No. 22-5329

IN THE SUPREME COURT OF THE UNITED STATES

CHADRICK FULKS, PETITIONER

v.

T.J. WATSON, WARDEN

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether petitioner, whose 2008 motion to vacate his capital sentence under 28 U.S.C. 2255 previously was denied, is entitled to seek federal habeas corpus relief under the "saving clause" in 28 U.S.C. 2255(e) based on a newly raised claim that he is constitutionally ineligible for the death penalty under Atkins v. Virginia, 536 U.S. 304 (2002).

ADDITIONAL RELATED PROCEEDING

United States Supreme Court:

Fulks v. United States, No. 09A324 (Dec. 11, 2009) (Roberts, C.J., in chambers)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 4 F.4th 586. The order of the district court (Pet. App. 10-23) is unreported but is available at 2019 WL 4600210.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2021. A petition for rehearing was denied on March 11, 2022 (Pet. App. 108). 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, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, petitioner was convicted of carjacking resulting in death, in violation of 18 U.S.C. 2119(3); kidnapping resulting in death, in violation of 18 U.S.C. 1201; and six other offenses. Pet. App. 10. After penalty-phase proceedings under the Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959, as amended (18 U.S.C. 3591 et seq.), the jury unanimously recommended that petitioner receive a capital sentence on both death-resulting counts, and the district court imposed such sentences. Pet. App. 10. The court also sentenced petitioner to 744 months of imprisonment, to run consecutively to the two death sentences, on his six noncapital convictions, to be followed by five years of supervised release. Ibid.; 02-cr-992 D. Ct. Doc. 853, at 2-3 (Dec. 20, 2004). The court of appeals affirmed, 454 F.3d 410, and this Court denied certiorari, 551 U.S. 1147. Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court denied. Pet. App. 28-107. The court of appeals affirmed, 683 F.3d 512, and this Court denied certiorari, 571 U.S. 941.

Petitioner subsequently filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Southern District of Indiana,

where he was confined. Pet. App. 113-191. The district court denied that petition, id. at 10-23, and the court of appeals affirmed, id. at 1-9.

1. In November 2002, petitioner and Brandon Basham escaped from a Kentucky jail and committed a string of crimes in several States. 454 F.3d at 414-417. In Kentucky, they carjacked a man at knifepoint, tied him to a tree, and stole his truck, id. at 414; in Indiana, they broke into a home and stole several firearms, a ring, and some checks, id. at 415; in Ohio, they wrote bad checks and stole a purse and cellphone from a car, ibid.; and in South Carolina, they broke into cars, stole purses, and shot at a man who stumbled upon them while they were burglarizing his son's residence, id. at 416.

On November 11, 2002, petitioner and Basham went to a shopping mall near Huntington, West Virginia, intending to break into cars and steal purses. 454 F.3d at 415. While there, they carjacked and kidnapped Samantha Burns, a 19-year-old college student. Ibid. After Basham announced that he wanted to rape Burns, he and petitioner drove Burns to a secluded area by the Ohio River, where they ultimately killed her and hid her body; they then bought gasoline and set fire to Burns's car to remove any fingerprints. Id. at 415-416.

On November 14, 2002, petitioner and Basham carjacked and kidnapped Alice Donovan in the parking lot of a Wal-Mart in Conway, South Carolina, and drove her to North Carolina. 454 F.3d at 416.

After taking turns raping her, they returned to South Carolina, where they killed her and left her body in a wooded area. Id. at 416-417.

Police arrested Basham on November 17, 2002, after a failed attempt to carjack a woman and her 15-year-old daughter in Ashland, Kentucky. 454 F.3d at 417. Petitioner managed to escape, leading police on a highway chase reaching speeds of 130 miles per hour, but was eventually arrested a few days later at his brother's home in Indiana. Ibid.

A grand jury in the District of South Carolina charged petitioner with carjacking resulting in Donovan's death, in violation of 18 U.S.C. 2119; kidnapping resulting in Donovan's death, in violation of 18 U.S.C. 1201; transporting a stolen vehicle in interstate commerce, in violation of 18 U.S.C. 2312; conspiring to commit carjacking, kidnapping, and other crimes, in violation of 18 U.S.C. 371; conspiring to use firearms in furtherance of a crime of violence, in violation of 18 U.S.C. 924(o); using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A); possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); and possessing stolen firearms, in violation of 18 U.S.C. 922(j). 454 F.3d at 417 & n.3. The superseding indictment set forth factual prerequisites for capital punishment on the first two counts, and the government filed a notice of intent to seek that sentence on those counts. Id. at 417.

2. Petitioner pleaded guilty to all of the counts in the superseding indictment without a plea agreement. 454 F.3d at 418. At the penalty-phase trial in 2004, petitioner's defense counsel -- including a Cornell Law School professor and founder of the Cornell Death Penalty Project, an experienced federal public defender, and "an array of pro bono lawyers and law students," Pet. App. 37; see id. at 37-38 -- presented "as complete and exhaustive a mitigation defense as one could reasonably expect in capital cases," id. at 52. "Trial counsel painted a compelling and empathetic picture of a young [petitioner] growing 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." Ibid.

The defense team hired or consulted at least 11 experts when "developing its mental health case in mitigation." Pet. App. 43. And the experts who testified at trial "fully explained," among other things, petitioner's "borderline range of intelligence." Id. at 45. Dr. James Evans "testified that [petitioner] suffers from borderline intelligence, ranging from [an IQ of] 75-79, moderate brain impairment, and cognitive impairment." Ibid. Dr. Ruben Gur "explained that [petitioner] 'is clearly not a bright individual' and that his I.Q. test 'comes up on the borderline, slightly above the cut of retardation. But a lot of the measures that go into that fruit salad that make up IQ are below that, well

below that threshold.'" Ibid. (brackets and citation omitted). And Dr. Arlene Andrews "testified that having an I.Q. above 70 actually makes people with brain damage from prenatal exposure more susceptible to breaking the law, being unemployable, being kicked out of school, and other problems." Ibid.

Petitioner did not, however, argue that he was ineligible for the death penalty based on an intellectual disability (then known as mental retardation) under Atkins v. Virginia, 536 U.S. 304 (2002). And the testifying experts did not indicate that petitioner was intellectually disabled. C.A. Supp. App. 5 ("I am not saying he is retarded") (capitalization altered); id. at 7 (observing that petitioner had "borderline intellectual functioning" that "in terms of an IQ score, would have been a 75 to 79 range") (capitalization altered); id. at 9 (observing that petitioner was "in the borderline level of intellectual functioning" and had IQ between 77 and 79) (capitalization omitted). In closing argument, petitioner's counsel told the jury that there was "not a shred of contradiction that [petitioner] has an IQ between 77 and 79," which was "just the point above the level of mental retardation," id. at 13 (capitalization altered), and repeatedly told the jury that petitioner was "not mentally retarded," id. at 15 (capitalization omitted); see id. at 14 ("He is not retarded, but he is close * * * . If a person's IQ is 70 or less, they are retarded. [Petitioner]'s IQ is between 77 and 79.") (capitalization altered).

The jury unanimously recommended that petitioner receive a capital sentence on each capital count. 454 F.3d at 420. The district court accordingly imposed capital sentences on those counts, along with a total of 744 months of imprisonment on the remaining six counts, to be served consecutive to the capital sentences. Ibid. The Fourth Circuit affirmed, id. at 420-438, and this Court denied certiorari, 551 U.S. 1147.

3. In 2008, petitioner moved to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. See Pet. App. 40-41. Petitioner's motion asserted 33 claims, including an allegation that his trial counsel had rendered ineffective assistance by failing to call additional mental health experts as part of the mitigation case. See id. at 42-47. Petitioner did not raise an intellectual disability claim under Atkins or assert that his attorneys were ineffective for failing to raise such a claim at trial. See id. at 43-100.

The district court denied petitioner's Section 2255 motion but issued a certificate of appealability. Pet. App. 100. The Fourth Circuit affirmed the denial of Section 2255 relief, 683 F.3d at 515-525, and this Court denied certiorari, 571 U.S. 941. In 2016, the Fourth Circuit authorized petitioner to file a second Section 2255 motion asserting that his convictions under 18 U.S.C. 924(c) and (o) are invalid in light of Johnson v. United States, 576 U.S. 591 (2015), and that he is therefore entitled to a full resentencing (including on the capital counts). 16-9 C.A. Doc.

19-1 (June 17, 2016); see 02-cr-992 D. Ct. Doc. 1618 (June 17, 2016). That motion remains pending in the South Carolina district court.

4. In 2015, petitioner filed a pro se petition for a writ of habeas corpus in the Southern District of Indiana, where he is confined. 15-cv-33 D. Ct. Doc. 1 (Jan. 29, 2015). In 2019, after he was appointed counsel, petitioner filed an amended petition for a writ of habeas corpus in which he argued for the first time that he is intellectually disabled and was therefore ineligible for a capital sentence under Atkins. Pet. App. 113-175. In support of his claim, petitioner attached a report from a neuropsychologist, Barry M. Crown, who had concluded that petitioner was intellectually disabled based on an April 2018 examination and interview. C.A. App. 470-478.

The district court denied the habeas petition. Pet. App. 10-23. The court determined that petitioner was not authorized to seek habeas relief because he could not meet the requirements of the "saving clause" in 28 U.S.C. 2255(e), whereby a federal prisoner may avoid Section 2255's general preclusion of habeas petitions if he shows that "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. 2255(e). The court noted that the Seventh Circuit's decision in In re Davenport, 147 F.3d 605 (1998), had held that the Section 2255 motion remedy could be inadequate or ineffective in the case of a prisoner whose claim relies on a "new case of

statutory interpretation that is retroactive." Pet. App. 17. But the district court observed that petitioner's claims were based on this Court's decisions in Hall v. Florida, 572 U.S. 701 (2014), Moore v. Texas, 137 S. Ct. 1039 (2017) (Moore I), and Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam) (Moore II), all of which "involve[d] Eighth Amendment claims, not statutory ones." Pet. App. 17.

The district court also rejected petitioner's argument that updates to the medical community's diagnostic manuals regarding intellectual disability were new factual developments that would satisfy the saving clause. Pet. App. 18. The court noted that the Seventh Circuit's decision in Webster v. Daniels, 784 F.3d 1123 (2015) (en banc), allowed application of the saving clause for certain evidentiary claims challenging a capital sentence -- namely, claims that the evidence "existed at the time of the original proceedings," was "unavailable at the time of trial despite diligent efforts to obtain it," and "show[ed] that the petitioner is constitutionally ineligible for the penalty he received." Pet. App. 19 (quoting Webster, 784 F.3d at 1140 n.9). But the court reasoned that the updates to the diagnostic manuals failed Webster's "critical" requirement of having "'existed before the time of the trial.'" Ibid. (citation omitted).

Finally, the district court determined that the saving clause did not extend beyond Davenport or Webster in a manner that would encompass petitioner's claim. Pet. App. 20-21. The court found

that petitioner had not identified a "structural problem with § 2255 that prevented him from raising his claims during his [initial] § 2255 proceedings." Id. at 20. The court rejected petitioner's contention that his Atkins claim was not "'viable'" before this Court's more recent Eighth Amendment cases and the updates to the diagnostic manuals, explaining that the saving clause "focuses on whether a prisoner had a reasonable opportunity to raise a claim, not whether that claim would have been successful." Ibid. (citation omitted).

5. The Seventh Circuit affirmed. Pet. App. 1-9. Like the district court, the court of appeals determined (Pet. App. 6) that petitioner could not "satisfy the saving clause's requirements," explaining that it had previously "reached the same conclusion on similar facts" in Bourgeois v. Watson, 977 F.3d 620 (7th Cir.), cert. denied, 141 S. Ct. 507 (2020) (No. 20-6500). The court observed that although petitioner could have raised an Atkins claim in his initial Section 2255 motion in 2008, he did not do so, "ostensibly because he believed he would not have prevailed under the legal landscape and clinical diagnostic standards in effect at that time." Pet. App. 6. And the court reasoned that "[t]he probability that [petitioner] would not have prevailed on his Atkins claim in 2008 does not mean or show that § 2255 was inadequate or ineffective" within the meaning of the saving clause. Ibid.

The court of appeals determined that legal developments and updates to the diagnostic manuals since petitioner's initial Section 2255 motion, "which may now provide [petitioner] a stronger basis to prove an intellectual disability," did "not expose any structural defect in § 2255." Pet. App. 6. The court reasoned that "[o]n the legal front, Hall, Moore I, and Moore II did not alter the law of intellectual disability to such a great extent that the remedy by a § 2255 motion was inadequate or ineffective to test the legality of [petitioner's] death sentence at the time he filed his petition in 2008." Ibid. And the court explained that although petitioner "may have a marginally stronger case of proving intellectual disability" under the updated diagnostic standards, those updates "fail to reveal anything inadequate or ineffective about § 2255 that made it impossible for [petitioner] to pursue an Atkins claim in his initial postconviction motion." Id. at 7.

The Seventh Circuit rejected petitioner's argument that his Atkins claim was "so squarely foreclosed by Fourth Circuit precedent that it would have been impossible or altogether futile for him to raise the claim" in 2008, explaining that the Fourth Circuit decisions that petitioner cited had not foreclosed "arguments for adapting the legal framework to include updated clinical standards." Pet. App. 7. The court of appeals also observed that in United States v. Roane, 378 F.3d 382 (2004), cert. denied, 546 U.S. 810 (2005) (Nos. 04-1136, 04-8850, and 04-8856),

the Fourth Circuit had in fact "show[ed] amenability to an argument that [petitioner], with an IQ score of 75, is * * * intellectually disabled." Pet. App. 7.

Finally, the Seventh Circuit rejected petitioner's reliance on Madison v. Alabama, 139 S. Ct. 718 (2019), which clarified the standard applicable to executing an individual who lacks a rational understanding of the reasons for his execution. Pet. App. 8. The court of appeals explained that claims of mental incompetence to be executed, of the type addressed in Madison, were distinct from Atkins-based claims of mental disability of the type that petitioner was raising. Ibid. And the court explained that Madison had not announced a "newly recognized functional application of the Eighth Amendment" that would apply to petitioner's Atkins claim. Ibid.

ARGUMENT

Petitioner requests (Pet. 22, 25-30) that this Court either grant certiorari and consider his case alongside Jones v. Hendrix, No. 21-857 (argued Nov. 1, 2022), or alternatively that the Court hold the petition pending its decision in Jones. Neither course is appropriate. Merits briefing and oral argument already have been completed in Jones, and the question presented in that case is substantially different from the one presented here. Moreover, petitioner would not be entitled to relief under any of the positions set forth by the parties and court-appointed amicus in Jones. And at all events, the court of appeals correctly

determined that petitioner is not entitled to seek habeas relief under the saving clause on his constitutional claim, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that petitioner cannot satisfy the requirements of Section 2255(e)'s saving clause.

a. Congress enacted Section 2255 in 1948 "to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts" by creating a motion remedy, to be brought in the sentencing court, to address postconviction challenges by federal prisoners in lieu of a petition for habeas corpus in the district of confinement. United States v. Hayman, 342 U.S. 205, 219 (1952); see id. at 210-219 (recounting enactment history). As a general rule, a prisoner authorized to seek relief by Section 2255 motion may not instead pursue a habeas remedy. 28 U.S.C. 2255(e). Section 2255(e)'s saving clause, however, allows such a prisoner to pursue habeas relief if he can show that "the remedy by [Section 2255] motion is inadequate or ineffective to test the legality of his detention." Ibid. As the government has explained in Jones, because the Section 2255 motion remedy "afford[s] the same rights" as habeas, Hayman, 342 U.S. at 219, the Section 2255 motion remedy may be inadequate or ineffective if it would preclude consideration of a prisoner's claim that would

be cognizable in habeas. Gov't Br. at 13-18, Jones, supra (No. 21-857).

As relevant here, Section 2255 precludes consideration of certain claims raised by a prisoner who already has filed an initial Section 2255 motion. Under Section 2255(h), any second or subsequent Section 2255 motion must be certified by the court of appeals to contain (1) "newly discovered evidence" strongly indicative of factual innocence or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by [this] Court, that was previously unavailable." 28 U.S.C. 2255(h). A second or subsequent Section 2255 motion raising a pure statutory claim thus is categorically barred. See ibid. But because Congress has not indicated that it has withdrawn the traditional habeas remedy for compelling statutory claims of innocence based on subsequent changes in the law, the Section 2255 motion remedy may be "inadequate or ineffective" under the saving clause -- and habeas relief may therefore be available -- when an intervening statutory decision of this Court establishes the prisoner's actual innocence. See Gov't Br. at 28-32, Jones, supra (No. 21-857). But habeas relief under the saving clause generally is unavailable for such a prisoner to raise constitutional claims that do not satisfy the requirements set forth in Section 2255(h)(2), because such claims are barred by parallel limits on the habeas remedy. See id. at 25-28.

b. The court of appeals correctly determined that petitioner's constitutional intellectual-disability claim cannot satisfy the requirements of the saving clause. See Pet. App. 6-7. As the court observed, petitioner acknowledged that his constitutional claim "did not meet the narrow requirements" in Section 2255(h) to file a second or subsequent Section 2255 motion raising that claim. Id. at 6. Accordingly, petitioner cannot invoke the saving clause to circumvent the Section 2255 framework and seek relief for that constitutional claim under habeas instead. See Gov't Br. at 25-28, Jones, supra (No. 21-857).

Indeed, as the court of appeals observed, the Section 2255 motion remedy was not inadequate or ineffective even when petitioner first sought postconviction relief under Section 2255. As the court explained, this Court had decided Atkins v. Virginia, 536 U.S. 304 (2002), "years before" petitioner filed his initial Section 2255 motion in 2008, and he thus "could have raised substantially the same argument that he brings now -- that he is intellectually disabled -- in his initial § 2255" motion. Pet. App. 6. The court of appeals further observed that petitioner also could have raised an Atkins claim at his penalty-phase trial in 2004, but -- despite being represented by skilled and experienced death-penalty counsel -- chose not to do so, presumably because the defense experts who testified about his intellectual abilities agreed that petitioner was not intellectually disabled. See C.A. Supp. App. 5, 7, 9-11.

Contrary to petitioner's contention (Pet. 7-8, 11), the fact that this Court had not yet decided Hall v. Florida, 572 U.S. 701 (2014); Moore v. Texas, 137 S. Ct. 1039 (2017) (Moore I); or Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam) (Moore II), at the time of the initial Section 2255 proceedings did not render the Section 2255 motion remedy "inadequate or ineffective" to test the legality of his capital sentence, 28 U.S.C. 2255(e). As the Seventh Circuit explained, although Atkins "did not prescribe a specific test for determining when a person is intellectually disabled, it did rely on clinical definitions requiring both subaverage intellectual functioning and significant limitations in adaptive skills that manifest before age 18 -- the same three requirements governing the standard today." Pet. App. 6 (citing Atkins, 536 U.S. at 318). Hall, Moore I, and Moore II simply "further elaborated on the measurements of intellectual function and the evaluation of adaptive deficits." Ibid. (quoting Bourgeois v. Watson, 977 F.3d 620, 636 (7th Cir.), cert. denied, 141 S. Ct. 507 (2020) (No. 20-6500)). As the court of appeals explained, "[w]ith or without that trio [of cases], [petitioner] could have raised the same Atkins claim in his initial § 2255 motion." Ibid.

Nor is petitioner correct in contending (Pet. 8-10, 26) that intervening updates to the diagnostic standards for intellectual disability render Section 2255 "inadequate or ineffective." Such updates do not effect a change to any governing law, and petitioner has not contended that those updates constitute newly discovered

evidence to support a factual claim under Section 2255(h)(1). See Pet. App. 6. As the court of appeals explained, "these recent updates to the [diagnostic manuals] fail to reveal anything inadequate or ineffective about § 2255 that made it impossible for [petitioner] to pursue an Atkins claim in his initial postconviction motion." Id. at 7. Although petitioner "may have [had] a marginally stronger case of proving intellectual disability under today's standards," ibid., the saving clause "does not apply * * * every time the medical community updates its diagnostic standards," Bourgeois, 977 F.3d at 636. "Were that the case, [courts] would truly be facing 'a never-ending series of reviews and re-reviews.'" Ibid. (citation omitted).

Moreover, at least as applied to petitioner's circumstances, the updated standards are not the sort of clear break with the past that petitioner's argument might suggest them to be. Contrary to petitioner's suggestion (Pet. 9), the pre-2012 diagnostic manuals did not treat "intellectual-disability evaluations" as rigid "actuarial determinations." Instead, the 2000 version of the Diagnostic and Statistical Manual (DSM) required assessment of both "intellectual functioning" and "adaptive functioning," emphasizing that "[i]mpairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with" intellectual disability. C.A. Supp. App. 19-20; see Hall, 572 U.S. at 712 (explaining that courts must not rely on quantitative IQ scores to the exclusion of qualitative evidence of

intellectual disability, such as adaptive functioning). Furthermore, the 2000 version of the DSM did not employ a hard IQ cutoff, but instead stated that "it is possible to diagnose" intellectual disability "in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." C.A. Supp. App. 19-20. Additionally, a 2007 "User's Guide" to the American Association on Intellectual and Developmental Disabilities (AAIDD) manual specifically emphasized the "importance of clinical judgment" in diagnosing intellectual disability. Id. at 44.

Although petitioner's non-adjusted IQ score was above the 70-75 range that the DSM identified as potentially still indicative of intellectual disability, he is incorrect to suggest (Pet. 9) that the diagnostic manuals did not recognize the "Flynn Effect" adjustment before 2012. In fact, whereas the 2012 and 2013 manuals simply state that the Flynn Effect "may affect test scores" and "recommend" correction for the Flynn Effect, C.A. App. 497, 524, the 2007 AAIDD User's Guide used stronger language, instructing that "the clinician needs to * * * take into consideration the Flynn Effect * * * when estimating an individual's true IQ score," C.A. Supp. App. 47 (emphasis added). In any event, because only one of petitioner's three IQ scores falls within the standard error of measurement for intellectual disability even when adjusted for the Flynn Effect, that adjustment does not provide a substantial basis for a claim of intellectual disability. See Pet. App. 7.

2. Contrary to petitioner's contention (Pet. 22-25), this case does not implicate any conflict in the courts of appeals. The circuit conflict that petitioner identifies involves the distinct question whether the saving clause is available where a defendant who has unsuccessfully sought relief under 28 U.S.C. 2255 seeks relief based on an intervening decision of statutory interpretation under which his conduct is now recognized not to have been subject to the criminal punishment that he received. This Court has granted certiorari in Jones, supra (No. 21-857), to address the saving clause's availability for such statutory claims.

This case, by contrast, does not involve a new statutory interpretation. Instead, it presents the question whether a federal prisoner may rely on the saving clause to raise a constitutional claim for the first time in a habeas petition based on purportedly intervening legal and factual developments after he filed his initial Section 2255 motion that, at most, make his constitutional claim marginally stronger. Petitioner has not identified any decision from any court of appeals -- and the government is not aware of one -- that would apply the saving clause in that situation.

Nor does petitioner provide a sound basis to hold this petition pending the Court's decision in Jones. Not only does Jones present a different question, but petitioner would not be entitled to saving-clause relief on his constitutional Atkins

claim under any of the positions advocated by the parties, or the court-appointed amicus, in their respective briefs in Jones. See Pet. Reply Br. at 13, Jones, supra (No. 21-857) ("Jones interprets the saving clause to allow a claim challenging the legality of a prisoner's detention to proceed in habeas when binding precedent foreclosed the claim at the time of the prisoner's § 2255 motion but would no longer foreclose the claim under present law."); Gov't Br. at 27-28, Jones, supra (No. 21-857) ("[T]he Section 2255 remedy is not 'inadequate or ineffective' when it bars second or subsequent factual and constitutional claims not permitted under Section 2255(h), because such claims would not be cognizable in habeas either."); Brief for Court-Appointed Amicus Curiae at 26, Jones, supra (No. 21-857) ("The logical inference from Congress's inclusion of those two exceptions [in Section 2255(h)] is that they are the only exceptions, and that an inmate who previously filed a 2255 motion cannot pursue a second collateral attack for any other reason.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2022

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* The Solicitor General is recused in this case.