OCTOBER TERM 2020

No. 20-6500

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED BOURGEOIS,
Petitioner,

v.

T.J. WATSON, Warden, USP-Terre Haute, and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

--- CAPITAL CASE ---
EXECUTION SCHEDULED FOR DECEMBER 11, 2020

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ARGUMENT

The question in this case is whether Congress's present-tense language in § 3596(c) of the Federal Death Penalty Act must be given some present-tense effect, requiring the application of current legal and diagnostic standards to an intellectual-disability determination. Because Mr. Bourgeois has made a "strong showing" that he is intellectually disabled under current standards, the two dissenting Seventh Circuit judges and district court were correct: "petitioner is entitled to a hearing on his claim that his execution will violate the FDPA." PA25, 266.

I. THE FDPA HAS PRESENT-TENSE EFFECT.

All of the Government's arguments stem from the mistaken premise that § 3596(c) provides no present-tense protections for the intellectually disabled and thus the "question in this appeal is not whether Alfred Bourgeois is intellectually disabled." PA15. The Government defends this premise by arguing that "Congress's use of the present tense simply reflects the fact that intellectual disability is a permanent condition." BIO 24 (internal quotation and brackets omitted). According to the Government, "it would not have made sense for Congress to have phrased the statute differently" because, when the § 2255 court "considered whether petitioner 'is' intellectually disabled and determined that petitioner failed to prove that he 'is,'" that determination became permanent too. BIO 24–25.

As a threshold matter, the Government's statutory interpretation flatly contradicts the Dictionary Act, 1 U.S.C. § 1, which "instructs that the present tense generally does not include the past," but rather has a "prospective orientation." *Carr v. United States*, 560 U.S. 438, 448–49 (2010). The Government's Brief in Opposition fails to grapple with either the Dictionary Act or *Carr*. Instead, the Government promotes the Seventh Circuit's assertion that there is "no textual (or other) support" for Petitioner's FDPA claim. BIO 15. The Government is wrong. The FDPA's text establishes a present-tense and categorical rule that a death sentence "shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(a) & (c). Nothing in the language or history of § 3596 suggests that this dictate was meant to turn solely on a previous intellectually-disability ("ID") determination.

The Government also overlooks the fact that, although the disability may be permanent, the legal and diagnostic standards defining ID can change. For example, before this Court's decision in *Hall v. Florida*, 572 U.S. 701, 704 (2014), a condemned prisoner in Florida with an IQ of 72 was not considered ID, no matter how severe and lifelong that prisoner's adaptive deficits. *Hall* struck down such bright line IQ requirements because, under prevailing medical and scientific standards, the prisoner could now be determined to be ID. *Id.* at 721–23. Mr. Hall's

impairments did not change; the law changed to bring its standards in line with science.

The same is true here. Mr. Bourgeois has been impaired since childhood, and those impairments have not changed. But, as with the defendants in *Hall* and *Moore v. Texas*, 137 S. Ct. 1039, 1044-53 (2017) ("*Moore-I*"), the non-diagnostic and judge-made standards that were applied to Mr. Bourgeois's ID determination were contrary to medical standards that define the diagnosis. Cert. Pet. 27–32. They were also contrary to current legal standards that now require the use of prevailing diagnostic criteria. *Id.*

For Mr. Bourgeois's present claim, the proper standards are those in place now, i.e., "[w]hen the sentence is to be implemented," 18 U.S.C. § 3596(a), as opposed to the unscientific judge-made standards employed in Mr. Bourgeois's § 2255 proceedings. There is good reason for this. As this Court held in *Moore-I*, "[r]eflecting improved understanding over time, current manuals offer the 'best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" 137 S. Ct. at 1053 (citations omitted) (quoting Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition* xli (2013)). Moreover, the use of diagnostically inappropriate practices "create[s] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051. For this reason, the use of current, scientifically sound

diagnostic standards is required to enforce Congress's stated prohibition on the "carrying out" of a death sentence "upon a person who is mentally retarded" at the time of "implementation of a sentence of death." 18 U.S.C. § 3596.

Thus, Mr. Bourgeois is not—contrary to the Government's assertion—"presenting the same intellectual-disability claim" that he presented to the § 2255 court. BIO 1–2; *see also id.* at 22, 23, 25. Although Mr. Bourgeois's impairments have stayed the same, the standards for the review of those impairments have been fundamentally altered by *Moore-I*. A reviewing court must now apply the standards used by "trained clinicians" in the field, *Moore-I*, 137 S. Ct. at 1053, rather than the "legal" approach used by the § 2255 court in this case, PA90–101, 104.

To understand when the carrying out of a death sentence is prohibited by § 3596 is simple: it is what Congress said that matters. The Government's counter-textual assertions regarding whether it would have "made sense for Congress to have phrased the statute differently" do not change the FDPA's clearly expressed language and intent. BIO 24. Congress chose present-tense language, and the courts are bound to give it effect.

Accordingly, it is irrelevant whether *Moore-I* and *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore-II*"), "announce[d] any retroactive change in the law." BIO 20. The Petition asks whether the FDPA bars the execution of a person who is ID under current standards. If it does, then *Moore-I* and *Moore-II* apply because they are part

of the current standards for assessing whether the prisoner "is" intellectually disabled at the time of "implementation of a sentence of death," 18 U.S.C. § 3596(c), not because of retroactivity. The question is simply whether the FDPA measures intellectual disability as of the time of execution; if so, then the prevailing legal and diagnostic standards must apply.

Equally misplaced is the Government's argument that other Courts of Appeals have distinguished intellectual-disability claims from claims of incompetency, and that only the latter may be raised at the time of execution. *See* BIO 27–29 (citing *Williams v. Kelley*, 858 F.3d 464, 472 (8th Cir. 2017), and *Busby v. Davis*, 925 F.3d 699, 713 (5th Cir. 2019)). *Williams* and *Busby* involved review of state-court death sentences; neither opinion addresses the language, structure, or history of the FDPA, or the availability of 28 U.S.C. § 2241 to enforce it. Moreover, those cases distinguished incompetency claims from intellectual-disability claims that were asserted under *Atkins v. Virginia*, 536 U.S. 304 (2002), rather than under the FDPA. *Williams*, 858 F.3d at 472–73; *Busby*, 925 F.3d at 713. But Congress plainly did not make the same distinction. Congress treated intellectual-disability claims and incompetency claims identically, placing them in the same "Implementation" section and using the same language to prohibit the "carr[ying] out" of an execution. Unlike in *Williams* and *Busby*, this case involves an ID claim under the FDPA, and so the Seventh Circuit here was duty-bound to follow the congressional directive.

The Government leans heavily on the straw man that Mr. Bourgeois supposedly seeks "a fresh intellectual-disability claim [that] arises every time the medical community updates its literature." BIO 15, 26 (quoting PA14); *see also id*. at 20. Petitioner's position is much narrower: "When the [death] sentence is to be implemented," 18 U.S.C. § 3596(a), if a petitioner makes a "strong showing" that he is ID under current standards, and significant developments of law or fact invalidate any prior ruling, PA25, then § 3596(c) entitles the petitioner to an opportunity to prove his claim. If a federally death-sentenced prisoner cannot demonstrate a significant and dispositive change in the legal or diagnostic landscape, he or she is unlikely to show that initial post-conviction remedies are "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Mr. Bourgeois is entitled to further proceedings so that his disability may be assessed under a diagnostic standard recognized by this Court as binding today, instead of under a contra-diagnostic "legal" standard from 2011.

The rule advanced by the Government and adopted by the Seventh Circuit, which relies on an analysis that was contrary to the governing clinical standards and has since been rejected by this Court, cannot effectuate § 3596(c)'s prohibition on executing intellectually disabled persons. By its own terms, the Government's argument and the Seventh Circuit's rule would permit the Government to carry out a death sentence on a person who is, beyond any dispute, intellectually disabled

under current diagnostic standards. Under this view, the plain language of the FDPA does not apply if the prisoner raised an ID claim in § 2255 proceedings at any prior time and according to any prior standards or non-standards—including a lay judge's armchair diagnosis of the defendant's functioning in a courtroom. *See* PA78, 97–99. Accepting that view would mean that Mr. Bourgeois's claim will be rejected without *any* court *ever* assessing his ID under diagnostic standards. That result would violate the FDPA.

The Government's claim that *United States v. Webster*, 421 F.3d 308, 313 (5th Cir. 2005), did not compel the § 2255 court to reject the medical standards, BIO 21–22, similarly fails. In *Webster*, the Fifth Circuit endorsed an ID determination, like the § 2255 court's here, that treated risk factors for ID as alternative explanations for Webster's low functioning, weighed adaptive strengths against deficits, based its determination on prison functioning, and relied on erroneous stereotypes. *Id.* at 313. Similarly, in *Clark v. Quarterman*, 457 F.3d 441 (5th Cir. 2006), the Fifth Circuit endorsed the use of diagnostically inappropriate practices such as disregarding the lower end of the confidence interval, basing an ID determination on strengths, and relying on prison functioning and stereotypes. 457 F.3d at 446–47. This Fifth Circuit precedent—which the § 2255 court relied on and used as a model for its diagnostically inappropriate analysis—endorsed such an approach and precluded

any viable claim that the § 2255 court abused its discretion by employing non-clinical standards. Cert. Pet. 12–14, 28–31.

Finally, the Government cherry-picks a phrase from the legislative history to argue that Congress meant for ID to provide only a standard trial defense. BIO 25–26. The comment from Representative Levin upon which the Government relies—that an ID claim "would be handled as any other defense," BIO 26—addressed a question about whose *burden* it would be to establish ID, not *when* that claim could be raised. *See* 134 Cong. Rec. H7259-02 (Sept. 8, 1988), 1988 WL 175612, at *64 (Rep. Gekas) (commenting that the "burden" of establishing ID would be on the defense). The Government's position fails to answer why Congress placed the ID provision in the "Implementation" section and within the same sub-section as the incompetency bar, why it used language barring the carrying-out, rather than the imposition, of death sentences, and why it conspicuously did *not* include ID among the "other defense[s]" to a death sentence that it specified in 18 U.S.C. § 3592. *See* Amicus Br. 5. In sum, the Government offers no persuasive response to the overwhelming evidence from the common law, legislative history, and structure of the FDPA that § 3596(c) establishes a present-tense restriction on the Government's power to execute a person who is ID. *See* Cert. Pet. 21–26; Amicus Br. 11–17.

II. MR. BOURGEOIS HAS MADE A STRONG SHOWING THAT HE IS INTELLECTUALLY DISABLED UNDER CURRENT STANDARDS.

The Government does not address the § 2241 court's finding that Mr. Bourgeois made a "strong showing" that he is intellectually disabled under current legal and diagnostic standards. BIO 29–32. Instead, the Government argues that the § 2255 court's prior determination was valid because that court: addressed the three prongs of ID; concluded that Mr. Bourgeois's IQ test scores "did not accurately measure his intellectual abilities"; did not rely on adaptive strengths in making its prong two finding; did not view risk factors as alternate explanations for deficits; and made credibility determinations between competing experts. BIO 29–31 (quoting PA6, 13). The Government is wrong on all counts.

First, simply addressing the three prongs of ID does not establish compliance with clinical standards for measuring them. A court must also employ the current diagnostic standards that underlie and define those three prongs. Indeed, the Texas state court made similar findings on all three prongs in *Moore-I* and *Moore-II*, but this Court still rejected the Texas court's methodology as improperly contra-diagnostic. *Moore-I*, 137 S. Ct. at 1049–53; *Moore-II*, 139 S. Ct. at 670–72. Similarly, in *Hall*, this Court recognized that Florida employed a three-pronged test, which "on its face . . . could be consistent with the views of the medical community." 572 U.S. at 711. Nevertheless, *Hall* rejected Florida's standard because its prong-one standard relating to IQ scores created an "unacceptable risk that persons with

intellectual disability will be executed." *Id.* at 704, 711. Here, like the Texas court in *Moore-I,* the § 2255 court discarded what it termed the "psychological" standard employed by the mental health community in favor of a "legal" standard in reviewing Mr. Bourgeois's ID claim. PA88–91, 103–04. The § 2255 court then employed the very practices later rejected by this Court in *Moore-I*. Cert. Pet. 28–31.

Second, the § 2555 court's findings regarding IQ tests did not cause the court to "*invalidate*" Mr. Bourgeois's IQ scores, as the Government misleadingly suggests about Petitioner's supposed lack of effort on his IQ tests. *See* BIO 29–30; Cert. Pet. 28–29 (citing PA88–91). In fact, the court acknowledged that the scores would satisfy prong one of the diagnosis under the "psychological" standards. However, under the court's non-scientific "legal" standards, it determined that Mr. Bourgeois's "true" IQ score was on the upper end of the confidence interval created by the measurement error present for all IQ tests—a practice that was later rejected in *Moore-I*. Cert. Pet. 28–29; 137 S. Ct. at 1047, 1049. And, the § 2255 court based its finding as to *why* it believed Mr. Bourgeois's IQ scores were in the upper end of the confidence interval on its own "lay assessment" of his functioning. PA95. This lay assessment employed manifestly erroneous stereotypes, including the belief that an intellectually disabled person cannot "engage[] in conversation" and must "operate

as a child." PA95, 100; Cert. Pet. 29–30. This Court later rejected the use of such unsupportable lay opinions and stereotypes. *Moore-I*, 137 S. Ct. at 1050–53.

Third, contrary to what the Government maintains, BIO 31, the § 2255 court did, in fact, rely on perceived adaptive strengths. In its opinion, the court "note[d] the difference between the legal and psychological inquiries" for ID, recognized that the "mental health community ignores an individual's strengths when looking at adaptive functioning," and stated that—consistent with pre-*Moore-I* Fifth Circuit precedent—it would "blunt" the effect of Mr. Bourgeois's deficits with his strengths. PA103–04. Yet again, this type of contra-clinical analysis was later rejected in *Moore-I*. 137 S. Ct. at 1051.

Fourth, even if the § 2255 court did not treat the "adaptive impairments as a zero-sum game," attributable to either Mr. Bourgeois's dysfunctional upbringing or his ID, but not both, it nonetheless found that there was insufficient evidence that Mr. Bourgeois's impairments were caused by ID as opposed to child abuse or other risk factors. BIO 31 (quoting PA13). However, risk factors such as childhood abuse, poverty, and a socially deprived upbringing are *causes* of intellectual disability, not alternate explanations for deficits. *Moore-I*, 137 S. Ct. at 1051; PA532–35 (Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) (listing child abuse, poverty, and social deprivation among the known causes for ID)). Mr.

Bourgeois would still be ID even if, as the Seventh Circuit and the Government hypothesize, his impairments were caused by these risk factors.

Finally, the § 2255 court's diagnostically invalid practices are not rendered valid because they are couched as credibility findings. In *Moore-II*, this Court considered Moore's case after it had been remanded and the Texas court had denied relief a second time. 139 S. Ct. at 670–72. Even though the Texas state court professed to employ current diagnostic standards and denied relief based on credibility findings between competing experts, *Moore-II* rejected the state court's credibility findings because they were based on many of the same diagnostically inappropriate factors that were at issue in *Moore-I*. *Id.* Here, the § 2255 court based its credibility determination on the same practices that were rejected in *Moore-I*, *and* stated that it was rejecting the diagnostic standards. *See, e.g.*, PA88–91, 99, 103–04.

Much as the Government refuses to take Congress at its word when it barred the execution of any prisoner who "is" intellectually disabled at the time of "implementation of a sentence of death," 18 U.S.C. § 3596, the Government refuses to take the § 2255 court at its word when it adopted a "legal" rather than a "psychological" standard. PA103–04. But the Government is mistaken in both respects, and Mr. Bourgeois is entitled to further proceedings on his FDPA claim.

CONCLUSION

For the reasons set forth above and in Mr. Bourgeois's prior submissions to this Court, this Court should grant the writ of certiorari and stay Mr. Bourgeois's execution.

Respectfully submitted,

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