OCTOBER TERM 2021

No. 22-5329

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---

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ARGUMENT

Mr. Fulks's petition asks that this Court consider whether an intellectually-disabled capital prisoner may be put to death without ever having received judicial review of his claim that his execution will violate the Eighth Amendment. The government argues two points in response. First, it opposes Mr. Fulks's request that the Court either join his case with or hold it pending a decision in *Jones v. Hendrix*, No. 21-857 (argued Nov. 1, 2022), claiming the two cases are inapposite. Second, the government argues that the decision of the court of appeals below denying Mr. Fulks judicial review under the 28 U.S.C. § 2255(e) "savings clause" was correct and does not conflict with any decision of another court of appeals. The government errs on all counts.

I. THE QUESTIONS PRESENTED IN THIS CASE AND *JONES* ARE SUFFICIENTLY SIMILAR TO WARRANT A GRANT OF CERTIORARI.

According to the government, this case should not be joined with *Jones* because there, the Court's review is strictly limited to the "distinct question whether the saving clause is available" for claims "based on an intervening decision of *statutory* interpretation." BIO 19 (emphasis in original). But the minority view of the savings clause newly adopted by the Eighth Circuit in *Jones* is in no way so limited. Rather, according to that view—long held by only the Tenth and Eleventh Circuits—the saving clause permits a prisoner to bring a claim under 28 U.S.C. § 2241 *only* if the claim would previously have been completely precluded from

review under § 2255. *See, e.g.*, *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1086 (11th Cir. 2017) (en banc); *accord Jones v. Hendrix*, 8 F.4th 683, 687 (8th Cir. 2021), *cert. granted*, No. 21-857, 2022 WL 1528372 (U.S. May 16, 2022); *Prost v. Anderson*, 636 F.3d 578, 584–85 (10th Cir. 2011). Thus, as summarized by the petitioner in *Jones*, the question under review is whether the savings clause is limited to just two circumstances: "(1) where the sentencing court has dissolved, thus making § 2255 relief impossible[;] and (2) where the prisoner has been denied good time credits or parole release." *Jones v. Hendrix*, No. 21-857, Pet. Br., 2022 WL 2824415, at *30 (U.S. filed July 1, 2022).

Nor are the arguments of the parties in *Jones* and here "substantially different," as the government maintains. BIO 19. Mr. Jones has argued that he is entitled to review of his claim because he did not have "a meaningful opportunity to collaterally challenge it" in his initial § 2555 motion, and he has specifically urged the Court to reject the "Eighth Circuit's narrow interpretation of the saving clause" in favor of a "broader reading." *Jones*, Pet. Br., 2022 WL 2824415, at *45, 47. Mr. Fulks raises precisely the same argument, albeit in a different factual context. Meanwhile, in both *Jones* and in this case, the respondent[1] has argued the petitioner

[1] After certiorari was granted in *Jones*, the Solicitor General advised it would not defend the rationale of the decision below and an amicus curiae was appointed to do so. *See Jones v. Hendrix*, No. 21-857, Br. for Court-Appointed Amicus Curiae 1 n. 1 (U.S. filed Sept. 12, 2022).

could have raised his claim in his initial § 2255 motion, and that he now seeks to use § 2241 to perform an impermissible end-run around the statutory limits of § 2255(h). *See, e.g.*, *Jones*, Br. for Court-Appointed Amicus Curiae 26 ("logical inference" from § 2255(h) is that the two exceptions identified therein "are the *only* exceptions, and that an inmate who previously filed a 2255 motion cannot pursue a second collateral attack for any other reason") (emphasis in original); BIO 15 (savings clause "is unavailable for . . . a prisoner to raise constitutional claims that do not satisfy the requirements set forth in Section 2255(h)(2)").

In short, contrary to the government's position, the questions presented in this case and *Jones* are "substantially" similar and it makes sense to consider them together. *Cf.* BIO 12. At a minimum, the questions are sufficiently similar to justify Mr. Fulks's request that the Court grant certiorari and hold his petition pending the resolution of *Jones*. If *Jones* is resolved in favor of the petitioner, a remand will likely be appropriate. Otherwise, the Court should review Mr. Fulks's unique claim that denying savings clause review on the particular facts presented here raises serious constitutional concerns because it creates an "unacceptable risk," that intellectually disabled defendants will be unconstitutionally executed. Pet. 3 (quoting *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017)).

II. THE DECISION BELOW WAS ERRONEOUS AND CONFLICTS WITH THE SAVINGS CLAUSE STANDARD APPLIED BY THE MAJORITY OF CIRCUIT COURTS OF APPEAL.

Per the government, the decision below correctly held that, because Mr. Fulks's claim "did not meet the narrow requirements" of § 2255(h), he "cannot invoke the saving clause to circumvent the [§] 2255 framework." BIO 15. Yet in *Jones*, the government argued that a petitioner may be entitled to § 2241 review of a claim based on a new rule of statutory interpretation, notwithstanding the Eighth Circuit's conclusion that "Jones's proposed interpretation of the saving clause would work an end run around [§ 2255(h)'s] limitation[s] by rewriting § 2255(h)(2) to remove the word 'constitutional.'" *Jones*, 8 F.4th at 688. The government explained its position in *Jones* on the ground that "[n]othing in AEDPA justifies an inference that Congress silently repealed the traditional habeas remedy for federal prisoners who have been imprisoned for conduct that Congress did not criminalize." *Jones v. Hendrix*, No. 21-857, Br. for Resp., 2022 WL 3327457, at *28 (U.S. filed Aug. 1, 2022). But the same logic applies here, as "[n]othing in AEDPA justifies an inference that Congress" intended to preclude review for claims involving a categorical exemption from execution such as the one presented by Mr. Fulks. To the contrary, "[a]t the time AEDPA was under consideration, the Supreme Court had not yet held it unconstitutional to execute either an intellectually disabled person (*Atkins* [*v. Virginia*, 536 U.S. 304 (2002)]) or a minor (*Roper v. Simmons*, 543 U.S.

551[] (2005)).” *Webster v. Daniels*, 784 F.3d 1123, 1138 (7th Cir. 2015) (en banc). Hence, as the Seventh Circuit recognized in *Webster*, the exclusion from review of cases such as that of Mr. Fulks “is not one that Congress could have contemplated” in passing AEDPA. *Id.* This fact, in turn, “supports the conclusion that the narrow set of cases presenting issues of constitutional ineligibility for execution is a[] lacuna in the [§ 2255] statute,” *id.*, not an expression of “a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open,” *Jones*, No. 21-857, Br. for Resp., 2022 WL 3327457, at *28-29 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Because the government offers no reasoned explanation for supporting a supposed “end run” around § 2255(h) in *Jones*, but not doing so here, its defense of the decision below is meritless.

The government also defends the decision below by arguing that the diagnostic changes relied upon by Mr. Fulks did not meaningfully alter his claim of intellectual disability. BIO 17–18. But neither of the government’s supporting examples withstands scrutiny.

First, the government denies that the pre-2012 standards imposed a hard IQ cutoff, citing the fact that the 2000 version of the Diagnostic and Statistical Manual (“DSM-IV-TR”) allowed for a statistical margin of error and contained an adaptive behavior requirement. Yet the very language quoted by the government for support *imposes a hard IQ cutoff* of 75. BIO 18 (observing that DSM-IV-TR allowed for an

intellectual-disability diagnosis "in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior"). By contrast, the DSM-5 mandates that deficits in intellectual functioning be assessed clinically and declares hard cutoffs of any type to be diagnostically inappropriate. PA214. Similarly, while the 2007 User's Guide to the American Association on Intellectual and Developmental Disabilities ("AAIDD") manual mentions the "importance of clinical judgment" in diagnosing intellectual disability, *see* BIO 18, it was not until 2012 that the organization proclaimed that "[a] fixed cutoff for ID is not psychometrically justifiable," *see* PA221.

Second, the government seeks to minimize the fact that only the AAIDD, and not the DSM, acknowledged the Flynn Effect prior to 2012. In its decision below, however, the Seventh Circuit found that "*[u]nder the DSM–5*, . . . Fulks's Flynn-adjusted IQ scores of 75, 76, and 77 could satisfy the first prong of showing intellectual disability." PA7 (emphasis added). The court's reliance on the DSM-5's Flynn Effect requirement alone highlights the importance of *both* organizations having incorporated that requirement into their manuals, which did not occur until 2013, when the DSM-5 was issued. The government also ignores that it was not until 2015 that the AAIDD declared that "[a] consensus" regarding the Flynn Effect had emerged among "the professional and scientific community" and that Flynn correction "is now considered best or standard practice." PA200. The Seventh

Circuit's finding that Mr. Fulks's Flynn-adjusted scores could satisfy the first prong of the intellectual-disability diagnosis also refutes the government's erroneous assertion that "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." BIO 18. Again, scores above 75 may also qualify, given that current diagnostic standards have rejected fixed cutoff points. Additionally, as explained in Mr. Fulks's initial petition, the slight increases on the tests yielding Flynn-adjusted scores of 76 and 77 are explained by the practice effect, meaning all three scores satisfy prong one. Pet. 14.

In addition to defending the substance of the holding below, the government contends that the decision did not conflict with that of any other appellate court. The government supports this argument, first, by again misstating the scope of the issue presented in *Jones*, in which all parties have acknowledged a circuit split over the scope of § 2241. BIO 19. This argument fails for the reasons identified above, as well as those articulated in Mr. Fulks's petition. Pet. 22–25.

Second, the government posits that no court of appeals has ever permitted a petitioner to use § 2241 to bring a claim that could have technically been brought in his initial § 2255, but that relies on intervening developments making the claim "marginally stronger." BIO 19. However, the legal and diagnostic changes relied

upon by Mr. Fulks did not merely "marginally" improve his claim. As the government acknowledges, at the time of Mr. Fulks's trial, six mental health experts concluded—based on the then-applicable standards—that Mr. Fulks fell into the borderline range of intellectual functioning, but was "slightly above the cut" for intellectual disability. *Id.* at 5–6. Absent a diagnosis of intellectual disability from a mental health expert, an *Atkins* claim was patently unviable. *See* Pet. 27. By contrast, applying the most recent diagnostic standards, as required under this Court's 2017 holding in *Moore v. Texas*, *supra*, experienced clinical and forensic neuropsychologist Barry Crown diagnosed Mr. Fulks as intellectually disabled. *See* PA164–65. This diagnosis changed Mr. Fulks's claim of intellectual disability from one that would have been frivolous to one that the district court below found to be supported by "extensive evidence." PA10.

Furthermore, the government is wrong in asserting that no other court has allowed for savings clause review based on intervening changes that "at most" strengthened a claim that could have been asserted in the petitioner's initial § 2255 motion. BIO 19. In fact, in *Webster*, the court held that § 2241 review was appropriate even though Mr. Webster not only *could have* previously litigated his intellectual-disability claim, but had actually done so, albeit without some later-discovered records from the Social Security Administration. 784 F.3d at 1141. Notably, both the district court and a three-judge appellate panel had denied savings

clause review on the ground that the claim had already been adjudicated. *See Webster v. Caraway*, 761 F.3d 764 (7th Cir.), *reh'g en banc granted, opinion vacated*, 769 F.3d 1194 (7th Cir. 2014). But the en banc court reversed, holding that the petitioner had not previously had a reasonable opportunity to raise "the particular" *Atkins* claim he presented in his § 2241 petition. *Webster*, 784 F.3d at 1141; *see id.* at 1148 (Easterbrook, J., dissenting) (so characterizing the majority's approach). The court then remanded for a merits determination on Mr. Webster's claim, noting that the lower court would need to assess, inter alia, "the significance of the [new] records," as "there was a good deal of evidence about intellectual disability at the trial." *Id.* at 1142. Hence, whether or not the intervening development on which the petitioner relied rendered his claim only "marginally stronger" was not determinative of whether he was entitled to savings clause review. The same is true here.

The fact that the Seventh Circuit decided both *Webster* and the decision below also supports Mr. Fulks's position that this case implicates the same circuit split at play in *Jones*. Specifically, the irreconcilable nature of these two cases highlights that, just as the Eighth Circuit did in *Jones*, the Seventh Circuit has newly adopted the minority view that § 2241 review is available only in circumstances in which it was *literally impossible* for a petitioner to have raised his claim in his initial § 2255 motion. *See Jones*, 8 F.4th at 687 (agreeing "with the Tenth and Eleventh Circuits"

that "§ 2255 is not inadequate or ineffective where a petitioner had *any opportunity* to present his claim beforehand" (emphasis added)).

As explained in Mr. Fulks's petition, the Seventh Circuit was the first of several appellate courts to hold that the scope of the savings clause must be understood in light of the "essential function of habeas corpus," which is to provide a prisoner a "reasonable opportunity" to challenge his conviction and sentence. *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998). Applying this standard, the *Davenport* court found § 2241 appropriate for a claim based on an intervening change in statutory interpretation. Likewise, as already mentioned, the court found § 2241 review appropriate in *Webster* because the petitioner had not previously had a reasonable opportunity to raise the precise *Atkins* claim he presented in his § 2241 petition. The Seventh Circuit again invoked the no-reasonable-opportunity standard in *Purkey v. United States*, 964 F.3d 603, 615–17 (7th Cir. 2020), in which it rejected an argument that savings clause review was available based on initial post-conviction counsel's ineffective assistance, reasoning that the evidence supporting petitioner's § 2241 claims had been readily "apparent" as of his § 2255 proceedings and he therefore failed to show "as a practical matter" he had no reasonable opportunity to raise them earlier.

Although the particulars supporting the holding in each of these cases varied, the Seventh Circuit affirmed in each that the concern was whether the petitioner had

previously had a *reasonable opportunity* to present the *particular* claim being raised via § 2241. In none of the cases did the court require a showing that it was *literally impossible* to raise the claim earlier. To the contrary, in *Davenport*, the court affirmatively rejected such a standard, explaining that the law was "so firmly against" the petitioner at the time of his first § 2255 motion that "[i]t would just clog the judicial pipes to require defendants . . . to include challenges to settled law in their briefs on appeal and in postconviction filings." 147 F.3d at 610.

Yet the standard began to change with the Seventh Circuit's decision in *Bourgeois v. Watson*, 977 F.3d 620 (7th Cir. 2020), another case in which the court denied savings clause review of an *Atkins* claim. There, the petitioner re-raised a previously-adjudicated claim of intellectual disability and argued that § 2241 review was appropriate because the standards employed by his § 2255 court in evaluating the claim had since been rejected by this Court in *Moore*. *Id.* at 635–39. The Seventh Circuit denied the argument on the ground that Mr. Bourgeois had already raised *an* intellectual-disability claim under § 2255, ignoring that, like Mr. Webster, Mr. Bourgeois had not had a reasonable opportunity to raise the "particular" *Atkins* claim he raised in his § 2241 petition. The Seventh Circuit then relied on *Bourgeois* to deny § 2241 review to Mr. Fulks, again dismissing the similarities with *Webster* and holding the savings clause inapplicable because Mr. Fulks "could have" as a theoretical matter raised "substantially the same argument he brings now." PA6.

There is no justifiable explanation for the Seventh Circuit's disparate holdings in *Webster* and here other than that the court has newly abandoned the no-reasonable-opportunity standard and joined the minority interpretation of the savings clause. This change not only supports Mr. Fulks's position that his case is implicated in the circuit split acknowledged in *Jones*, it demonstrates that the court below has adopted a position irreconcilable with the "essential function of habeas corpus." *Davenport*, 147 F.3d at 609. Finally, the application of the Seventh Circuit's new standard in this case violates this Court's precedent barring the adoption of procedures that create an "unacceptable risk" that an intellectually disabled individual will be unconstitutionally executed. *See* Pet. 2 (citing, inter alia, *Moore*, 137 S. Ct. at 1051). For all of these reasons, this Court should grant certiorari review.

CONCLUSION

For the reasons set forth above and in Mr. Fulks's prior submission to this Court, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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