OCTOBER TERM 2021
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHADRICK FULKS,
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

PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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QUESTION PRESENTED

As a general matter, a federal prisoner may only collaterally attack his conviction or sentence by filing a motion to vacate or set aside his conviction or sentence under 28 U.S.C. § 2255. Under § 2255(e)'s "savings clause," however, a federal inmate may petition for a writ of habeas corpus under 28 U.S.C. § 2241 when a § 2255 motion is "inadequate or ineffective to test the legality of his detention."

The question presented is:

Is an intellectually disabled and death-sentenced prisoner condemned to be executed in violation of the Eighth Amendment because he was found not to be intellectually disabled under the outdated diagnostic standards prevailing at the time of his trial and initial 28 U.S.C. § 2255 proceedings, or is he entitled to review under 28 U.S.C. § 2241 because diligent counsel could not have raised this claim in any prior proceeding?

LIST OF ALL RELATED PROCEEDINGS

United States v. Fulks, No. 02-CR-992 (D.S.C.) (trial, initial § 2255 motion, and successive § 2255 motion)

United States v. Fulks, No. 04-33 (4th Cir. July 27, 2006) (direct appeal)

Fulks v. United States, No. 06-9232 (U.S. Sup. Ct. June 25, 2007) (petition for certiorari review of direct appeal)

Fulks v. United States, Nos. 09-9 & 11-3 (4th Cir. June 26, 2012) (initial § 2255 appeal)

Fulks v. United States, No. 12-8364 (U.S. Sup. Ct. Dec. 2, 2013) (petition for certiorari review of initial § 2255 motion)

In re Fulks, No. 16-9 (4th Cir. June 17, 2016) (authorization to file successive § 2255 motion granted)

Fulks v. Krueger, No. 02:15-CV-33 (S.D. Ind. Sept. 20, 2019) (§ 2241 petition)

Fulks v. Watson, No. 20-1900 (7th Cir. July 19, 2021) (§ 2241 appeal)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chadrick Fulks is intellectually disabled. He was born with brain damage caused by a fetal alcohol spectrum disorder ("FASD") and has had significant intellectual and adaptive deficits since long before the age of 18. His execution is constitutionally prohibited by *Atkins v. Virginia*, 536 U.S. 304 (2002). However, the current diagnostic standards that form the basis for Mr. Fulks's *Atkins* claim post-date his trial and the filing of his initial 28 U.S.C. § 2255 motion, and indeed, six separate mental health experts opined during trial and § 2255 proceedings that Mr. Fulks was deeply impaired but not intellectual disabled; as a result, Mr. Fulks could not have previously raised his claim of categorical ineligibility for the death penalty based on his intellectual disability. Furthermore, because these new developments do not meet the requirements for a successive § 2255 motion, Mr. Fulks cannot pursue this claim under § 2255 now. Accordingly, Petitioner's intellectual disability renders him constitutionally exempt from execution, but he is without an avenue under § 2255 to vindicate his claim for relief. For this reason, § 2255 is "inadequate or ineffective" to test the legality of Mr. Fulks's death sentence, and 28 U.S.C. § 2241 review is appropriate under § 2255(e)'s "savings clause."

In the proceedings below, Mr. Fulks proffered what the district court acknowledged to be "extensive evidence that he has an intellectual disability."

PA010. The Seventh Circuit acknowledged the diagnostic advances that support Mr. Fulks's claim for relief, as well as this Court's jurisprudence holding that *current* diagnostic standards are binding in *Atkins* proceedings and that the use of outdated standards creates an "unacceptable risk" that an intellectually disabled person will be erroneously denied relief and executed. *Fulks*, 4 F.4th at 590–91 (PA005–006) (citing *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*")). Nevertheless, because it was not literally "impossible" for Mr. Fulks to have raised an *Atkins* claim in his initial § 2255 proceedings, the court below denied him review under § 2241. *Id.* at 592–93 (PA006–007).

This Court has already granted certiorari to review, in a different context, whether the appropriate standard under the savings clause is one of practical or literal impossibility. *See Jones v. Hendrix*, No. 21-857, --- S. Ct. ---, 2022 WL 1528372 (May 16, 2022). Mr. Fulks requests that the Court also grant review here and join his petition with that of Mr. Jones, as reviewing the cases together will assist the Court in establishing a broadly applicable standard to be applied by lower courts assessing the availability of § 2241 review.

Alternatively, Mr. Fulks requests that the Court grant review and order action on the cause deferred pending the disposition of *Jones*. In the event that *Jones* is resolved in favor of the petitioner, who advocates for a more lenient savings clause standard than that applied by the Seventh Circuit in this case, the Court should vacate

the opinion below in Mr. Fulks's case and remand for further proceedings consistent with *Jones*. If *Jones* is resolved in favor of the government, the Court should review Mr. Fulks's unique claim—not implicated by *Jones*—that denying savings clause review on the facts presented here raises serious constitutional concerns because it creates an "unacceptable risk," *Moore I*, 137 S. Ct. at 1051, that intellectually disabled defendants will be erroneously denied relief and an unconstitutionally executed.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Fulks v. Watson*, 4 F.4th 586 (7th Cir. 2021), and is included in the Appendix. *See* PA001. The order denying rehearing is unreported and is also included in the Appendix. *See* PA108.

JURISDICTION

The Court of Appeals issued its opinion denying relief and ordering Mr. Fulks's § 2241 petition to be dismissed on July 19, 2021. The petition for rehearing was denied on March 11, 2022, and the mandate was issued on March 21, 2022. On June 7, 2022, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including August 8, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, in relevant

part: "cruel and unusual punishment [shall not be] inflicted."

Section 2241(a) of title 28 of the U.S. Code provides: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

Section 2255 of title 28 of the U.S. Code provides, in relevant part:

> (e) An application for a writ of habeas corpus [o]n behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
>
> . . .
>
> (h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

STATEMENT OF THE CASE

Petitioner Chadrick Fulks and his co-defendant Brandon Basham were originally indicted in 2002 in connection with a series of crimes that began after the two escaped from a Kentucky jail and eventually led to the death of Alice Donovan. In an eight-count superseding indictment filed in April 2003, Petitioner and Mr.

Basham were charged with carjacking resulting in death in violation of 18 U.S.C. § 2119, kidnapping resulting in death in violation of 18 U.S.C. § 1201(a)(1), and a number of other related offenses. As to those two counts, the Grand Jury also returned eight "Special Findings" relating to the defendants' eligibility for the death penalty under 18 U.S.C. §§ 3591 and 3592.

Acknowledging and accepting responsibility for his role in the offenses, Mr. Fulks pled guilty to all eight counts against him. Following a trial on the question of sentencing only, a jury sentenced Mr. Fulks to death on June 30, 2004. His convictions and sentence were affirmed by the United States Court of Appeals for the Fourth Circuit. *See United States v. Fulks*, 454 F.3d 410 (4th Cir. 2006), *cert. denied*, 551 U.S. 1147 (2007).

A. Initial § 2255 Proceedings

In 2008, Mr. Fulks filed a motion to vacate his convictions and sentence pursuant to 28 U.S.C. § 2255. Prior to the filing, Mr. Fulks had been evaluated by six mental health experts who considered, among other things, whether Mr. Fulks was intellectually disabled. As this Court recognized in *Atkins*, the American Psychiatric Association ("APA") and the American Association on Intellectual and Developmental Disabilities ("AAIDD")[1] define intellectual disability as requiring

[1] *Atkins*, 536 U.S. at 308 n.3. In 2002, the AAIDD was known as the American Association on Mental Retardation. *Id.*

three prongs: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age 18 ("prong three"). *Atkins*, 536 U.S. at 309 n.3. Applying the diagnostic standards prevailing at the time of their evaluations, each of the six experts who had evaluated Mr. Fulks as of 2008 concluded that he was on the cusp of being intellectually disabled, but under then-applicable diagnostic standards, his IQ scores were just a few points too high for the diagnosis. *See* PA229–37 (finding Mr. Fulks to be brain damaged and significantly impaired, but with an IQ in the "borderline" range just above the presumptive range for intellectual disability); PA241–48 (same, and describing Fulks's IQ scores as "borderline slightly above the cut of retardation"); PA264–65 (finding Mr. Fulks to be cognitively impaired, but in the "borderline range of intelligence); PA269–72 (same); PA273–79 (finding Mr. Fulks to be cognitively impaired and having a low IQ, but not intellectually disabled); PA286-87 (finding Mr. Fulks to be cognitively impaired, but not intellectually disabled).

Absent a diagnosis of intellectual disability from a mental health professional, Mr. Fulks could not and did not raise an *Atkins* claim in his initial § 2255 motion. The claims that were raised were ultimately denied and the denial was affirmed on appeal. *United States v. Fulks*, 683 F.3d 512 (4th Cir. 2012), *cert. denied*, 551 U.S. 1147 (2013).

B. Intervening Legal Developments

While *Atkins* established that person with intellectual disability are ineligible for the death penalty in 2002, the Court provided no "'definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment." *Hall*, 572 U.S. at 718 (internal citations omitted). Thus, for several years, state and lower federal courts were free to assess the availability of *Atkins* relief according to judicially crafted standards, as opposed to medical or diagnostic criteria. But *Atkins*'s grant of "unfettered discretion" in the adjudication of intellectual-disability claims was significantly curtailed in 2014, when this Court struck down a Florida statute establishing a "strict IQ test score cutoff of 70" for intellectual disability. *Id.* at 712, 719. The Court based its decision on medical standards that acknowledged an "inherent imprecision" in IQ tests and required that measurement error be taken into account in the evaluation of intellectual functioning. *Id.* at 723. More broadly, *Hall* established that the assessment of an *Atkins* claim must be "informed by the views of medical experts." *Id.* at 720–21.

The Court expanded on *Hall* in 2017 with *Moore I*, which held that courts are required to apply the "medical community's *current standards*" when evaluating an *Atkins* claim. 137 S. Ct. at 1053 (emphasis added). Citing to the most recent manuals published by the APA and the AAIDD, the Court explained that current standards

"[r]eflect[ed] improved understanding over time" and therefore offered the "best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* (quoting APA's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5") at xli). Consistent with this holding, the Court assessed the state court's analysis of Mr. Moore's *Atkins* claim based on the diagnostic authorities that were present at the time *Moore I* was litigated, and not the clinical definitions that were in place at the time of trial. *Id.* at 1050–53 (citing the DSM-5, as well as the AAIDD's *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ("AAIDD-2010") and *User's Guide* (11th ed. 2012) ("AAIDD-2012")).

Two years later, this Court considered Mr. Moore's case again on appeal. *Moore v. Texas*, 139 S. Ct. 666 (2019) ("*Moore II*"). On remand following *Moore I*, the state court had purported to employ current clinical standards, but again found Mr. Moore not to be intellectually disabled based on credibility determinations. This Court again reversed, re-affirming the binding nature of current diagnostic standards and rejecting the state court's factual findings for failing to reflect those standards. *Id.* at 670–71.

C. Intervening Diagnostic Developments

Diagnostic standards for intellectual disability have changed significantly since Mr. Fulks filed his initial § 2255 motion. For instance, the DSM-5, published

in 2013, rejected the notion of intellectual-disability evaluations as actuarial determinations, stating that "[t]he diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions." PA214. The AAIDD's updated User's Guide, published in 2012, did the same. *See* PA221 ("A fixed point cutoff for [intellectual disability] is not psychometrically justifiable. The diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination.").

The DSM-5 also required that the clinical interpretation of IQ scores take into account the Flynn Effect, which reflects a well-established clinical understanding that IQ scores are inflated at a rate of 0.3 points per year from the year of the development of the data upon which the test is based. PA214, PA221, PA201–02. Consistent with this development, in 2015, the AAIDD recognized:

> A consensus among the professional and scientific community of intelligence and [intellectual disability] scholars has emerged. This consensus is that given the high-stakes nature of *Atkins* [intellectual disability] cases and their tendency to artificially focus on specific "bright line" cutoff scores, *a Flynn effect correction to a person's scores in this setting is now considered best or standard practice*.

PA200 (emphasis in original).

Moreover, both the AAIDD-2012 and the DSM-5 made clear for the first time that it is critical to avoid the use of stereotypes in assessing adaptive functioning. The AAIDD-2012 expressly identified numerous commonly held, but erroneous, stereotypes relating to individuals with intellectual disability which "are

unsupported by both professionals in the field and published literature," "incorrect," and "must be dispelled." PA223–24. These stereotypes include that individuals with intellectual disability: "look and talk differently from persons from the general population," "are completely incompetent and dangerous," "cannot do complex tasks," "cannot get driver's licenses, buy cars, or drive cars," "do not (and cannot) support their families," "cannot romantically love or be romantically loved," "cannot acquire vocational and social skills necessary for independent living," and "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations." *Id.*

The DSM-5 confronted several of these stereotypes by recognizing that persons with significant adaptive deficits can maintain romantic relationships in adulthood, maintain competitive employment in jobs that do not emphasize conceptual skills, function age-appropriately in personal care, arrange for their own transportation and manage money with support, raise a family with support, and develop a variety of age-appropriate recreational skills. *See* PA211. The DSM-5 also provided guidance as to what constituted deficits in adaptive functioning by setting forth clinical summaries as to what level of functioning satisfied prong two in each domain. *Id*.

D. Section 2241 Petition

Given the dramatic shift in the legal framework governing *Atkins* claims since Mr. Fulks's initial § 2255 proceedings, as well as the publication of updated diagnostic manuals from the AAIDD and APA, Mr. Fulks was again evaluated for intellectual disability in 2018. Applying the most recent diagnostic standards as required under *Moore I*, neuropsychologist Barry M. Crown, Ph.D.—a clinical and forensic practitioner with decades of experience—diagnosed Mr. Fulks as intellectually disabled. *See* PA164–65.

Although newly eligible for *Atkins* relief, Mr. Fulks was unable to bring his claim in a successive motion under 28 U.S.C. § 2255(h), which requires either: "(1) newly discovered evidence" establishing that "no reasonable factfinder would have found the movant guilty of the offense"; or "(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Mr. Fulks therefore filed his *Atkins* claim in a petition for relief under 28 U.S.C. § 2241, arguing that review was available under the § 2255(e) savings clause. PA165–74.

1. Legal argument

In support of his argument that he was entitled to savings clause review, Mr. Fulks's petition relied on the Seventh Circuit's decision in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc) ("*Webster I*"). *See* PA166–67. In that case, the

petitioner had discovered new evidence supporting an *Atkins* claim, but could not seek review under § 2255(h)(2) because the evidence established that he was ineligible for a death sentence rather than innocent of his offense. In analyzing whether § 2241 review was available, the Seventh Circuit acknowledged that the savings clause requires "something more" than an inability to comply with § 2255(h)'s procedural requirements. *Webster I*, 784 F.3d at 1136. However, it also determined that those procedural requirements cannot preclude review of a claim of categorical exemption from execution. *Id.* at 1138-39. Nor, the court noted, did Congress intend to preclude review of such claims, as § 2255(h) was adopted well before this Court had decided either *Atkins* or *Roper v. Simmons*, 543 U.S. 551 (2005), which bans the execution of those under age 18 at the time of the offense. *Webster I*, 784 F.3d at 1138–39. Lastly, the court reasoned that precluding § 2241 review would "lead in some cases . . . to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.* at 1139; *see also id.* at 1136 (rejecting the "'Kafkaesque' nature of a procedural rule that, if construed to be beyond the scope of the savings clause, would (or could) lead to an unconstitutional punishment"). To avoid this outcome, the court held that Mr. Webster had identified a "structural problem" in § 2255(h) that justified § 2241 review. *Id*. at 1139.

Mr. Fulks's petition invoked the same "structural problem," the only difference being that his *Atkins* claim did not become newly available based on the

discovery of new evidence, but rather by the development of new diagnostic standards and this Court's evolving *Atkins* jurisprudence. Furthermore, like Mr. Webster, Mr. Fulks argued that denying him savings clause review would violate the Eighth Amendment by creating an "unacceptable risk," *Moore I*, 137 S. Ct. at 1051, that he would be improperly denied *Atkins* relief and be subject to an unconstitutional execution.

2. Factual proffer

In addition to the forgoing legal arguments, Mr. Fulks's petition and accompanying documentation included substantial evidence of intellectual disability, including a report from Dr. Crown supporting his intellectual-disability diagnosis. The following is merely an overview of this evidence, which the district court described as "extensive." PA010.

a. Intellectual functioning

Deficient intellectual functioning is defined as an IQ of approximately 70 with a confidence interval for measurement error of 5 points taken into account. PA125. For this reason, at a minimum, scores up to 75 fall within the presumptive range for intellectual disability. Scores above 75 may also qualify, given that current diagnostic standards have rejected fixed cutoff points and made clear that the assessment of intellectual functioning is a clinical assessment rather than an actuarial determination. PA126–27, PA214, PA221. Additionally, current standards mandate

that IQ scores be corrected for the Flynn Effect, and recognize the spurious inflation of IQ scores arising from prior administrations of intelligence tests, referred to as the "practice effect." PA127–28, PA199–202, PA214, PA221.

Mr. Fulks satisfies prong one. He has been given three individually administered, comprehensive IQ tests as an adult, all within a ten-month period. In April 2003, he received a full-scale IQ score of 77, which Flynn-corrects to 75 (74.6) and is within the presumptive range for intellectual disability. In a strikingly consistent testing pattern, he received scores of 78 in August 2003 and 79 in February 2004, which Flynn-correct to 76 (75.6) and 77 (77.2), respectively. Because the one- and two-point increase in scores on the last two tests are consistent with the initial score of 75 and explained by the practice effect, all three scores satisfy prong one. *See* PA128–30.

Mr. Fulks was also administered three IQ tests between the ages of 9 and 14, yielding Flynn-corrected scores spanning from the mid-80s to 91. That these scores are higher than his adult scores is not unusual. Individuals with intellectual disability develop more slowly than the age-peers against whom they are compared; thus, as they age, they fall increasingly behind, and their IQ scores drop. *See, e.g., Sasser v. Hobbs*, 735 F.3d 833, 848 (8th Cir. 2013) ("[I]individuals with mild mental retardation 'often are not distinguishable from children without Mental Retardation until a later age.'"); PA129–30. Furthermore, as explained below, Mr. Fulks's

intellectual disability is the product of brain damage caused by fetal alcohol exposure and other biomedical and environmental risk factors that had been present throughout his childhood, and he exhibited significant impairments from a young age. Hence, although no IQ tests were administered between the ages of 14 and 18, Mr. Fulks's intellectual disability onset occurred prior to the age of 18, as confirmed by his subsequent qualifying scores. *Id.*; PA155–64.

b. Adaptive functioning

The adaptive deficits prong is satisfied if there is a significant limitation in any one of three domains of adaptive behavior: conceptual, social, or practical. PA130–32. Mr. Fulks has had significant adaptive deficits in all three domains throughout his life.

In the *conceptual* domain, Mr. Fulks showed a consistent, lifelong pattern of profound impairments in learning, comprehension, self-direction, academics, and communication. He repeated the first grade, began receiving special education for speech and language issues during his second first-grade year, and was referred again to special education in the third grade. From that point, he received special supports in nearly all academic subjects for the rest of his schooling, including individualized or small group attention in a self-contained classroom. Nevertheless, Mr. Fulks fell increasingly behind his peers. He failed to successfully complete the seventh, eighth, or ninth grades and eventually dropped out in the ninth grade. *See*

PA134–35.

Educational staff repeatedly described Mr. Fulks as slow, hard to teach, requiring repeated and hands-on instruction, and failing to keep up despite receiving significant assistance from his teachers. He had problems with self-direction, attention, decision making, impulse control, and reasoning. Reports confirmed that he had impairments in verbal communication and was teased by his peers as a result. These impairments were apparent outside of the school setting as well, as friends and relatives reported childhood deficits in comprehension, speech and language, motor skills, reading, and self-care skills. *See* PA135–47.

Formal testing confirmed these deficits. Mr. Fulks scored far below grade level on achievement tests throughout his academic career, despite having at least one more year of cognitive development than his grade-mates after repeating the first grade. For example, at the age of fourteen, he scored between the third and fifth grade level on nine of ten achievement test scores, despite being old enough for the ninth grade. *See* PA140–42.

When Mr. Fulks was evaluated before his trial as a 26-year-old adult, he tested predominantly at the fifth and sixth grade levels across achievement testing administered in four separate evaluations and, in one instance (writing), as low as the second grade level. Even his most advanced scores were at the seventh and eighth grade level, still showing impairments and functioning well below age-related

expectations. PA142. Moreover, neuropsychological testing from these four evaluations reflected cognitive impairments in executive functioning, attention, processing speed, memory, communication, motor skills, and visuospatial processing. Debilitating individually, the combined impact of these deficits along with the academic and intellectual impairments discussed above created generalized deficits in processing and integration that further impaired Mr. Fulks's ability to exercise good judgment, deal with problems, and cope with the world around him. PA142–43.

Finally, psychologist and FASD expert Natalie Novick-Brown, Ph.D., administered behavioral questionnaires to four third-party reporters who knew Mr. Fulks at four different time periods in Mr. Fulks's life: ages 10, 13, 14, and 21. These instruments consistently reflected impairments in learning, following directions, attention, impulse control, comprehension, communication, understanding the consequences of his actions, and several other aspects of self-direction. PA139–40, PA143–44, PA147.

Mr. Fulks's *social functioning* was also impaired. As a child, he was immature, a follower, and someone who was drawn into trouble by more sophisticated children. He was difficult to play with because he was "slow" and could not understand the rules of games. Childhood testing reflected visuomotor impairments, and his peers described him as clumsy and uncoordinated. Throughout

his life, Mr. Fulks was emotionally unstable, could not problem-solve socially, and was prone to outbursts, particularly when dealing with situations calling for coping skills. He had difficulties forming relationships with others, alternating between social victimization, inappropriate behavior, and emotional instability. The behavioral instruments again confirmed these findings, both before and after age 18. *See* PA148–50.

Mr. Fulks's *practical functioning* was similarly impaired. He failed to manage his behavior across multiple life settings, was unable to sustain productive employment as an adult, and never lived independently for any length of time. *See* PA150–51.

c. Structural evidence of brain impairments

The structural evidence of Mr. Fulks's brain damage provides further support to the evidence of intellectual and adaptive deficits discussed above. Prior to his trial, Mr. Fulks received an MRI, a PET scan, an EEG, and a Quantitative EEG, all of which showed obvious structural brain impairments. These structural problems included a subarachnoid cyst that had formed where the brain had failed to develop, widespread abnormalities across multiple regions that caused his "whole brain" to be "misshapen," and a corpus callosum that showed a six-hundred-to-one chance of having been damaged by prenatal alcohol exposure. Experts could have testified that these structural impairments have been present since birth and were caused primarily

by prenatal alcohol exposure. *See* PA151–55. The evidence also showed that the areas of the brain that were damaged corresponded with the impairments detected by neuropsychological testing. PA154–55.

d. Age of onset

The age of onset for Mr. Fulks's intellectual and adaptive deficits was well before the age of 18. As set forth *supra*, Mr. Fulks had intellectual-disability-level functioning from birth through adulthood and his brain damage—the cause of those deficits—has also existed since birth. Although cause need not be determined for an intellectual-disability diagnosis to be made, diagnostic standards have identified risk factors that correlate with intellectual disability and are known causes of it, including biomedical factors such as fetal alcohol exposure, pre-18 head injuries, and pre-18 exposure to toxins, as well as environmental factors such as childhood abuse and neglect, improper parenting, poverty, malnutrition, and exposure to domestic violence. *See* PA155. Mr. Fulks had all of these biomedical and environmental risk factors for intellectual disability in his background. *See* PA155–64. Among the most consequential was fetal alcohol exposure, which was identified by fetal alcohol diagnostician Julian Davies, M.D., as the primary cause of Mr. Fulks's many impairments.[2] The environmental risk factors were also significant, as summarized

[2] PA153, PA157–59, PA164. Dr. Davies evaluated Mr. Fulks and concluded that he suffers from an FASD. *Id.* Collateral sources confirm that Mr. Fulks's mother drank on a daily basis when pregnant with him and had even been out drinking on the night she went into labor. *Id.*

by Mr. Fulks's trial judge, who observed that Fulks grew "up in poor, crowded, filthy, and deplorable living conditions, raised by violently abusive, sexually deviant, emotionally neglectful, and alcoholic parents who did not appear to care at all about their children's well being." *Fulks v. United States*, 875 F. Supp. 2d 535, 568 (D.S.C. 2010); *see also* PA160–64.

E. The Lower Courts' Denial of Savings Clause Review

The district court denied Mr. Fulks's § 2241 petition without a hearing. The court acknowledged the extensive evidence regarding Mr. Fulks's intellectual disability and did not question the validity of his diagnosis, but held he was not entitled to review under § 2241 because he had not identified a structural defect in § 2255. PA010, PA015–22.

The Seventh Circuit affirmed the district court, but it applied a different rationale than the lower court did. Unlike the lower court, the circuit court acknowledged that Mr. Fulks had identified "a potential structural limitation" in § 2255(h) that "may require additional assessment in a future case." *Fulks v. Watson*, 4 F.4th 586, 595 (7th Cir. 2021). It elaborated:

> The difficult question on the horizon is whether a capital prisoner can access § 2241 to vacate a death sentence in the face of a monumental change to the clinical definition of intellectual disability that occurs *after* the prisoner has completed one round of § 2255 proceedings. Assuming a substantial change in the clinical standards allows a newfound diagnosis of intellectual disability, his execution would offend the Eighth Amendment. But the prisoner would have no way to raise his *Atkins* claim as a second or successive motion under

§ 2255(h)'s two express exceptions.

Id. (emphasis in original).

The Seventh Circuit similarly recognized that there were significant new diagnostic developments set forth in the AAIDD-2012 and the DSM-5. *Fulks*, 4 F.4th at 591 (PA005–06). For instance, the court noted that these new manuals "now include express recommendations for certain considerations when measuring intellectual disability," which included that "evaluators should base diagnoses on both a clinical assessment and standardized testing" and "may adjust IQ scores for the so-called Flynn effect." *Id.* The court further recognized that: "Fulks's Flynn-adjusted IQ scores of 75, 76, and 77 could satisfy the first prong of showing intellectual disability—subaverage intellectual functioning—because scores of up to 75 fall within the range for an intellectual disability." *Id.* at 592–93 (PA007). Nevertheless, the Seventh Circuit denied § 2241 review because "these recent updates to the AAIDD-2012 and DSM-5 fail to reveal anything inadequate or ineffective about § 2255 that made it *impossible* for Fulks to pursue an *Atkins* claim in his initial postconviction motion." *Id.* at 587, 592–93 (PA002, PA007) (emphasis added). The court reasoned that "Fulks sought at sentencing to avoid the death penalty by relying on his cognitive impairments and fetal alcohol spectrum disorder—owing in no small part to his horrific upbringing—and he had every opportunity to take the next step and argue . . . that he was intellectually disabled."

Id.

Mr. Fulks filed a timely petition for en banc reargument, which was denied on March 11, 2022.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SHOULD BE CONSIDERED ALONGSIDE *JONES V. HENDRIX*, IN WHICH THIS COURT RECENTLY GRANTED CERTIORARI TO ADDRESS THE MEANING OF "INADEQUATE" AS USED IN THE SAVINGS CLAUSE.

To date, this Court has provided little guidance to lower courts tasked with determining whether 28 U.S.C. § 2255 is "inadequate or ineffective" within the meaning of the savings clause in any given case. However, with its grant of certiorari in *Jones v. Hendrix*, the Court agreed to review the question whether federal inmates may use § 2241 to raise a claim based on a statutory rule of law announced by this Court where the new law corrects prior circuit precedent that would have foreclosed relief on the claim had it been raised in the inmate's initial § 2255 proceedings. Because Mr. Fulks's petition also involves the appropriate scope of the savings clause, albeit in a context different from that presented in *Jones*, the Court should grant review and consolidate the petitions.

A. There Is a Widely Acknowledged Circuit Split Concerning the Meaning of "Inadequate or Ineffective" Under § 2255(e).

As the Eleventh Circuit observed nearly a decade ago, "[t]here is a deep and mature circuit split on the reach of the savings clause." *Bryant v. Warden, FCC Coleman-Medium*, 738 F.3d 1253, 1279 (11th Cir. 2013), *overruled by McCarthan*

v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir. 2017) (en banc). Because the availability of § 2241 review in a particular case is typically fact-specific, this split is most starkly illustrated by the different positions adopted on the issue raised in the *Jones* petition, namely, whether a prisoner may use § 2241 to challenge a conviction based on a new statutory interpretation of law where prior circuit precedent foreclosed any possibility of relief at the time of the prisoner's initial § 2255 proceedings.

Eight circuit courts of appeal—the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Ninth—have held that § 2255 is "inadequate" to test such claims. *See Bruce v. Warden Lewisburg USP*, 868 F.3d 170, 179 (3d Cir. 2017) (listing cases).[3] The Seventh Circuit, which was one of the first appellate courts to address the issue, reached its holding after determining that the term "adequacy" in § 2255(e) must be understood in light of the "essential function of habeas corpus," which is to "give a prisoner a *reasonable opportunity* to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998) (citing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (emphasis added)). Applying this rationale to the facts, the *Davenport* court held that § 2255 was "inadequate" because circuit precedent had been "so firmly against" the

[3] *Bruce* included the Eighth Circuit in its list, but that court has since overruled its prior precedent on this issue and joined the minority view, as discussed immediately below.

petitioner when he filed his initial post-conviction motion that he had no "reasonable chance" to raise his claim at that time. *Id.* at 611. Other appellate courts subsequently cited favorably to *Davenport*'s rationale and adopted the Seventh Circuit's "no-reasonable-opportunity test." *Wright v. Spaulding*, 939 F.3d 695, 702–03 (6th Cir. 2019); *see also In re Jones*, 226 F.3d 328, 333 (4th Cir. 2000) ("agree[ing] with the rationale" of *Davenport*); *cf. Alaimalo v. United States*, 645 F.3d 1042, 1047–49 (9th Cir. 2011) (petitioner "could not have raised his claim of innocence *in an effective fashion*" because circuit law squarely foreclosed his claim) (emphasis added).

A minority of circuits—the Eighth, Tenth, and Eleventh—have rejected the no-reasonable-opportunity test and precluded prisoners from challenging their convictions based on an intervening change in statutory law. *See, e.g.*, *McCarthan*, 851 F.3d at 1080. These courts reason that the savings clause "is concerned with process—ensuring the petitioner *an opportunity* to bring his argument—not with substance—guaranteeing nothing about what the opportunity promised will ultimately yield in terms of relief." *Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011); *see also Jones v. Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021), *cert. granted*, No. 21-857 (U.S. May 16, 2022) ("[T]he question is whether [petitioner] *could have raised* the argument, not whether he would have succeeded."). According to this view, "§ 2255 is not inadequate or ineffective where a petitioner had *any opportunity* to present his claim beforehand," regardless of the merits of that claim. *Jones*, 8

F.4th at 687.

B. Because this Petition Raises the Same Issue Presented in *Jones v. Hendrix* in a Different Context, Combining Review of the Petitions Will Contribute to a Just Resolution of the Circuit Split.

Fewer than three months ago, this Court granted certiorari in *Jones v. Hendrix*, which presents the question: "whether federal inmates who did not—because established circuit precedent stood firmly against them—challenge their convictions on [statutory grounds] may apply for habeas relief under § 2241 after this Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction." *Jones v. Hendrix*, 2021 WL 5864561, Petition for Writ of Certiorari, at *1 (Dec. 7, 2021).

In *Jones*, the petitioner was convicted in the Western District of Missouri of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). At the time, Eighth Circuit precedent clearly established that a conviction under § 922(g) required that the government prove only "defendant's status as a convicted felon and knowing possession of the firearm." *See Jones v. Hendrix*, 2022 WL 2824415, Br. for Petitioner at *6 (July 14, 2022) (quoting *United States v. Kind*, 194 F. 3d 900, 907 (8th Cir. 1999)). The jury "accordingly made no finding on whether Jones knew he had the relevant status when he possessed [the gun]," and Mr. Jones raised no claims in relation to that status in his initial § 2255 proceedings. *Id.* Over ten years after those proceedings had concluded, however, this Court held that § 922(g)

requires that the government prove the defendant knew both that he had a prohibited status and that he possessed a firearm. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019). Because *Rehaif* involved a new statutory rule of law, Mr. Jones could not challenge his conviction in a successive § 2255 motion and therefore filed for relief § 2241, arguing that his case fell within the scope of the § 2255(e) savings clause. Despite recognizing that Mr. Jones was "[c]aught in [a] Catch-22," the Eighth Circuit denied relief, reasoning that § 2255 was not inadequate because it had not been literally impossible for Mr. Jones to "have raised his *Rehaif*-type argument either on direct appeal or in his initial § 2255 motion." *Jones*, 8 F.4th at 687.

Here, Mr. Fulks has demonstrated that, despite prior counsel's diligence, any *Atkins* claim raised at the time of initial § 2255 proceedings would have been entirely meritless. Initial § 2255 counsel—which the district court referred to as the "dream team" of capital defense—conducted a "wide-ranging mitigation investigation" of Mr. Fulks's background that yielded "as complete and exhaustive a mitigation defense as one could reasonably expect in capital cases." *Fulks v. United States*, 875 F. Supp. 2d 535, 565–74 (D.S.C. Aug. 20, 2010) (PA050–56). However, testing conducted prior to trial returned IQ scores of 77, 78, and 79, diagnostic standards in place at that time required an IQ score of 75, and the scientific consensus that now exists around correcting IQ scores for the Flynn effect in *Atkins* cases and the clinical interpretation of IQ scores had not yet emerged. *See supra*, Statement of the Case

§ A. Thus, as six mental health experts concluded at the time, Mr. Fulks fell into the borderline range of intellectual functioning, which was "slightly above the cut" for intellectual disability. *See id.*; *see also Fulks*, 875 F. Supp. 2d at 558 (PA045). Lacking the benefit an intellectual-disability diagnosis, and faced with six adverse expert assessments that are now obsolete, prior counsel were prevented from raising an *Atkins* claim at Mr. Fulks's trial and in his § 2255 proceedings. Anything they filed on this issue would have been denied without an evidentiary hearing, and counsel would have violated ethical directives against filing frivolous claims. *See* Fed. R. Civ. P. 11(b)(2)–(3). Nevertheless, the Seventh Circuit denied Mr. Fulks § 2241 review based on a finding that he "could have" as a theoretical matter raised "substantially the same argument he brings now." *Fulks*, 4 F.4th at 591 (PA006).

Thus, the instant case is similar to *Jones* in that each petitioner established that he had no realistic chance of obtaining relief on his particular claim at the time of his initial § 2255 proceedings, yet cannot pursue relief under § 2255 now. However, the arguments presented in the *Jones* petition are, understandably, narrowly tailored to the availability of savings clause review on the basis of a new statutory rule of law. And, as Mr. Fulks's case demonstrates, the scope of the savings clause is relevant to factual scenarios that bear no resemblance to those presented in *Jones*. *See also Webster I*, 784 F.3d at 1141 (determining § 2255 was inadequate at the time of petitioner's initial § 2255 proceedings even though petitioner had in fact

litigated a different version of his intellectual-disability claim and the "new" evidence raised in his § 2241 petition predated his trial); *Purkey v. United States*, 964 F.3d 603, 615–17 (7th Cir. 2020) (rejecting argument that savings clause review was available based on initial post-conviction counsel's ineffective assistance because the petitioner had failed to show "as a practical matter" that he had no reasonable opportunity to raise those claims earlier).

Because the interpretation of "adequacy" for purposes of the savings clause should not vary depending on the facts of the case, this Court should simultaneously review Mr. Fulks's petition alongside that of Mr. Jones. By considering both cases together, the Court will be more likely to craft a standard that provides the greatest guidance to lower courts faced with petitions under § 2241.

II. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION PENDING A DECISION IN *JONES V. HENDRIX*.

Should this Court determine that it will not consider a plenary review of Mr. Fulks's petition in conjunction with *Jones*, it should grant review and hold this petition pending a decision in that case.

If *Jones* is resolved in favor of the petitioner, the Court will have rejected the unduly narrow interpretation of the savings clause applied by the Eighth, Tenth, and Eleventh Circuits, as well as the Seventh Circuit in this case. Upon such a resolution, it would be appropriate for the Court to grant Mr. Fulks's petition, order that the lower court's opinion be vacated, and remand the case for further proceedings in

light of *Jones*. Such orders are particularly appropriate when an intervening decision issues that could affect the lower court's determination. *See Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996) (explaining that GVR is appropriately exercised in light of intervening developments such as decisions of this Court).

If, on the other hand, *Jones* is resolved in favor of the government, the Court should review Mr. Fulks's petition to consider whether application of the standard adopted to the facts of this case violates the Eighth Amendment by prohibiting Mr. Fulks from obtaining judicial review of his claim that he is categorically ineligible for the death penalty. As Justice Gorsuch recognized while sitting on the Tenth Circuit, savings clause review may in some circumstances be necessary "to avoid serious constitutional questions arising from application of § 2255(h)." *Prost*, 636 F.3d at 594. Although Justice Gorsuch considered this to be an "important question," the opinion in *Prost* did not address the issue because it had not been adequately briefed. *See id.* Here, by contrast, Mr. Fulks has consistently argued that the unreachable nature of the standard applied below unconstitutionally forecloses judicial review of his claim of categorical ineligibility for death.

Furthermore, a ruling in favor of the government in *Jones* would not necessarily resolve this issue. Mr. Jones, who is not a capital prisoner, has argued that the strict savings clause interpretation applied in his case implicates the Eighth Amendment because it forecloses review on his claim that he is being imprisoned

for a non-existent offense. *Jones*, 2021 WL 5864561, at *23. But this Court has never declared that the imprisonment of an actually innocent individual violates the Eighth Amendment. By contrast, with its decision in *Atkins*, the Court indisputably imposed a "substantive restriction" on the government's power to "take the life" of an intellectually disabled defendant. *Atkins*, 536 U.S. at 321. *Moore I* further held that *current* diagnostic standards are binding in *Atkins* proceedings and that the use of outdated standards creates an "unacceptable risk" that an intellectually disabled person will be erroneously denied relief and executed. *Moore-I*, 137 S. Ct. at 1051–53. Yet imposition of the Seventh Circuit's insurmountable standard would preclude review of *Atkins* claims based on new diagnostic developments and confine the intellectual disability analysis to the diagnostic standards in place at the time of the initial § 2255 proceedings. In the case of Mr. Fulks—who the district court found proffered "extensive" evidence of his intellectual disability—this standard violates the "substantive restriction" on the Government's power to "take the life" of an intellectually disabled defendant imposed by *Atkins*. 536 U.S. at 321. Accordingly, a ruling in favor of the government in *Jones* would create an imperative that the Court consider whether savings clause review must be available where, as here, denying review runs afoul of a clear constitutional prohibition.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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