial-court case sat dormant for the next five and one-half years until May 16, 2013, when Bays moved to withdraw his notice of voluntary dismissal and to supplement or amend his 2003 *Atkins* post-conviction relief petition with additional evidence regarding his mental retardation.

(Doc. #453). Bays also filed a January 14, 2014 motion seeking relief from judgment pursuant to Civ.R. 60(B) and *State v. Waddy*, Franklin C.P. No. 86-CR-10-3182 (July 20, 2005). The motion requested relief from judgment "so that he [could] withdraw the notice of voluntary dismissal of his *Atkins* petition." (*Id*. at 1).

{¶ 6} After briefing by the parties, the trial court denied Bays' motion to withdraw his notice of voluntary dismissal, his motion to supplement or amend his voluntarily-dismissed *Atkins* petition, and his motion for relief from judgment. (Doc. #470, 471). The trial court found that Bays' Civ.R. 41(A)(1) dismissal in November 2007 left the parties in the same position as if no petition had been filed and deprived it of jurisdiction "to do anything further on the dismissed case." (Doc. #470 at 5). The trial court also concluded that "since Bays' Rule 41(A) dismissal was his first voluntary dismissal, the dismissal was not a final judgment, order, or proceeding subject to review under Civ.R. 60(B)." *Id*. at 7. Even if Bays could proceed under Civ.R. 60(B), the trial court found that he had failed to establish grounds for relief or timeliness. (*Id*. at 7-9). In light of the foregoing determinations, the trial court refused to allow him to supplement or amend his voluntarily-dismissed *Atkins* petition. (*Id*. at 9). It concluded that "[a] new petition needs to be filed." (*Id*.). Bays timely appealed from the trial court's judgment entry denying his motions. (Doc. #471, 474).[1]

[1] In its appellate brief, the State objects to Bays' citation to evidentiary materials he submitted below in support of his motion to withdraw his notice of voluntary dismissal, his motion to amend or supplement the voluntarily-dismissed petition, and his motion for Civ.R. 60(B) relief. (Appellee's brief at 6). Broadly speaking, those materials consist of new evidence regarding Bays' alleged mental retardation. (*See* Doc. #453 and accompanying materials). Because Bays filed those materials below and the trial court did not strike them, we will accept them as part of the record. For purposes of the legal issues now before us, however, we need not discuss those evidentiary materials in detail.

{¶ 7} In his first assignment of error, Bays claims the trial court erred in denying his motion to withdraw his November 9, 2007 notice of voluntary dismissal. He reasons that he had a constitutional right to effective assistance of counsel in connection with his *Atkins* petition, that his *Atkins* counsel rendered ineffective assistance by voluntarily dismissing his petition, and that the trial court was obligated to remedy the problem by allowing him to withdraw the voluntary dismissal and supplement or amend his petition. In support, he cites *Waddy*, supra, for the proposition that a notice of voluntary dismissal can be withdrawn in a post-conviction proceeding. (Appellant's brief at 12-18).

{¶ 8} Upon review, we see no error in the trial court's refusal to allow Bays to withdraw his notice of voluntary dismissal. In *Atkins*, the U.S. Supreme Court held that executing a mentally retarded criminal violates the Eighth Amendment. *Atkins* relegated to states the responsibility for developing ways to implement this prohibition. *Atkins* at 317. In *Lott*, the Ohio Supreme Court adopted the three-part "test" set forth above for defining mental retardation. *Lott* at ¶ 12. It also held that "[t]he procedures for postconviction relief outlined in R.C. 2953.21 et seq. provide a suitable statutory framework" for resolving *Atkins* claims brought by convicted defendants facing the death penalty. *Id*. at ¶ 13.

{¶ 9} The Ohio Rules of Civil Procedure apply to proceedings under Ohio's post-conviction relief statute except to the extent that, by their nature, they would be clearly inapplicable or would conflict with the statutory procedure. *State v. Mitchell*, 2d Dist. Montgomery No. 21096, 2006-Ohio-1601, ¶ 5; *State v. Hansbro*, 2d Dist. Clark No. 2001-CA-88, 2002 WL 1332297, fn. 1 (June 14, 2002), citing *State v. Aldridge*, 120 Ohio App.3d 122, 136, 697 N.E.2d 228 (2d Dist.1997); *see also* Civ.R. 1(C)(7) ("These rules, to

the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in * * * special statutory proceedings[.]").

{¶ 10} Here Bays' counsel invoked Civ.R. 41(A)(1)(a) when voluntarily dismissing his post-conviction *Atkins* petition in November 2007. That rule provides, in relevant part, that "a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any time before the commencement of trial[.]" Although the terminology in Civ.R. 41(A)(1)(a) does not fit perfectly with a post-conviction action, we see nothing in the nature of the rule itself that makes it clearly inapplicable to such a proceeding. But even without regard to Civ.R. 41(A), we see nothing to prevent Bays from simply discontinuing pursuit of his *Atkins* petition and waiving the issue, which is effectively what his attorney did. *Cf*. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 155 (holding that the appellant permissibly waived his *Atkins* claim by withdrawing his *Atkins* motion at trial when the evidence did not support it). For the foregoing reasons, we see no error, and certainly no reversible error, in the trial court's decision to give effect to the notice of voluntary dismissal.[2]

{¶ 11} "[F]ollowing a Civ.R. 41 voluntary dismissal without prejudice, the parties

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[2] In light of our analysis above, we are unpersuaded by the reasoning in *Waddy*, an unpublished Franklin County Common Pleas Court decision cited by Bays. (*See* Appellant's brief at 18). In *Waddy*, the defendant filed a Civ.R. 41(A)(1)(a) notice of voluntary dismissal of his *Atkins* claim on July 15, 2004. Five days later, he filed a motion to withdraw the notice of voluntary dismissal. With little analysis, the common pleas court reasoned that the Ohio Rules of Civil Procedure did not apply because post-conviction proceedings are governed by statute. Therefore, it found the Civ.R. 41(A) notice ineffective, treated it as a motion for dismissal, and denied the motion. (*See* Copy of *Waddy* decision accompanying Doc. #464). Although *Waddy* was appealed, resulting in reversal and a remand, the Tenth District did not address this procedural aspect of the case. *See State v. Waddy*, 10th Dist. Franklin No. 05AP-866, 2006-Ohio-2828.

are in the same position they were in before the action was filed."[3] *Nielsen v. Firelands Rural Elec. Coop., Inc*., 123 Ohio App.3d 104, 109, 703 N.E.2d 807 (6th Dist.1997), citing *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 464 N.E.2d 142 (1984). The action is treated as if it never had been commenced, the trial court loses jurisdiction over the dismissed matter, and "[j]urisdiction cannot be reclaimed by the court." *Zimmie* at 95; *see also State ex rel. Fifth Third Mtge. Co. v. Russo*, 129 Ohio St.3d 250, 2011-Ohio-3177, 951 N.E.2d 414, ¶ 17 ("The plain import of Civ.R. 41(A)(1) is that once a plaintiff voluntarily dismisses all claims against a defendant, the court is divested of jurisdiction over those claims. * * * The notice of voluntary dismissal is self-executing and completely terminates the possibility of further action on the merits of the case upon its mere filing, without the necessity of court intervention."); *Kaiser v. Ameritemps, Inc.*, 84 Ohio St. 3d 411, 416, 704 N.E.2d 1212 (1999) ("Because Kaiser could properly dismiss his complaint pursuant to Civ.R. 41(A)(1)(a), the trial court was without jurisdiction[.]"); *State ex rel. Fogle v. Steiner*, 74 Ohio St. 3d 158, 161, 656 N.E.2d 1288 (1995) ("When a case has been properly dismissed pursuant to Civ.R. 41(A)(1), the court patently and unambiguously lacks jurisdiction to proceed and a writ of prohibition will issue to prevent the exercise of jurisdiction."); *State ex rel. Ahmed v. Costine*, 99 Ohio St.3d 312, 2003-Ohio-3080, 790 N.E.2d 330, ¶ 5 (finding that a Civ.R. 41(A)(1)(a) notice of voluntary dismissal deprived the appellate court of jurisdiction to proceed on petitions for writs of prohibition and

[3] This dismissal in Bays' case was without prejudice because it was his first such dismissal. *Cf*. *State ex rel. Jackson v. Ohio Adult Parole Auth*., 140 Ohio St.3d 23, 2014-Ohio-2353, 14 N.E.3d 1003, ¶ 16 (recognizing that a second voluntary dismissal under Civ.R. 41(A)(1) operates as an adjudication on the merits and, therefore, is with prejudice).

mandamus).[4] Based on the foregoing authority, we agree with the trial court that Bays' November 9, 2007 notice of voluntary dismissal deprived it of jurisdiction "to do anything further" on the dismissed *Atkins* petition. Therefore, the trial court did not err in denying Bays' motion to withdraw his notice of voluntary dismissal for purposes of supplementing or amending the petition.

{¶ 12} In any event, we also reject the premise underlying Bays' motion to withdraw his notice of voluntary dismissal. Therein, he argued that withdrawal of the notice of dismissal was *constitutionally mandated* because he had a right to effective assistance of counsel in connection with the *Atkins* petition, he had been deprived of that right, and no other avenue of relief existed for remedying the constitutional violation.

{¶ 13} Whether Bays in fact had a constitutional right to effective assistance of counsel in connection with his post-conviction *Atkins* petition is debatable. It has been recognized, of course, that a defendant pursuing post-conviction relief ordinarily has no such right.[5] *Smallwood v. Erwin*, 2d Dist. Greene No. 89-CA-16, 1989 WL 87575, *1

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[4] An exception exists with regard to a collateral issue, such as a motion for sanctions, that exists separate and apart from the dismissed matter. *State ex rel. J. Richard Gaier Co., L.P.A. v. Kessler*, 97 Ohio App. 3d 782, 784-85, 647 N.E.2d 564, 565 (2d Dist.1994); *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 395, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990).

[5] The Revised Code provides indigent defendants sentenced to death with a *statutory* right to counsel in post-conviction proceedings. *See* R.C. 2953.21(I)(1) ("If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel."). Notably, however, R.C. 2953.21(I)(2) provides that "[t]he ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal." *But see Hooks v. Workman*, 689 F.3d 1148, 1183-1184 (10th Cir.2012) (finding a federal constitutional right to effective assistance of counsel in

(Aug. 3, 1989), citing *State v. Mapson*, 41 Ohio App.3d 390, 535 N.E.2d 729 (8th Dist.1987). But even if we accept Bays' claim that this case is different, and that he did have a constitutional right to effective assistance of counsel, we are unpersuaded that he was deprived of that right.

{¶ 14} The performance of counsel is constitutionally deficient if it is objectively unreasonable and it results in prejudice to the defendant. *State v. Thrasher*, 2d Dist. Greene No. 06CA0069, 2007-Ohio-674, ¶ 10, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. King*, 2d Dist. Montgomery No. 18463, 2002 WL 1332565, *5 (June 14, 2002), citing *Strickland*.

{¶ 15} Here Bays claims his attorney acted objectively unreasonably by dismissing his *Atkins* claim without a full evaluation. With regard to prejudice, he asserts that he *is* mentally retarded and, therefore, that he likely would have prevailed and would have had the death penalty vacated if his attorney had acted competently.

{¶ 16} Having reviewed the record, we disagree that Bays' *Aktins* counsel acted objectively unreasonably in evaluating his claim of mental retardation. As set forth above, *Lott* adopted a three-part "test" defining mental retardation for *Atkins* purposes. The definition requires a showing of "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Lott* at ¶ 12. In *Lott*, the Ohio Supreme Court also established "a rebuttable presumption that a defendant is not

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post-conviction *Atkins* proceedings).

mentally retarded if his or her IQ is above 70." *Id.*

{¶ 17} Bays was evaluated in connection with his *Atkins* petition by two psychologists, Dr. Hammer (retained by Bays) and Dr. Bergman (retained by the State). After evaluating Bays, Hammer and Bergman both concluded that he did not meet *Lott's* definition of mental retardation. For his part, Hammer opined that Bays did not "meet the criteria for a diagnosis of mental retardation at any level." (Doc. #453, Exh. B, Vol. II, Appx. 451). He noted that Bays had a full-scale IQ score of 78, a verbal score of 76, and a non-verbal score of 83, none of which were "in the range of mental retardation." (*Id*.). Hammer added: "The major finding here was that the IQ scores were above the Mental Retardation range and they do not support the *Atkins* plea, in my professional opinion." (*Id*.). With regard to adaptive behavior, Hammer noted that Bays had scored 95 on a Street Survival Skills Questionnaire, which fell "in the normal range of adaptive behavior functioning." (*Id*.) He then added: "The findings on the Street Survival Skills Questionnaire also do not support the *Atkins* claim, although this particular adaptive behavior measure is not as well accepted by MRDD professionals as other standardized measures such as the Vineland, SIB-R, or ABAS-II. It is mostly used to determine whether someone has the basic skills appropriate for community employment." (*Id*.).

{¶ 18} At the conclusion of her ten-page forensic-evaluation report, Bergman set forth the following opinions on each part of *Lott's* three-part definition:

> Present evaluation indicates that Mr. Bays does not meet the criteria specified in the *Atkins* decision to be considered "mentally retarded" as evidenced by the following:

> 1) Mr. Bays' Full Scale IQ score on the Stanford Binet-V was 78, which was well beyond the IQ score of 70. In addition, available scores on all past testing of intellectual functioning are consistent with present test results.
>
> 2) Mr. Bays' adaptive behavior, as measured by the Street Survival Skills Questionnaire, was in the average range.
>
> 3) Mr. Bays' intellectual functioning prior to age 18 years---as reflected in school records---was always in the Borderline range of intelligence. (IQ above 70).
>
> In conclusion, based on the present evaluation, it is the opinion of the undersigned psychologist, within a reasonable degree of psychological certainty, that Richard Bays DOES NOT meet the *Atkins* criteria to be considered "mentally retarded."

(*Id*. at Appx. 461).

{¶ 19} On appeal, Bays insists that his *Atkins* counsel, armed with the foregoing expert opinions, acted unreasonably and rendered ineffective assistance by dismissing his petition. In support, he first claims that "Dr. Hammer had told counsel that Dr. Bergman used the SSSQ for an adaptive-deficits assessment, which competent counsel would have determined was 'completely inappropriate' and 'scientifically unacceptable' under the circumstances." (Appellant's brief at 15). Notably, these descriptions of the SSSQ as "completely inappropriate" and "scientifically unacceptable" come from Bays' *new expert*, psychologist Stephen Greenspan, who provided an affidavit below in connection with Bays' effort to reopen his voluntarily-dismissed *Atkins* petition. (Doc.

#453 at Vol. I, Appx. 84). All Hammer himself told *Atkins* counsel about the SSSQ was (1) that Bays' score fell "in the normal range of adaptive behavior functioning," (2) that Bays' score did "not support the *Atkins* claim," and (3) that the SSSQ was "not as well accepted by MRDD professionals as other standardized measures[.]"[6] (Doc. #453, Exh. B, Vol. II, Appx. 451). But mere knowledge that other tests of adaptive behavior might be *better accepted* by psychologists would not reasonably have led *Atkins* counsel to conclude that the SSSQ discussed by Hammer and Bergman was "inappropriate" or "unacceptable."[7] Therefore, Bays has not shown that *Atkins* counsel acted objectively unreasonably in relying on the adaptive-behavior findings made by Hammer and Bergman using the SSSQ. *Cf*. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 150 ("Leonard has also not shown how Dr. Hawkins' use of the Minnesota Multiphasic Personality Inventory amounted to deficient performance by trial counsel. Dr. Hawkins was the expert in this area, and he determined which tests to administer."). That being so, *Atkins* counsel reasonably could have concluded that Bays would be unable to satisfy the second part of *Lott's* three-part mental-retardation definition. Because *Lott* required each part of the test to be satisfied, *Atkins* counsel acted objectively reasonably in concluding that the petition would fail and in dismissing it. This is true without regard to Bays' ability to

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[6] Bays asserts "that no expert had administered a standardized adaptive-behavior instrument" to him. (Appellant's brief at 17). In an e-mail to Bays' *Atkins* counsel, however, Hammer specifically identified the SSSQ test as a "standardized adaptive behavior scale[.]". (Doc. #453, Exh. B, Vol. II, Appx. 451).

[7] Bergman subsequently defended her use of the SSSQ test in a March 2011 deposition. A transcript of that deposition is among the evidentiary materials filed by Bays below in connection with his motion to withdraw his notice of voluntary dismissal and motion to supplement or amend his prior *Atkins* petition. During her March 2011 deposition, Bergman explained why she believed in Bays' case that no better assessment tool existed and that the adaptive-skills evaluation she performed was "[a]s valid as [she] could do under the circumstances." (Doc. #453, Exh. B, Vol. I, Appx. 169-171).

satisfy the other two parts of *Lott's* mental-retardation definition. *Cf*. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶ 176-180 (finding no ineffective assistance in counsel's decision not to pursue an *Atkins* claim and noting that expert opinion about the defendant's lack of "significantly subaverage intellectual functioning" undermined the claim and made the other parts of the *Lott* test immaterial).

{¶ 20} In any event, we also believe *Atkins* counsel acted objectively reasonably in relying on the IQ assessment performed by Hammer and Bergman. In arguing to the contrary, Bays claims *Atkins* counsel provided deficient representation by failing to verify that the full-scale score of 78 was valid "by determining whether it had been adjusted to compensate for obsolete norms, a phenomenon known as the Flynn Effect." (Appellant's brief at 16). Bays claims this adjustment was required, that it had not been made, and that it would have reduced his full-scale score to a 76. (*Id*.).

{¶ 21} We are unconvinced that counsel's duty included investigating whether the two experts had done their job competently by adjusting for the Flynn Effect. Even if we accept, arguendo, that counsel had a general obligation to be aware of the Flynn Effect, Bays cites nothing that reasonably should have alerted counsel the adjustment was not made. Absent such evidence, we are unpersuaded that counsel's professional duty encompassed micromanaging the experts' scoring of Bays' IQ test. We note too that giving Bays the benefit of the roughly two-point adjustment still would have resulted in a full-scale score of 76, six points above the threshold established by *Lott* for a presumption of no mental retardation.[8] *Cf*. *State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9

[8] Although Bays claims other scoring errors were made as well, he apparently does not attempt to hold his *Atkins* counsel responsible for not detecting them. (Appellant's brief at 16).

N.E.3d 930, ¶ 172-176 (finding no ineffective assistance in failing to request an *Atkins* hearing where the defendant's two full-scale IQ scores were above 70, there was no evidence that he suffered from a significant limitation on two or more adaptive skills, and an expert determined that he was not mentally retarded); *Frazier v. Jenkins*, 770 F.3d 485, 501 (6th Cir.2014) ("Lawyers are permitted to rely upon qualified experts * * * and in this case, Frazier's own expert found him not to be mentally retarded. Fairminded jurists could find that counsel's reliance upon Dr. Smalldon's opinion was consistent with professional norms.").

{¶ 22} Finally, we reject Bays' assertion that his *Atkins* counsel acted unreasonably in dismissing his petition despite the fact that another defendant had prevailed on a post-conviction *Atkins* claim in 2006 with one IQ score of 79. In that case, *State v. Gumm*, 169 Ohio App.3d 650, 2006-Ohio-6451, 864 N.E.2d 133 (1st Dist.), the record contained substantial other evidence of mental retardation, including evidence of significantly subaverage intellectual functioning, that was strong enough to overcome the rebuttable presumption of no mental retardation created by an IQ score above 70. *Id*. at ¶ 24-29. Unlike *Gumm*, Bays' *Atkins* counsel reasonably could have determined that she lacked sufficient evidence of significantly subaverage intellectual functioning to overcome the rebuttable presumption created by his IQ score. As noted above, she also lacked evidence to satisfy *Lott's* adaptive-behavior definition. Therefore, we find *Gumm* distinguishable.

{¶ 23} Having determined (1) that the trial court properly gave effect to Bays' notice of voluntary dismissal, (2) that the voluntary dismissal deprived the trial court of

jurisdiction "to do anything further" on the dismissed *Atkins* petition, and (3) that the entire premise for Bays' request to withdraw his notice of voluntary dismissal lacked merit, we hold that the trial court did not err in denying his motion to withdraw his notice of voluntary dismissal for purposes of supplementing or amending the petition. The first assignment of error is overruled.

{¶ 24} In his second assignment of error, Bays claims the trial court erred in denying his Civ.R. 60(B) motion for relief from judgment. He argues that relief was warranted under Civ.R. 60(B)(4) and (5) "because his *Atkins* counsel had been ineffective and because his underlying *Atkins* claim was clearly meritorious." (Appellant's brief at 18). He insists that the voluntary dismissal of his petition did not preclude relief, that his *Atkins* counsel's ineffectiveness provided grounds for relief, and that his motion was timely. Alternatively, Bays reiterates the argument we rejected above about voluntary dismissal not being available in post-conviction proceedings.

{¶ 25} Upon review, we see no error in the trial court's denial of relief from judgment under Civ.R. 60(B). We reach this conclusion for at least two reasons. First, no final judgment, order, or proceeding exists from which relief can be obtained. Bays filed a petition and later voluntarily dismissed it, leaving him in the same position as if nothing had been filed. His non-filing of a petition does not constitute a final judgment, order, or proceeding from which relief can be obtained. *Hensley v. Henry*, 61 Ohio St. 2d 277, 400 N.E.2d 1352 (1980), syllabus ("Unless plaintiff's Civ.R. 41(A)(1)(a) notice of dismissal operates as an adjudication upon the merits under Civ.R. 41(A)(1), it is not a final judgment, order or proceeding, within the meaning of Civ.R. 60(B)."); *Thorton v. Montville Plastics & Rubber Co*., 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, ¶ 24;

Huntington Natl. Bank v. Molinari, 6th Dist. Lucas No. L-11-1223, 2012-Ohio-4993, ¶ 25; *Homecomings Fin. Network, Inc. v. Oliver*, 1st Dist. Hamilton No. C-020625, 2003-Ohio-2668, ¶ 9. Second, we find no grounds for relief under Civ.R. 60(B). Bays cites ineffective assistance of counsel, but we rejected that argument above. Accordingly, the second assignment of error is overruled.

{¶ 26} In his third assignment of error, Bays asserts that the trial court erred in failing to rule on (1) a successive petition for post-conviction relief that he filed, (2) his motion for an evidentiary hearing on that new petition, and (3) his argument under the *Waddy* case addressed in his first assignment of error.

{¶ 27} In essence, Bays contends the trial court overlooked his alternative request to treat his attempt to amend or supplement the previously dismissed *Atkins* petition as a new, successive petition. He also maintains that the trial court should have ruled on his motion for an evidentiary hearing in connection with his new petition. In response, the State asserts that Bays did not make clear that he wanted his filing to be treated as a new petition for post-conviction relief. The State also argues that he has not met the requirements for filing an untimely new petition. Upon review, we believe Bays adequately informed the trial court that if it denied his motion to supplement or amend the previously-dismissed *Atkins* petition, he wanted it to consider a new petition that he had filed. The record reflects that Bays made this request clear.[9]

{¶ 28} Bays filed his new *Atkins* petition with volumes of supporting exhibits on

[9] As for Bays' claim that the trial court erred in failing to consider the applicability of the Franklin County Common Pleas Court's decision in *Waddy*, we see no basis for reversal. Although the trial court did not mention *Waddy*, its persuasiveness as legal authority is something we can determine ourselves. We considered and rejected Bays' *Waddy*-based legal argument in our resolution of his first assignment of error.

May 16, 2013. (Doc. #453). In that filing, he first asked the trial court to consider it as a supplement or amendment to the earlier petition he dismissed in November 2007. (*Id*. at i-ii). Alternatively, he stated: "Bays files a new *Atkins* petition, attached as Exhibit A, Supplemental *Atkins* Petition I, under the authority of *Atkins v. Virginia*, 536 U.S. 304 (2002), and *State v. Lott*, 97 Ohio St.3d 303 (2002), and pursuant to Ohio Rev. Code sections 2953.21 and 2953.23." (*Id*. at ii). Bays also alerted the trial court on other occasions that he had filed a new petition for post-conviction relief as an alternative to his motion to supplement or amend his previously-dismissed petition. (*See* Doc. #455 at 8) ("If the Court denies Bays's Motion to vacate and supplement or amend his *Atkins* pleading, Bays has already filed the petition attached as Exhibit A to his May 16th Motions. He meets the requirements for a successor post-conviction petition[.]"); (Doc. #464 at 4, fn.1) ("As Bays has noted, even if the Court decides not to permit him to withdraw his prior notice of voluntary dismissal, he has already filed an alternative *Atkins* petition under Ohio Revised Code section 2953.23. *See* May 16, 2013 Motions at § V; July 22, 2013 Reply at § III."). Despite the State's claim on appeal that Bays did not make his alternative pleading clear, the prosecutor below acknowledged that he had filed a new petition for post-conviction relief. (Dec. 20, 2013 Tr. at 5).

{¶ 29} In its written decision denying Bays' motion to withdraw his notice of voluntary dismissal and his motion for Civ.R. 60(B) relief, however, the trial court failed to acknowledge that he alternatively had filed a new post-conviction relief petition with supporting evidentiary materials. In fact, the trial court opined that Bays "may have a meritorious claim" but concluded that "[a] new petition needs to be filed." (Doc. #470 at 9). We agree with Bays that the trial court erred in failing to recognize that a new petition

already had been filed and that a request for an evidentiary hearing had been made. (*See* Doc. #463).

{¶ 30} Given that Bays already has filed all of the materials necessary for the trial court to consider his new petition for post-conviction relief with new supporting evidentiary materials and has given the trial court sufficient notice of that filing, we see no useful purpose in requiring him to overcome more delay and file the petition again. Because the trial court did not rule on Bays' new petition or his request for a hearing thereon, we conclude that those matters remain pending below.[10] The third assignment of error is sustained insofar as Bays contends the trial court erred in failing to recognize their existence and finding a need for another petition to be filed. We express no opinion on any aspect of that new petition, which shall be addressed in the first instance by the trial court.

{¶ 31} In his fourth assignment of error, Bays maintains that the trial court erred in failing to grant him an evidentiary hearing in connection with his new petition. In support, he argues that if the trial court implicitly denied his motion, then it abused its discretion. As explained in our analysis of the third assignment of error, however, Bays' new petition and motion for an evidentiary hearing thereon remain pending below. That being so, whether the trial court denied an evidentiary hearing on the new petition is not before us. Accordingly, the fourth assignment of error is overruled.

{¶ 32} Based on the reasoning set forth above, the trial court did not err in

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[10] Although we often presume that a trial court implicitly has overruled an unaddressed motion, that principle does not apply here, where the trial court's ruling makes clear that it did not rule on the new petition. *See*, *e.g*., *State v. Ryerson*, 12th Dist. Butler No. CA2003-06-153, 2004-Ohio-3353, ¶ 54 ("Generally, a reviewing court will presume that a lower court overruled a motion on which it did not expressly rule, in instances where it is clear from the circumstances that that is what the lower court actually intended to do.").

overruling (1) Bays' motion to withdraw his November 2007 notice of voluntary dismissal, (2) his motion to amend or supplement the voluntarily-dismissed petition, and (3) his motion for Civ.R. 60(B) relief from the voluntarily-dismissed petition. The trial court's judgment overruling these motions is affirmed. The cause is remanded, however, for the trial court to proceed to consider Bays' pending *Atkins* petition for post-conviction relief and his motion for an evidentiary hearing thereon.

. . . . . .

DONOVAN, J., dissenting:

{¶ 33} I disagree.

{¶ 34} Bays' claim presents both a substantive and procedural conundrum. However, the question of whether he should be executed requires heightened procedural safeguards. Recently the Court held in *Hall v. Florida* that the general understanding of medical experts will "inform[ ]" but not "dictate" whether a person has an intellectual disability that precludes his execution under the Eighth Amendment. *Hall v. Florida*, __ U.S. __, 134 S.Ct. 1986, 2000, 188 L.Ed.2d 1007 (2014). *Hall* also mandated that the legal standard for determining subaverage intellectual functioning must account for the margin of error in IQ testing. *Id*. at 2001.

{¶ 35} I would remand the case for an evidentiary hearing on mental retardation and a decision on the merits of the *Atkins* claim. In my view, the trial court erred in refusing to permit Bays to withdraw his "Notice of Voluntary Dismissal pursuant to Civ.R. 41(A)".[11] The real difficulty is the *Atkins* claim is criminal in nature, but civil in form, thus forced into the post-conviction process. Criminal post-conviction proceedings in Ohio

[11]The "dismissal" did not contain a stipulation of all parties nor a court order in accordance with Civ.R. 41(A)(1)(b) or Civ.R. 41(A)(2).

are governed by statute and have been held to be "quasi civil" in nature by the Supreme Court of Ohio. R.C. 2953.21; *State v. Nichols*, 11 Ohio St.3d 40, 42, 463 N.E.2d 375 (1984). Civ.R. 41(A)(1)(a) by its very language only applies to claims asserted by a plaintiff against a defendant which are dismissed before the commencement of trial. Bays has already stood trial and been sentenced to death. Accordingly, Civ.R. 41(A)(1)(a) cannot apply. Nothing in the statute provides for a voluntary dismissal nor should it.

{¶ 36} Although generally civil rules apply to post-conviction, since Civ.R. 41(A)(1)(a) has no applicability to Bays' petition, the Notice of Voluntary Dismissal constitutes a nullity. "The commencement of trial cuts off a plaintiff's ability to unilaterally dismiss claims without prejudice." *Schwering v. TRW Vehicle Safety Sys., Inc.*, 132 Ohio St.3d 129, 2012-Ohio-1481, 970 N.E.2d 865, ¶ 21. A claim can only be withdrawn after a trial commences by stipulation of all of the parties or by a motion for a court ordered dismissal pursuant to Civ.R. 41(A)(2). *Id*. at ¶ 22; *Chadwick v. Barba Lou, Inc.*, 69 Ohio St.2d 222, 229, 431 N.E.2d 660 (1982). If the withdrawal is by motion, the trial court will "determine the conditions to impose to protect the other parties and to ensure that they are not prejudiced upon refiling." *Schwering* at ¶ 22. *See also Chef's Garden, Inc. v. Reep*, 6th Dist. Erie No. E-10-048, 2011-Ohio-3407 (finding a voluntary dismissal of an action by notice after commencement of trial is a nullity and did not divest the trial court of jurisdiction). Thus, the trial court has not lost jurisdiction to entertain Bays' petition and the proposed amendment(s) thereto. Significantly, Civ.R. 1(C)(7) provides: "These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure * * * in * * * special statutory proceedings." In fact, R.C. 2953.21(E)

dictates that "unless the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issue."

{¶ 37} Logically, and statutorily, the trial court should serve as gatekeeper and consider and rule upon the *Atkins* claim on its merit. This necessarily inures to the benefit of the State as well. This type of claim should not be placed in a position of repose. R.C. 2953.21 authorizes the summary dismissal of a post-conviction petition if the petition and the files and the records in the case show that the petitioner is not entitled to relief. However, this was not a summary dismissal of Bays' petition on a motion for summary judgment by the State. In fact, a summary judgment motion filed by the State had not been ruled upon when the experts were ultimately funded. "Because post-conviction proceedings are statutorily created, the specific requirements set out by statute take priority where they conflict with civil rules." *State v. Greer*, 9th Dist. Summit No. 15217, 1992 WL 316350 (Oct. 28, 1992). The statute makes no provision for Civ.R. 41(A)(1)(a) dismissal, nor should it, as both the State and Bays have an interest in a timely determination of the *Atkins* claim. It is well settled that a court is not required to hold an evidentiary hearing on every petition for post conviction relief. *State ex rel. Jackson v. McMonagle*, 67 Ohio St.3d 450, 619 N.E.2d 1017 (1993); *State v. Jackson,* 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). However, when a petitioner has demonstrated sufficient operative facts to establish substantive grounds for relief, a court is required by R.C. 2953.21(E) to hold an evidentiary hearing.

{¶ 38} The State of Ohio had conceded in a responsive pleading that Bays had tested as low as 71 in an IQ test while in the seventh grade, well within a recognized margin of error, coupled with documented adaptive, educational and functional deficits.

Bays' claim must proceed to an evidentiary hearing on its merits. Although there should be a procedural mechanism to allow a competent, effective attorney to move to dismiss a frivolous or spurious *Atkins* claim, Bays' case does not fall into that category. Specifically, a motion to dismiss analogous to Crim.R. 47 would necessitate a court order which would have allowed the State to weigh in on the *Atkins* issue in the legitimate interest of finality and would require the trial court, as gatekeeper, to rule on the merits of such a motion or proceed with an evidentiary hearing.

{¶ 39} Concerns regarding the fairness and appropriateness of capital punishment are particularly acute/compelling whenever the defendant in question suffers from a mental impairment or defect. As we noted in Bays' prior appeal, Bays has "significant, documented cognitive deficits as shown by his school records and the testimony of Drs. Burch and Jackson." *Bays*, 159 Ohio App.3d 469, 2005-Ohio-47, 824 N.E.2d 167, ¶ 24. Accordingly, I would find the notice of voluntary dismissal ineffective, a legal nullity, as the Franklin County Common Pleas Court did in *Waddy*.

{¶ 40} Additionally, the majority suggests it is "debatable" whether Bays has a constitutional right to effective assistance of counsel in connection with his *Atkins* claim. I cannot concur with such an assertion. The courts have consistently recognized capital cases are different:

> "[I]n Capital cases the fundamental respect for humanity underlying the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [*Woodson v. North Carolina,* 428 U.S. 280, 304, 96

S.Ct. 2978, 49 L.Ed.2d 944 (1976)].

> That declaration rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id.* at 305, 96 S.Ct., at 2991. We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

{¶ 41} Ohio recognizes this difference by providing the right to counsel on Bays' post-conviction petition. Although this right to counsel is afforded by statute, I agree with the reasoning of *Hooks* that it should be recognized as a federal constitutional right as well. This is Bays' first opportunity to litigate his *Atkins* claim, therefore, to suggest he has a right to counsel, but not effective counsel, renders his right to counsel meaningless and would only eviscerate his *Atkins* claim. As the court noted in *Hooks*, nothing seems more critical in a criminal proceeding than deciding whether the power of the State will take the life of one of its citizens. As noted in *U.S. v. Wilson*, E.D. New York No. 04-CR-1016 (NGG), 2013 WL 1338710 (April 1, 2013), fn. 8, quoting *Hooks* at 1184:

> Neither the Supreme Court nor the Second Circuit has addressed whether an *Atkins* proceeding (or a Government-requested examination conducted as part of an *Atkins* proceeding) is a "critical stage" such that the Sixth Amendment's right to counsel applies. But as the Tenth Circuit recently noted * * *, an *Atkins* proceeding is "inextricably intertwined with sentencing" and holds "significant consequences for the accused."

{¶ 42} Ineffective assistance of counsel creates the risk that a mentally retarded

individual may be executed in violation of the Eighth Amendment's prohibition. Hence, Ohio's post-conviction relief statute recognizes an exception to the rule of *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed. 2d 1 (1989), providing for the appointment of counsel where the post-conviction petition is the first opportunity for Bays to present a challenge to his death sentence based upon *Atkins*. Importantly, the Ohio Constitution has its own prohibition against cruel and unusual punishments. Section 9, Article I of the Ohio Constitution. The Ohio Constitution is a document of independent force and Section 9, Article I is and has always been a protection of the people that is independent of the protection provided by the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. Thus, the State Constitution can be interpreted more broadly than the Sixth Amendment.

{¶ 43} Furthermore, no one could reasonably suggest that Bays' *Atkins* petition and the scheduled hearing were not addressed to a critical stage of the proceedings to which Sup.R. 20 also has applicability. In relevant part, Sup. R. 20 III(B)(2) provides: "Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards."

{¶ 44} In this instance, Bays' right to counsel, albeit statutorily created to implement *Atkins*, also has a foundation in the Sixth Amendment under the United States Constitution and the Ohio Constitution, as made applicable through the Fourteenth Amendment. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441,

25 L.Ed.2d 763 (1970), fn. 14. The core purpose of the right to counsel is to guarantee that individuals such as Bays have competent assistance when confronted with the "intricacies of the law and the advocacy of the public prosecutor." *U.S. v. Ash*, 413 U.S. 300, 309, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). "The protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions." *Austin v. United States*, 509 U.S. 602, 608, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). The *Atkins* claim comes about exclusively through a capital criminal prosecution.

{¶ 45} Furthermore, in my view, the Due Process Clause of the Ohio Constitution demands effective assistance of counsel as a safeguard to ensure that a trial court's determination of Bays' *Atkins* petition is fundamentally fair. Bays' due process rights are guaranteed by the Ohio Constitution's Redress in Courts provision, Section 16, Article 1 falling within the language of "lands, goods, **person** or reputation." The Due Process Clause should not allow the State to provide fewer procedural safeguards in Bays' *Atkins* proceedings than in his initial guilt and penalty phase. It would be ludicrous to suggest that if he stood trial today, he is entitled to the effective assistance of counsel in the trial on its merits and in the penalty phase, but not in a pre-trial *Atkins* determination phase. Bays should be treated equally. Equal protection requires that there be a compelling interest to justify unequal treatment between individuals. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985). To suggest otherwise is to lose sight of the fact that although designated a "civil petition," Bays' claim is truly a constitutional one arising out of a criminal prosecution which *Atkins* recognized as a substantive restriction upon execution. I reiterate, this is his sole opportunity at the State level to litigate the claim of mental retardation and Ohio Sup. R. 20 requires

"competent representation."

{¶ 46} Bays' claim should not be permitted to fall through the cracks in the system, essentially depriving him of a timely *Atkins* decision on the merits. When his petition was subsequently taken up after a long delay occasioned by, in my view, ineffective assistance of counsel and the untimely death of his lawyer, the State now seeks to shift the burden to Bays, a man with acknowledged intellectual deficits by improperly imputing to him an affirmative duty to ensure that the State Court decides his eligibility for the death penalty promptly.

{¶ 47} Death is different and this case illustrates that the essential ingredients of meaningful process of review did not occur. The process should be expeditious without sacrificing fairness. The law contemplates an entirely different kind of evidentiary hearing than your stereotypical PCR petition, wherein the argument normally is that trial counsel was ineffective. Such alleged ineffectiveness can normally be raised on initial direct appeal. The lack of a merit hearing or judicial determination of the *Atkins* claim advanced by Bays could not have been addressed on an initial direct appeal.

{¶ 48} In my view, at a minimum, Bays is entitled to effective assistance of counsel and active and reasonable judicial oversight. The proper course would have been to strike the Civ.R. 41(A) notice of dismissal. This did not occur, hence the trial court never lost jurisdiction. I recognize that generally, "[s]tate post-conviction review is not a constitutional right. * * *." *State v. Kinley*, 136 Ohio App.3d 1, 735 N.E.2d 921 (2d Dist.1999). However, clearly Bays has a constitutional right to full consideration of his non-frivolous *Atkins* claim.

{¶ 49} Although the majority suggests a voluntary dismissal of Bays' *Atkins* claim

was reasonable because it would likely fail on the merits, this conclusion, in my view, is not apparent on the entirety of this record. I would reverse and remand for a full hearing on the amended petition.

. . . . . .

FROELICH, P.J., concurring in judgment:

{¶ 50} I agree with Judge Hall's conclusion that Civ.R. 41 applies to petitions for post-conviction relief, and that this case must be remanded for the trial court's consideration of Bays's 2013 petition. At the same time, I agree with Judge Donovan's conclusion that Bays had a constitutional right to effective assistance of counsel in pursuing post-conviction relief based on *Atkins* and *Lott*.

{¶ 51} Post-conviction proceedings are generally treated as civil proceedings. Nevertheless, there are circumstances where the Supreme Court of Ohio has provided increased protections for the parties, despite the civil nature of the proceeding. For example, custody disputes are considered civil cases and are controlled by the Rules of Civil or Juvenile Procedure. Yet, with permanent changes in custody, respondents have a statutory right to counsel, *see* R.C. 2151.352, and if they cannot afford an attorney, one is appointed. Further, the Ohio Supreme Court has consistently held that there is a constitutional right to assistance of counsel in permanent custody cases and that the same standards apply as in criminal cases. This is perhaps a logical conclusion from the court's reference to the termination of parental rights being the family law equivalent of the death penalty in a criminal case. *E.g*., *In re B.C*., 141 Ohio St.3d 55, 2014-Ohio-4558, 21 N.E.3d 308, ¶ 19, quoting *In re Smith*, 77 Ohio App.3d 1, 16, 601 N.E.2d 45, 54 (6th Dist.1991); *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997).

{¶ 52} Pushing this analogy further, there is a statutory right to counsel in death penalty post-conviction relief petitions, R.C. 2953.21(I)(1), and as the permanent custody cases reinforce, such a right without the concurrent right to effective assistance of counsel is, at best, illusory. R.C. 2953.21(I)(2)'s language that purports to eviscerate this right by seemingly condoning "ineffectiveness or incompetence of counsel" cannot impact a constitutional right.

{¶ 53} Judge Hall concludes that Civ.R. 41 applies to post-conviction relief proceedings and thus the 2003 *Atkins*-based petition for post-conviction relief is considered, legally, as if it had never been filed. He therefore further concludes that the 2003 petition cannot be supplemented, and there is no final judgment to be subject to a Civ.R. 60 motion. In contrast, Judge Donovan concludes that Civ.R. 41 does not apply and, without a court's dismissing the petition, Bays's 2003 petition for post-conviction relief is still pending, and thus can be supplemented. The immediate bottom line does not appear to be different; that is, in either scenario, Bays would receive a consideration of his petition.

{¶ 54} It may matter, however, as to whether the petition before the trial court is considered a timely petition.[12] If, as Judge Donovan suggests, the voluntary dismissal were a nullity, the 2003 petition, as supplemented, remains pending before the trial court. On the other hand, if Civ.R. 41 is applicable, the 2003 petition is treated as if it had never

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[12] Bays's 2003 *Atkins* petition was filed four months after *Lott*, but ten months after *Atkins* was decided.

been filed, and the 2013 amended petition could conceivably be considered, legally, to be the first *Atkins* petition before the trial court. At the time Bays filed his *Atkins* petitions, R.C. 2953.21(A)(2) required a petition for post-conviction relief in a death penalty case to be filed within 180 days of the filing of the trial transcript in the supreme court;[13] the only exception (other than the recognition of a new federal or state right) was if the petitioner were "unavoidably prevented" from timely filing his petition for post-conviction relief. R.C. 2953.23(A)(1)(a).

{¶ 55} Assuming that Civ.R. 41 applies, the delay between the 2003 and 2013 petitions could be found to be "unavoidable" if the dismissal under Civ.R. 41 was the result of ineffective assistance of counsel. This would not graft an unlimited "saving statute" onto R.C. 2953.21(A)(2)'s time rule. That is, if the Civ.R. 41 dismissal – which occasioned the delay – were the result of counsel's ineffectiveness, a trial court would have to decide whether the time between the dismissal under Civ.R. 41 and the re-filed (2013) petition was "unavoidable," which is the same fact-sensitive process in deciding any petition for post-conviction relief filed beyond the statutory time limit.

{¶ 56} Judge Donovan's position that Civ.R. 41 does not apply and that there should be a Motion to Dismiss or Withdraw filed by the petitioner so that the trial court can act as a gatekeeper is enticing. But it could result in an evidentiary hearing in every such situation, which not only would limit counsel's legitimate strategic decisions, but could present a bar – in the res judicata or collateral estoppel sense – to a re-filed or successive petition.

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[13] R.C. 2953.21(A)(2) was amended, effective March 23, 2015, to provide 365 days, rather than 180 days. *See* Sub.H.B. 663 (2014). Other modifications to Ohio's post-conviction relief proceedings in death penalty cases have recently been proposed in the Ohio legislature. *See* S.B. 139 (2015).

{¶ 57} I agree with Judge Hall that Bays's dismissal of his 2003 petition under Civ.R. 41 was effective. In the "usual" denial of a petition for post-conviction relief, there can be an appeal. Here, with a Civ.R. 41 dismissal, there is no final appealable order to be reviewed by the appellate court.

{¶ 58} However, Bays filed a Motion to Withdraw his Civ.R. 41 dismissal in the trial court, which was summarily denied. Judge Hall states that Civ.R. 41 dismissal was self-executing and completely terminated the possibility of further action by the trial court and that, as a result, the trial court could not consider the motion to withdraw the Civ.R. 41 dismissal. In the unique circumstances before us, I would find that the trial court could consider whether the Civ.R. 41 dismissal was the result of ineffective assistance of counsel and, if so, vacate that dismissal.

{¶ 59} In denying the motion to withdraw the Civ.R. 41 dismissal, the trial court did consider whether Bays's counsel acted deficiently in voluntarily dismissing the 2003 petition, and the court found no basis to set aside the voluntary dismissal based on ineffective assistance of counsel. The trial court stated:

> Without going into too much detail about the underlying ineffective assistance of counsel claim, the court has great difficulty finding that a lawyer who had two expert opinions against his client is ineffective in voluntarily dismissing the case so that she may in the next several months find an expert supporting her position. Had counsel gone forward with her original petition, it would have been lost and such adjudication would have barred another petition in the future. Bays would have this Court find that prior trial counsel was ineffective because she didn't have sufficient

> psychological knowledge to know that the two retained experts were wrong. The Court does not believe Bays has ground to set aside the voluntary dismissal.

Based on the record before us, I would affirm the trial court's ruling on that issue.

{¶ 60} Because the trial court properly concluded that the Civ.R. 41 dismissal of the 2003 petition was not the product of ineffective assistance, I agree with Judge Hall that the trial court should proceed to consider the 2013 petition.

. . . . . .

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