No. 18-5218

IN THE
SUPREME COURT OF THE UNITED STATES

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ALLEN ROBERTSON,
Petitioner
v.

STATE OF LOUISIANA,
Respondent

_____◊_____

On Petition for Writ of Certiorari to the Louisiana Supreme Court

_____◊_____

BRIEF IN OPPOSITION

_____◊_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case in Courts Below:

Cases:

Statutory/Other Authorities

PROCEDURAL HISTORY

Petitioner Allen Robertson, Jr. was indicted by grand jury for the first degree murders of Morris and Kazuko Prestenback. After a trial, the jury found petitioner guilty as charged on both counts and recommended sentences of death. The trial court sentenced petitioner to death in accordance with the jury's recommendation. Petitioner directly appealed his conviction and sentence to the Louisiana Supreme Court. That Court affirmed both convictions and sentences.[1] This Court then denied certiorari on October 5, 1998.[2]

Following the conclusion of direct review, petitioner filed a *pro se* post-conviction relief (PCR) application. On March 16, 2000, the trial court denied the post-conviction application. However, on April 26, 2000, the Louisiana Supreme Court vacated the trial court's ruling and remanded so that counsel could be appointed.[3]

On July 17, 2007, petitioner filed a two-hundred-fifty-three (253) page "Amended Petition for Post-Conviction Relief and a Motion for an Evidentiary Hearing." In this post-conviction application, petitioner alleged twenty-five (25) claims. Pertinent to this writ application, petitioner alleged in post-conviction claims one and seventeen:

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[1] *State v. Robertson*, 97-0177 (La. 3/4/98), 712 So.2d 8.
[2] *Robertson v. Louisiana*, 119 S.Ct. 190 (1998).
[3] *State ex rel Robertson v. State*, 00-1059 (La. 4/26/00) 760 So.2d 1163.

1) Petitioner is ineligible for execution under both state and federal law because he is mentally retarded; alternatively, a hearing is warranted to determine if petitioner is mentally retarded.[4]

17) Right to a fair and impartial jury was violated because Johnny Robin was a racist juror;[5]

The State filed a procedural objection and answer. On March 31, 2008, the state trial court denied petitioner's entire PCR application as either procedurally barred or for lack of merit.[6] Petitioner sought supervisory writs with the Louisiana Supreme Court. On September 4, 2009, that court granted the writ in part but otherwise denied the writ. The court granted petitioner's writ application as to his *Atkins*[7] claim and remanded to the trial court to conduct an evidentiary hearing on the issue of whether petitioner was intellectually disabled. The Louisiana Supreme Court judgment denied petitioner's writ application "in all other respects."[8] Petitioner did not seek a writ of certiorari with this Court contesting the state supreme court's 2009 judgment denying his twenty-four (24) post-conviction claims.

The trial court then conducted an *Atkins* hearing on November 13-14 of 2013, April 21-23 of 2014, and April 4-6 of 2016. On April 22, 2016, the trial court denied petitioner's *Atkins* claim. Petitioner sought supervisory writs with the Louisiana Supreme Court contesting the judgment denying his *Atkins* claim. During the pendency of this writ application petitioner filed a "supplement" directly with the

[4] Amended post-conviction petition pp. 9-42.
[5] Amended post-conviction petition pp. 162-177.
[6] *See* Exhibit "A" attached to petitioner's writ of certiorari.
[7] *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).
[8] *Robertson v. Cain*, 08-1116 (La. 9/4/09), 17 So. 3d 960.

state supreme court.[9] His supplement urged that his 2007 juror misconduct claim should be reconsidered in light of *Pena-Rodriguez v. Colorado.*[10] The Louisiana Supreme Court denied petitioner's *Atkin*s claim on April 6, 2018.[11]

On May 25, 2018, petitioner filed a four-hundred-and-thirty-three (433) page petition for writ of habeas corpus with the Middle District of Louisiana.[12] In the habeas petition petitioner claims his right to a fair and impartial jury was violated when juror Johnny Robin served.

Petitioner sought a writ of certiorari with this Court on July 5, 2018. In accordance with this Court's rules regarding capital cases the State files the instant response.

STATEMENT OF FACTS

On January 1, 1991, petitioner, then twenty-three years old, repeatedly stabbed to death seventy-six-year-old Morris Prestenback and his seventy-one-year-old wife, Kazuko, while committing an aggravated burglary and armed robbery of the couple's home. The elderly victims lived at 3455 Dayton Street in East Baton Rouge Parish, only a few doors down from petitioner's mother. Petitioner had observed the Prestenbacks in the neighborhood on several occasions prior to the night of the murders. Petitioner was well aware of the victims' advanced ages and their vulnerable natures.

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[9] Petitioner's supplement is attached to this response as Exhibit A.
[10] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017).
[11] *State v. Robertson*, 2016-1742 (La. 4/6/18), 239 So. 3d 268.
[12] *Robertson v. Vannoy*, 3:18-cv-00579-SDD-RLB (Document 1).

During the late evening hours of January 1, 1991, petitioner entered the Prestenback home in order to commit a theft. He entered through a screen door propped open for the couple's cats. Petitioner went through the residence, observing the victims asleep in separate bedrooms. He removed their television and left the house without disturbing the pair. Immediately thereafter, he sold the television set to buy drugs.

Petitioner quickly returned to the Prestenback home, intending to commit another theft. He again re-entered the house through the propped open screen door. Upon entering the kitchen, petitioner armed himself with a butcher knife having an eight-inch blade. He then proceeded to Mr. Prestenback's room to rob him. Mr. Prestenback awoke while petitioner was stealing his wallet. Petitioner charged the elderly man and began to violently slash him. In a prolonged struggle on the bed and floor of the bedroom, the victim suffered numerous fractures of the facial and nasal bones, and multiple stab wounds to the head, face and chest. Some of the eight stab wounds to the chest hit vital organs and major blood vessels, severed eight of the victim's ribs, and were almost 7" deep; others penetrated the floor of the bedroom. Blood was spattered over the bed, headboard, ceiling and walls. Mr. Prestenback bled to death.

Dr. Alfredo Suarez, a deputy coroner who performed the autopsy on Mr. Prestenback, established that petitioner inflicted excruciating pain and unjustifiable suffering upon his elderly victim in accomplishing the murder. Moreover, Dr. Suarez testified that in his expert opinion Mr. Prestenback

experienced a "very brutal, bloody, violent, erratic, bizarre death." The doctor concluded that he had seen only two or three worse stabbing deaths in twenty-nine years of practicing medicine.

While petitioner was brutally murdering her husband, 71-year-old Kazuko Prestenback awoke, left her bedroom, came upon the carnage, and attempted to flee. Petitioner turned and stabbed the 5-foot, 90-pound woman in the back. Mrs. Prestenback then returned to her bed where petitioner stabbed her multiple times in the chest. As with her husband, several of Mrs. Prestenback's ribs were severed completely through, and the savagery of the attack splattered blood on the ceiling and walls of her room. She also bled to death and was found in a fetal position in her bed.

After remaining in the house for some time to ensure the victims were dead, petitioner took Morris Prestenback's watch, car keys, and wallet containing $260.00 from a shelf in the headboard of his bed and left the house. He fled the murder scene in the couple's 1985 Oldsmobile Cutlass, taking the murder weapon with him. Hastily leaving the residence, defendant drove over a locked metal fence that secured the couple's carport.

Approximately a half block from the victims' home, an off-duty police officer in a marked police unit observed petitioner run a stop sign. Because he was off-duty, the officer did not intend to cite petitioner for the violation; however, he continued to watch the vehicle. The officer followed the car, and when the car sped up and made an illegal turn, the officer turned on his lights and siren. After

making the turn, the officer observed the Oldsmobile abandoned in a yard. On the front seat of the car was the butcher knife, covered with blood and dirt. The headlights were on and the keys were left in the ignition. As petitioner fled the scene, he hopped a metal fence, tearing his shoe and leaving several fibers from the shoe protruding from the fence. While fleeing on foot back to his girlfriend's nearby residence, petitioner discarded Mr. Prestenback's watch and wallet. He became trapped in the yard of a residence during the flight. The male property owner confronted petitioner with a shotgun. Petitioner held out the Prestenbacks' money, offering the same in exchange for his freedom. He was ordered to leave the yard. Petitioner confessed the murders to his girlfriend and mother shortly after arriving at the girlfriend's residence. He then went to bed for the night.

Petitioner was arrested pursuant to a warrant on January 3, 1991, at his girlfriend's home. Subsequent to his arrest, police consensually seized petitioner's blue jeans and leather shoes. Fibers from the torn lining of one of the shoes matched fibers that had been seized from the fence near the Prestenback vehicle. Petitioner's blue jeans contained faint traces of blood. Two of petitioner's fingerprints were found in the Oldsmobile. Two of his fingerprints were found on objects near the television stand in the victims' kitchen. Petitioner's right palm print was found on the handle, and the print was in Morris Prestenback's blood. There was also human blood on the blade of the butcher knife left in the Prestenback vehicle. After being taken into custody and advised of his *Miranda* rights, defendant confessed to the murders.

ARGUMENT

Reasons for Denying Review

Remand to state court to determine whether Pena-Rodriguez is retroactive is both unnecessary and unwarranted. The state post-conviction statutes allow petitioner to contest the retroactivity of Pena-Rodriguez via a properly filed state post-conviction application. Petitioner did not properly contest the retroactivity issue in the state courts and the issue is not properly before this Court.

In claim two of his writ of certiorari to this Court, petitioner alleges that his right to a fair and impartial jury was violated when juror Johnny Robin served. He argues the 2017 case of *Pena-Rodriguez v. Colorado* should retroactively apply and his case should be remanded to the state courts for proceedings consistent with that opinion. Remand is both unnecessary and unwarranted.

Petitioner raised an impartial jury claim regarding juror Robin in his 2007 state post-conviction relief application. The trial court denied the post-conviction claim in 2008 and the Louisiana Supreme Court issued judgment denying petitioner's impartial jury claim on September 4, 2009:

> Granted in part; otherwise denied. The district court's judgment denying relator's claim that he is mentally retarded and so exempt from capital punishment, *see* A*tkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), is reversed. This case is remanded to the district court for purposes of conducting an evidentiary hearing at which relator will have the burden of proving by a preponderance of the evidence that he is mentally retarded and thus may not be executed. *See State v. Dunn*, 07–0878 (La.1/25/08), 974 So.2d 658. In all other respects, the application is denied.[13]

[13] *Robertson v. Cain*, 08-1116 (La. 9/4/09), 17 So. 3d 960. The 2009 decision is not attached to petitioner's writ application.

Petitioner did not contest the state supreme court's judgment denying his impartial jury claim with this Court within ninety days of the 2009 judgment. U.S. Supreme Court Rule 13 provides that a petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within ninety days after entry of the order denying discretionary review. 28 U.S.C.A. § 2101(d) provides "[t]he time for appeal or application for a writ of certiorari to review the judgment[14] of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." When a statute distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty.[15] The ninety–day limit is mandatory and jurisdictional.[16]

The state court of last resort (Louisiana Supreme Court) issued judgment denying discretionary review of petitioner's initial impartial jury claim in September of 2009. Under Rule 13, petitioner had ninety days from that judgment, or until December 3, 2009, to file a writ with this Court. Petitioner filed his writ of certiorari with this Court on July 5, 2018. Eight years and seven months elapsed since the Louisiana Supreme Court rendered judgment denying petitioner's initial

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[14] *Caldwell v. Dretke*, 429 F.3d 521, 528 (5th Cir. 2005): "The Federal Rules of Civil Procedure define "judgment" as including "a decree or any order from which an appeal lies." Fed.R.Civ.P. 54; *see also* Black's Law Dictionary (8th ed. 2004)('The term *judgment* includes an equitable decree and any order from which an appeal lies.')."

[15] *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977, 195 L. Ed. 2d 334 (2016), citing *United States ex rel. Siegel v. Thoman,* 156 U.S. 353, 359–360, 15 S.Ct. 378, 39 L.Ed. 450 (1895).

[16] *See for example Missouri v. Jenkins,* 495 U.S. 33, 45, 110 S.Ct. 1651, 1660, 109 L.Ed.2d 31 (1990); *Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90, 115 S. Ct. 537, 539, 130 L. Ed. 2d 439 (1994).

impartial jury claim. To any extent petitioner contests the merits of his impartial juror claim, it is untimely.

Additionally, petitioner has no right to request this Court remand his impartial jury claim to state court in light of *Pena-Rodriguez*. Seven years after his impartial jury claim became final, the state trial court denied petitioner's *Atkins* claim (2016). Petitioner sought supervisory writs directly with the Louisiana Supreme Court regarding his *Atkins* claim. During the pendency of this writ, this Court decided *Pena-Rodriguez*. Petitioner then filed a "supplement" to his pending writ. In the supplement petitioner argued that his impartial juror claim should be reconsidered in light of *Pena-Rodriguez*. The state supreme court denied writs in 2018, solely addressing petitioner's *Atkins* claim.[17]

Petitioner did not properly present a *Pena-Rodriguez* retroactivity claim with the state trial court. Petitioner's proper avenue to challenge whether *Pena-Rodriguez* was retroactive was to proceed under La. C.Cr.P. art. 930.8 and file a new state post-conviction application with the trial court within one year of the decision.[18] He did not file the appropriate state post-conviction application. Instead, he urged his *Pena-Rodriguez* retroactivity argument midstream, during the pendency of his *Atkins* writ application. Tacking the *Pena-Rodriguez* retroactivity

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[17] *See* Exhibit "B" attached to petitioner's writ of certiorari.

[18] *See* La. C.Cr.P. art. 930.8(A)(2):

(A) No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

[…]

(2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case, and the petition is filed within one year of the finality of such ruling.

argument to the Louisiana Supreme Court's review of his *Atkins* claim was procedurally improper, and the state supreme court justifiably did not address it.

Petitioner does not ask this Court to make a retroactivity determination.[19] *Pena-Rodriguez* would not apply retroactively.[20] Regardless, his impartial jury claim is not properly before this Court. If petitioner possesses any right to contest the retroactivity of *Pena-Rodriguez* in the state courts, it would be through a properly filed state post-conviction application. His request to have this Court remand his impartial juror claim is improper.

The AAIDD does not prohibit using the facts surrounding a defendant's crime as evidence affecting intellectual disability. The state court did not consider evidence of "past criminal conduct" when determining petitioner was not intellectually disabled.

In his initial claim to this Court petitioner contends it was improper for the state courts to consider the facts of petitioner's crime as evidence that he is not intellectually disabled. He argues that the *American Association on Intellectual and Development Disabilities* (AAIDD) manual discourages the use of past criminal behavior to infer adaptive behavior.[21] He asks this court to vacate the state court's *Atkins* ruling and remand for re-evaluation of the claim in light of *Moore v. Texas*.[22]

In *Moore v. Texas*, this Court ruled that Texas's use of rigid, outdated, non-clinical (*Briseno*) factors to determine intellectual disability created an unacceptable risk that persons with intellectual disability will be executed. *Moore* reiterated the

[19] Petitioner's brief, pp.17-18: "Petitioner respectfully requests that this Court remand his jury misconduct claim for consideration in light of Pena-Rodriguez." Petitioner's brief, pp.21-22: Petitioner respectfully requests that this Court remand his racial bias claim for reconsideration in a manner not inconsistent with this Court's precedent.
[20] *Teague v. Lane*, 489 U.S. 288, 290, 109 S. Ct. 1060, 1064, 103 L. Ed. 2d 334 (1989).
[21] Petitioner's brief, p. 12.
[22] 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017).

Court's statement in *Hall v. Florida*[23] that the intellectual disability determination should be "informed by the medical community's diagnostic framework."[24] Nonetheless, *Moore* reminded the States what *Hall* had previously indicated, that "being informed by the medical community does not demand adherence to everything stated in the latest medical guide."[25]

The latest medical guide as stated in *Moore* is the AAIDD-11. The manual warns against using past criminal behavior to assess intellectual disability. It does not prohibit using the facts supporting the crime itself to assess intellectual disability. The distinction is significant. The AAIDD has never equated "past" criminal behavior with the "current" facts of the crime.

In *Brumfield v. Cain*,[26] a Louisiana petitioner amended his pending state post-conviction petition to raise an *Atkins* claim. He sought an evidentiary hearing. The state trial court dismissed the petition without holding a hearing or granting funds to conduct additional investigation. The petitioner subsequently sought federal habeas relief. The federal district court ruled that the state court's rejection of the *Atkins* claim was improper. It conducted an *Atkins* hearing, wherein it found the petitioner was intellectually disabled. The federal Fifth Circuit found that the district court overstepped its bounds by rejecting the state court ruling. This Court reversed, holding the petitioner satisfied § 2254(d)(2)'s requirements and was entitled to have his *Atkins* claim considered on the merits in federal court.

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[23] 134 S. Ct. 1986, 1992, 188 L. Ed. 2d 1007 (2014).
[24] *Moore* 137 S.Ct. at 1048–49, citing *Hall,* 134 S.Ct., at 2000.
[25] *Moore* 137 S.Ct. at 1049.
[26] 135 S. Ct. 2269, 2271–72, 192 L. Ed. 2d 356 (2015).

A 5-4 decision, the Court in *Brumfield* was nonetheless unanimous in its recognition that the facts of the crime itself would have significant bearing on the issue of whether a petitioner possessed deficits in adaptive skills:

> To be sure, as the dissent emphasizes, *post,* at 2289 – 2290, 2292 – 2293, other evidence in the record before the state court may have cut against Brumfield's claim of intellectual disability. Perhaps most significant, in his written report Dr. Bolter stated that Brumfield "appears to be normal from a neurocognitive perspective," with a "normal capacity to learn and acquire information when given the opportunity for repetition," and "problem solving and reasoning skills" that were "adequate." App. 421a. Likewise, the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns. But cf. AAMR, at 8 (intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation").[27]

Brumfield supports the position that the facts surrounding the crime are clearly probative towards disproving deficits in adaptive functioning.

In *Apelt v. Ryan*,[28] an allegedly intellectually disabled capital petitioner murdered his wife for insurance proceeds. He was convicted and sentenced to death. The state courts denied the petitioner's *Atkins* claim on post-conviction review. In doing so the state courts relied on the petitioner's pre-crime, crime, and post-crime activities as evidence to negate intellectual disability.

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[27] *Brumfield*, S.Ct. at 2280, 2281. Original emphasis.
[28] 878 F.3d 800 (9th Cir. 2018).

On habeas review, the petitioner urged that that the state court improperly relied on the facts of the crime to conclude that he did not have the requisite adaptive behavior deficits to qualify for a diagnosis of intellectual disability. He argued that the AAIDD did not permit the use of criminal behavior to assess adaptive behavior deficits.[29] Rejecting petitioner's argument, *Apelt* found the state court's reliance on evidence surrounding the crime was proper and relevant towards his adaptive behavior: "Indeed, Apelt's activities in the United States[30] reflect ingenuity, cleverness, and an ability to manipulate others."[31]

The AAIDD has never once stated the facts of the crime must not be considered when making an intellectual disability diagnosis. *Brumfield* recognized that the facts surrounding a petitioner's capital crime can certainly bear on the issue of adaptability. In the instant case petitioner literally bartered with a man for his freedom. Petitioner trespassed onto property to evade police capture. The property owner held petitioner at bay with a shotgun. Petitioner offered the money he stole from the Prestenbacks in exchange for his release. Petitioner's attempt at negotiating freedom clearly cannot be ignored when making an adaptive functioning diagnosis.

Petitioner acknowledges *Brumfield* recognized the facts of the crime may go towards evidence of adaptive skills.[32] Nonetheless, petitioner attempts to extend the AAIDD's language regarding "past criminal behavior" to the facts of the crime

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[29] *Apelt*, F.3d. at 836.
[30] Apelt was born in Germany in 1963 and came to America in 1988. The court's notation about his activities in the United States was to provide additional guidance.
[31] *Apelt,* F.3d at 837–38.
[32] Petitioner's brief, p. 15.

itself. Petitioner misrepresents the AAIDD when he alleges "the medical community's standards oppose[] the consideration of the facts of the crime in assessing intellectual disability."[33] The medical community has taken no such stance, much less provided a consensus that facts of the crime are to be disregarded when determining intellectual disability. To the contrary, the facts of the crime bear directly on the person's level of adaptive functioning.

In the instant case, two well-qualified experts provided testimony that petitioner's crime, not his past criminal behavior, was probative in defeating the adaptive functioning prong of intellectual disability. The Louisiana Supreme Court never once referenced petitioner's past criminal behavior when it issued its 2018 opinion.[34] Its sole focus was accepting the experts conclusions regarding the facts of the crime itself, the facts that directly went towards establishing petitioner was not intellectually disabled.

Finally, assuming *arguendo* an expert did incorporate past criminal activity as part of his or her diagnosis, such incorporation does not invalidate a diagnosis regarding intellectual disability. Neither *Moore* nor *Hall* precludes an expert from disagreeing with the AAIDD. The decisions preclude states from adopting inflexible procedures that altogether negate an expert's assessment of a person's intellectual disability. Experts are free to disagree about the efficacy of a particular scientific measure.[35] Take for example the *Flynn* effect. Pre-*Atkins*, the *Diagnostic and*

[33] Petitioner's brief, p. 15.
[34] *See* Exhibit "B" attached to petitioner's writ of certiorari.
[35] *See for example United States v. Hardy*, 762 F. Supp. 2d 849, 902 (E.D. La. 2010) (Using past criminal behavior to support a mental retardation diagnosis): "Finally, while

Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV–TR) did not acknowledge the *Flynn* effect. Post-*Atkins*, neither Louisiana nor the federal Fifth Circuit accepted the *Flynn* effect as scientifically valid.[36] It was not until 2013 that the *Flynn* effect was written into the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5).[37] Despite being written into the DSM, experts continue to debate whether that "effect" is valid. Further, research currently suggests the reverse-*Flynn* effect is happening.[38] The point here is that experts do not have to strictly adhere to a manual to arrive at a diagnosis.

Unlike the *Flynn* effect, the instant case presents nothing to disagree about. The state court relied upon evidence probative to the issue of whether petitioner

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the AAIDD recommends against using past criminal behavior as a measure of adaptive behavior or as relevant to mental retardation, the Court finds consideration of criminal conduct to be useful as one of many factors to consider;" *United States v. Montgomery*, No. 2:11-CR-20044-JPM-1, 2014 WL 1516147, at *50 (W.D. Tenn. Jan. 28, 2014) (Declining to "follow rigidly" the AAIDD User's Guide's admonition that the diagnosis of ID is not based on the person's street smarts, behavior in jail or prison, or criminal adaptive functioning.): "To be sure, post-incarceration adaptive functioning must be assessed in light of its potentially limited probative value, but the Court will not completely disregard Defendant's criminal and post-incarceration behavior that may lend support one way or another to Defendant's adaptive functioning profile;" *United States v. Wilson*, 920 F. Supp. 2d 287, 302–03 (E.D.N.Y. 2012) (Past criminal behavior—which may prove to be willful or ant-social behavior—has at least some relevance to an assessment of adaptive functioning, and there is no reason why the Government's experts should be prevented from collecting that information simply because it is more likely to be helpful than harmful to an *Atkins* motion.)

[36] *Harris v. Thaler*, 464 F. App'x 301, 308 (5th Cir. 2012); *Thomas v. Quarterman,* 335 Fed.Appx. 386, 390–91 (5th Cir.2009) ("The Flynn Effect ... has not been accepted in this Circuit as scientifically valid."); *State v. Dunn,* 41 So. 3d 454, 476 (La. 2010); *In re Mathis,* 483 F.3d 395, 398 n. 1 (5th Cir.2007); *Wiley v. Epps*, 668 F. Supp. 2d 848, 894 (N.D. Miss. 2009) *aff'd,* 625 F.3d 199 (5th Cir. 2010). *See also Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (failure to consider and apply *Flynn* Effect to adjust downwardly IQ scores of petitioner, who was convicted of capital murder, was not contrary to, or unreasonable application of, clearly established federal law.)

[37] *Compare* DSM-IV-TR and DSM-5. The DSM-IV-TR was published in 2000. The DSM-5 was published in 2013.

[38] http://www.pnas.org/content/early/2018/06/05/1718793115 "*Flynn* effect and its reversal are both environmentally caused."

possessed intellectual disability. Petitioner's attempt to shove the AAIDD past its boundaries falls short. No remand is warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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