

**[J-120-2019] [MO: Mundy, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 771 CAP
	:	
Appellee	:	Appeal from the Order dated
	:	November 21, 2018 (docketed
	:	November 26, 2018) in the Court of
v.	:	Common Pleas, Bucks County,
	:	Criminal Division at No. CP-09-CR-
	:	0006917-2005.
ROBERT ANTHONY FLOR,	:	
	:	SUBMITTED: December 19, 2019
Appellant	:	

**CONCURRING OPINION**

**JUSTICE DOUGHERTY**

**DECIDED: September 22, 2021**

I join the majority opinion in full with the exception of Part III(F) regarding the reviewability of appellant’s standalone *Atkins*<sup>1</sup> claim. Specifically, I find it imprudent to wade into the issue of whether our issue preservation rules should include a discrete exception for *Atkins* claims where the issue has not been fully briefed by the parties. See Majority Opinion at 17-18 (“The Commonwealth does not directly argue against [a]ppellant’s assertion that his substantive *Atkins* claim is cognizable under the PCRA independently of his ineffective assistance of counsel claim.”); *compare id.* at 22 (“a defendant may waive consideration of whether he or she is intellectually disabled explicitly, or by failing to present evidence at sentencing”) *with* Dissenting Opinion at 30 (Wecht, J.) (“an *Atkins* claim is a challenge to the legality of the sentence”). I find it especially ill-advised to consider such an important issue without pointed advocacy from

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<sup>1</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

the parties in these circumstances because: (1) it is simply not necessary to resolve this case; and (2) there exists an apparent conflict in our precedent. *Compare Commonwealth v. Robinson*, 82 A.3d 998, 1020 (Pa. 2013) (observing in *dicta* there is “little doubt that actual *Atkins* claims implicate the legality of sentencing”) with *Commonwealth v. Steele*, 961 A.2d 786, 808-09 (Pa. 2008) (concluding a PCRA petitioner’s *Atkins* claim was waived when raised for the first time on appeal), *abrogated on other grounds by Pena-Rodriguez v. Colorado*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 855 (2017). Accordingly, I respectfully distance myself from the majority’s waiver discussion, but I join the remainder of the majority opinion — including its merits analysis of appellant’s *Atkins* claim.

Chief Justice Baer joins this concurring opinion.