No. 18-5218

In The Supreme Court Of The United States

ALLEN ROBERTSON,

Petitioner,

v.

DARREL VANNOY, Warden,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. Current Medical Standards Explicitly Instruct Against Reliance on Criminal Behavior to Infer Adaptive Behavior.

In its *Brief in Opposition* (hereinafter "Respondent's Opposition"), Respondent argues that "past criminal behavior" is distinguishable from "the 'current' facts of the crime." *Respondent's Opposition* at 15. Neither the AAIDD nor the DSM differentiate between past and current criminal behavior in the manner suggested by Respondent.[1] The medical community, particularly the AAIDD, instructs that past criminal behavior and "streets smarts" should not be used to assess adaptive functioning. AAIDD Manual at 102 ("Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior or about having ID."). It is these standards that this Court relied on in *Atkins*, *Hall*, and *Moore*. *See Moore*, 137 S. Ct. at 1048 and 1053. And for a retrospective intellectual disability determination during post-

[1] In 2015, the AAIDD published *The Death Penalty and Intellectual Disability*, in which it is stated that the AAIDD User's Guide "argued strongly against using crime facts as a basis for determining whether or not a person has or does not have ID." *See The Death Penalty and Intellectual Disability* at 228 (Edward A. Polloway, ed., 2015) (providing no distinction between past or "current" criminal activity).

conviction proceedings, which is when Petitioner was first diagnosed as intellectually disabled, the facts of the crime at issue are necessarily "past behavior".

The reasoning behind the instruction to not use criminal behavior in an intellectual disability analysis is applicable whether the criminal behavior is considered "past" or "present." *See Petition for Writ of Certiorari* at 13-14. In brief, there is insufficient norming data for criminal behavior to accurately determine what criminal acts individuals with intellectual disability are capable of performing. *See id.* This concern applies regardless of whether the behavior occurred in the "past" or is considered part of the "current" crime. Additionally, a crime merely shows a snapshot of an individual's behavior and is not evidence of an individual's typical functioning and ability, which is at the heart of assessing adaptive behavior. "The assessment of adaptive behavior focuses on the individual's typical performance and not their best or assumed ability or maximum performance. Thus, what the person typically does, rather than what the individual can do or could do, is assessed when evaluating the individual's adaptive behavior." *AAIDD* at 47.

In its *Opposition*, Respondent points to Petitioner's negotiation with a property owner in an attempt to escape police capture as an example of adaptive functioning. *Respondent's Opposition* at 17. In order to avoid being shot, Petitioner offered the property owner, who had a gun pointed at Petitioner, money recovered in the robbery.[2] Rather than evidence of a complex and skilled negotiation, this behavior may have been driven by survival instinct.[3] "While evading police and avoiding capture can exhibit raw

[2] Corliss Wyer testified about the incident at trial: "My husband asked him what's he doing in the yard, and he asked my husband not to shoot him, he said that he had some money, that he had a lot of money and he would give him some of the money." *Trial Transcript* at R. 2782.

[3] The encounter between the property owner and Petitioner occurred due to Petitioner's inability to find his way out of the yard: "And my husband did tell him just get out of our yard. He said he didn't know how to get out of the yard because the back of the yard was covered by six foot tin (sic), so my husband told him to get out of the yard the same way he got in, that he saw the tin and to get out that way, through the tin." Trial testimony of Corliss Wyer, *Trial Transcript* at R. 2782-83.

physical skills, at other times those acts are just as consistent with primal survival instincts as they are with callous, cold-blooded calculation." *Brumfield v. Cain*, 854 F. Supp. 2d 366.[4]

Respondent argues in the alternative that, even if the AAIDD discourages reliance on the facts of a crime, experts are free to disagree with the AAIDD. *Respondent's Opposition* at 18. Respondent's argument is misplaced. The medical community recognizes the use of the criteria and guidelines in the DSM and the AAIDD as best practice for the diagnosis of intellectual disability. *The Death Penalty and Intellectual Disability* at 332 (Edward A. Polloway, ed., 2015). Further, this Court has accepted the AAIDD and DSM as current medical community standards and has explained that those standards "supply one constraint on States' leeway in this area [the states' discretion to enforce *Atkins*]." *See Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (citing the DSM-5 and AAIDD-11 as examples of current standards in the medical community). "States have some flexibility, but not 'unfettered discretion,' in enforcing *Atkins*' holding. 'If the States were to have complete autonomy to define intellectual disability as they wished,' . . . '*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.'" *See id.* (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1998-99 (2014)).

The medical community's current standards oppose relying on criminal behavior, including the facts of the crime at issue, in assessing adaptive behavior. *AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports* at 1 (11th ed. 2010); *AAIDD User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* (2012) at 20; *The Death Penalty and Intellectual Disability* at 196 (Edward A. Polloway, ed., 2015). Respondent's argument is baseless. Petitioner respectfully requests that this Court grant *certiorari*.

[4] When the Middle District Court decision in *Brumfield* was brought under review before the Fifth Circuit, the court noted that they approved of the Middle District Court's handling of Brumfield's criminal behavior. *Brumfield v. Cain*, 808 F. 3d 1041, n. 31 (5th Cir. 2015).

II. Petitioner's Juror Misconduct Claim is Properly Before This Court

In its *Opposition*, Respondent argues that Petitioner's juror misconduct claim is not properly before this Court. Respondent's argument is two-fold: first, that Petitioner failed to comply with United States Supreme Court Rule 13; and second, that Petitioner failed to comply with La. Code of Criminal Procedure article 930.8. Both arguments are without merit.

First, Respondent alleges that Petitioner did not appeal the denial of his juror misconduct claim to this Court within ninety days after entry of the order denying discretionary review in accordance with United States Supreme Court Rule 13. *See Respondent's Opposition* at 12. Respondent's argument erroneously relies on the 2009 denial by the Supreme Court of Louisiana as the start of the ninety-day period. However, the applicable denial date is the Supreme Court of Louisiana's 2018 denial of Petitioner's writ (and supplemental writ) addressing his *Atkins* claim (which was silent as to Petitioner's juror misconduct claim). *See* Appendix A to *Petition for Writ of Certiorari.* As Petitioner's pending *Petition for Writ of Certiorari* was timely filed, this Court has jurisdiction to review both his *Atkins* and juror misconduct claims.

This Court has held it has "jurisdiction to consider all of the substantial federal questions determined in the earlier stages of state proceedings,...and [the] right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case." *Hathorn v. Lovorn*, 457 U.S. 255, 262 (1982) (citing *Reece v. Georgia*, 350 U.S. 85, 87 (1955)); *see also Barclay v. Florida*, 463 U.S. 939, 945-946 (1983) (same); *Urie v. Thompson*, 337 U.S. 163, 172 (1949) ("local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."); *see also Davis v. O'Hara*, 266 U.S. 314 (1924).

The facts of *Barclay v. Florida* mirror the instant case. After the Florida Supreme Court affirmed the trial judge's decision to sentence the defendant to death, it *sua sponte* vacated its decision to allow the

defendant an opportunity to rebut the information contained in the presentence report. *Barclay*, 463 U.S. at 945-946. After the resentencing hearing, Barclay raised numerous objections to the trial judge's findings, which were identical to its original findings. *Id.* The Florida Supreme Court declined to reconsider the arguments, holding that it would not abrogate the law of the case on those questions. *Id.* This Court concluded "[s]ince the Florida Supreme Court held that it had considered Barclay's claims in his first appeal, and simply refused to reconsider its previous decision in the second appeal, those claims are properly before us." *Id.*

Likewise, the Supreme Court of Louisiana failed to reconsider Petitioner's juror misconduct claim in his supplemental writ addressing this Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). The state supreme court per curiam denial solely addressed Petitioner's *Atkins* claim and noted that "Robertson's claims have now been fully litigated in accord [sic] with La.C.Cr.P. art. 930.6, and this denial is final." Appendix A to *Petition for Writ of Certiorari* at 10. Thus, the Louisiana Supreme Court refused to consider Petitioner's request to remand his juror misconduct claim in light *of Pena-Rodriguez*, and the claim is properly before this Court for review.

Respondent further argues that Petitioner did not properly plead his juror misconduct claim by failing to comply with La. C.Cr.P. art. 930.8's requirement that a new state post-conviction application must be filed with the trial court within one year of a new decision. *See Respondent's Opposition* at 13. As an initial matter, the procedure and time limitations of La. C.Cr.P. art. 930.8 do not apply to Petitioner because this is a capital case.[5] Further, the wording of La. C.Cr.P. art. 930.8 envisions a defendant who is not currently under the state court's jurisdiction. *See* La. C.Cr.P. art. 930.8(A) ("No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed

[5] La. C.Cr.P. art. 930.8(A)(4):

> A. No application for post-conviction relief, including applications which seek 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:
>
> (4) The person asserting the claim has been sentenced to death.

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 [exceptions] apply.") (emphasis added). At the time of this Court's decision in *Pena-Rodriguez*, Petitioner's case still fell under the jurisdiction of the Louisiana state courts. Therefore, it was proper to request a remand from the Louisiana Supreme Court instead of filing a new application for post-conviction relief before the previous application was fully litigated. Second, when this Court issued its decision in *Pena-Rodriguez*, Petitioner's *Atkins* writ was already pending in the Supreme Court of Louisiana. Instead of circumventing that court's jurisdiction, Petitioner requested that the state supreme court remand his case to the district court for reconsideration of the juror misconduct claim in light of this Court's decision in *Pena-Rodriguez*, a request which was denied. Therefore, Petitioner's juror misconduct claim is properly before this Court for review.

For the foregoing reasons, the *Petition for Writ of Certiorari* should be granted.

Respectfully submitted,

Dated: August 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that Petitioner's *Reply to Respondent's Opposition to Petition for Writ of Certiorari* was served via regular U.S. Mail, on this 29th day of August, 2018 upon Dylan Alge, East Baton Rouge Parish District Attorney's Office, 222 St. Louis St., #550, Baton Rouge, LA 70802. All persons required to be served have been served.

Dated: August 29, 2018

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