No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY P. COONCE, Jr,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Because the age at which a capital defendant became intellectually disabled does not bear on his moral culpability, did the Court of Appeals err in concluding that the Eighth and Fifth Amendments permit the government to execute Petitioner — though his 71 I.Q. and severe adaptive deficits otherwise meet the criteria for a medical diagnosis of intellectual disability that would bar his execution under 18 U.S.C. § 3596(c) and *Atkins v. Virginia,* 536 U.S. 304 (2002) — solely because his impairment originated at age 20 rather than before age 18?

2. Did the Court of Appeals err in concluding, like other Circuits but unlike numerous state courts of last resort, that notwithstanding this Court's recent teaching concerning the Sixth Amendment's Confrontation Clause, its seventy-year-old decision in *Williams v. New York*, 337 U.S. 241 (1949), allows the admission of testimonial hearsay to prove an aggravating factor at a capital sentencing hearing?

RELATED PROCEEDINGS

United States District Court for the Western District of Missouri, Southern Division:

United States of America v. Wesley Paul Coonce, Jr., and Charles Michael Hall, No. 10-03029-01/02-CR-S-GAF

United States Court of Appeals for the Eighth Circuit:

United States of America v. Wesley Paul Coonce, Jr., No. 14-2800

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PETITION FOR WRIT OF CERTIORARI

Wesley P. Coonce, Jr., petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at *United States v. Coonce*, 932 F.3d 623 (8th Cir. 2019), and attached as App. 1.

JURISDICTION

The Eighth Circuit entered judgment on July 25, 2019. *See* App. 1. It extended the time for seeking rehearing to September 12. *See* App. 2. A petition for rehearing and rehearing en banc was filed on September 11, and denied on October 4. *See* App. 3, 4. Justice Gorsuch extended the time for filing a petition for writ of certiorari to March 2, 2020. *See* App. 5. This petition is timely filed pursuant to Supreme Court Rules 13.1, 13.3, and 13.5.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Federal Death Penalty Act of 1994 (FDPA), the Due Process Clause of the Fifth Amendment, the Confrontation Clause of the Sixth Amendment, and the Cruel and Unusual Punishments Clause of the Eighth Amendment. The text of each of these provisions is set forth in App. 6.

STATEMENT

Background

Following a jury trial in the United States District Court for the Western District of Missouri, which had jurisdiction under 18 U.S.C. § 3231, Petitioner was convicted of first-degree murder, in violation of 18 U.S.C § 1111, and murder by a federal prisoner serving a life sentence, in violation of 18 U.S.C. § 1118. His codefendant Charles Hall was convicted of first-degree murder in the same trial. After a joint penalty-phase hearing under the FDPA, 18 U.S.C. § 3593, the jury recommended death sentences for Petitioner and Hall, and the district court sentenced them accordingly. Petitioner timely appealed, and the Eighth Circuit affirmed. App. 1.

In the light most favorable to the verdict, the trial evidence showed that in January 2010, Petitioner and Hall were inmates in a locked ward that housed mental health patients at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri ("FMC Springfield"), where Petitioner was serving a life sentence for kidnapping and carjacking. Hall, who was a decade older than Coonce and whose IQ was 30 points higher, had for years been obsessively thinking about killing someone.[1] On the evening of January 26, 2010, Petitioner and Hall entered the cell of another

[1] Tr.1456-57, 1462-63, 1958-2003, 2059-85, 2224-44, 2405-11, 2424-25, 2472-74, 2500, 2546, 4113, 4175, 4248, 4271-73, 4335-36, 4405, 4419, 4424-26, 4445, 4787-88, 4801, 5079-81, 5318-19; A.625, 644-45, 660, 836-884, 1175-83, 1184-86,1484-88, 1492.

inmate, Victor Castro-Rodriguez, whom they had previously discussed killing. Petitioner left Castro's cell briefly; during his absence, Hall bound Castro's hands. When Petitioner returned, Hall tied Castro's feet, gagged him, and blindfolded him. Both Petitioner and Hall then assaulted Castro; Petitioner kicked and stepped on Castro's neck and throat, and both men stood on Castro's neck until he stopped breathing. Castro died as a result.[2] *See Coonce*, 932 F.3d at 630-31; *United States v. Hall*, 945 F.3d 1035, 1038-39 (8th Cir. 2019).

At Petitioner's and Hall's sentencing hearing before the jury, the government presented evidence that Petitioner had committed a range of crimes, including violent ones, both in the free world and in prison. Its extensive allegations of prison misconduct over Petitioner's decade of incarceration, some involving serious violence, are described more fully below. Its evidence of free-world crimes from before that period showed a series of assaults by Petitioner (against a teenage neighbor, his own stepmother, a girl he had been dating and her male friend) plus property crimes like burglary and attempted car theft. In the most serious incident, Petitioner kidnapped a young woman at knifepoint in Texas and forced her to drive him to Missouri, sexually assaulting her several times along the way; he pleaded guilty in federal court and was sentenced to life imprisonment. *See* Resp. C.A. Brf. at 23-33.

[2] Other evidence suggested Hall played the primary role in planning and carrying out the murder. *See*, *e.g.*, Tr. 5057-58 (Hall tells government's psychiatrist that Petitioner was "ambivalent" about murdering Castro and that Petitioner's "heart" wasn't "fully in it"); *see also* Tr. 860, 956-57; 7/11/13 Tr. 215 (in numerous statements, Hall consistently maintains that he alone killed Castro, by standing on his neck, after Petitioner had first only injured Castro by kicking or stomping him).

Jurors also heard an extensive case in mitigation, describing Petitioner's nightmarish upbringing and his resulting serious psychological disorders, and the severe brain injury he sustained at age 20. The evidence came from numerous lay witnesses, including from juvenile psychiatric institutions, child protective services, and foster families; thousands of pages of psychological, medical, institutional and child welfare records; and several defense experts who reviewed this evidence, including a clinical social worker, a neuropsychologist, and a forensic psychiatrist. The government's own evidence largely echoed the defense's portrait of Petitioner's upbringing. Calling his childhood "chaotic and traumatic," the prosecution psychiatrist testified that Petitioner suffered "quite awful" maternal neglect and "pervasive" abuse from both parents. (Tr.5008). Even the prosecution psychiatrist agreed that the mental problems that would later contribute to Petitioner's criminal conduct were substantially caused by his "abusive home" and "sad, tragic childhood." (Tr.5055-57). At summation, the prosecutor called Petitioner's youth "marked by chaos, abuse, both physical and sexual, as well as neglect and abandonment" and agreed that he "suffered from mental and emotional impairments from a very young age." (Tr.5252). And numerous jurors found those mitigating factors, as well as that "[t]he chaotic and abusive life" Petitioner endured as a young child "increased his risk for emotional and mental disturbances in his adult life." (A.551-53, 564-66 [ad.45-46, 58-59]).

How the Questions Presented were Raised and Decided Below

Question 1 – Adult-onset Intellectual Disability

Petitioner, who was 29 years old at the time of the crime and 34 at trial, had displayed average intelligence as a child. But at age 20, shortly before he committed the kidnapping and sexual assault that first landed him in federal prison, Petitioner suffered a severe traumatic brain injury. A high-speed auto accident left him in a coma, with multiple facial fractures and bleeding around the brain. Tr. 2959-67. Petitioner survived, but the accident had permanent and life-altering consequences for his brain and behavior, as his IQ plummeted and he found himself unable to live normally in the world.

Toward the end of his capital-sentencing hearing before the jury, Petitioner moved the district court to bar the death penalty as an available punishment, alleging that he was "an individual with … intellectual disability." ECF #795 at 1. The motion cited Petitioner's 71 IQ as demonstrating the "subaverage intellectual functioning" required by "the formal definition of intellectual disability," and pointed out that "much evidence of [his] deficits in adaptive functioning" had already been presented during the mitigation case at sentencing. *Id*. at 3. Given those showings, Petitioner contended, "the first two criteria of the medical community definition of intellectual disability" were met. *Id*.[3] As a person "for whom the onset of intellectual disability

[3] A medical diagnosis of mental retardation, now generally called "intellectual disability" (ID), has three elements: (1) significantly sub-average intellectual functioning, (2) significant impairment in adaptive life skills, and (3) onset of the

occurred after age 18," Petitioner argued, the Eighth Amendment should preclude his execution, just as it would for an intellectually disabled offender whose onset occurred prior to that age. *Id*. at 4-5.[4]

Petitioner's mitigation case had presented strong evidence of each of the two substantive elements of an ID diagnosis. Defense neuropsychologist Dr. Wood described the comprehensive evaluation of Petitioner's mental condition she conducted prior to trial. It included administering a "gold standard" intelligence test (the Weschler-Adult Intelligence Test-IV), which measured Petitioner's IQ as 71, with consistently low performance across all domains. (Tr. 2944-3057, 2951, 2982-85, 2992; DEX #1328).[5] Defense psychiatrist Dr. Dudley agreed that Petitioner suffered from significant "intellectual . . . deficits." (DEX #1252, at 6). Moreover, neither Dr. Wood nor a psychologist who had tested Petitioner in 2006, a national expert on detecting

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condition in "the developmental period." *Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014), *citing* American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders*, at 33 (5th ed. 2013) ("DSM-5") and American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports*, at 27 (11th ed. 2010) ("AAIDD Manual").

[4] The timing of the motion owed to trial counsel's prior view that an IQ score over 70 foreclosed an ID diagnosis, which changed when this Court handed down *Hall* (rejecting "[t]his rigid rule," 134 S. Ct. at 1996) in the middle of Petitioner's sentencing hearing. *See* ECF #408, ECF #429 at 2, ECF #795. In any event, the FDPA imposes no requirements for when such a claim must be raised. *See* 18 U.S.C. § 3596. Thus, the Eighth Circuit correctly assumed that Petitioner's motion preserved his claim under the Eighth Amendment and the FDPA. *See Coonce*, 932 F.3d at 632-34.

[5] Dr. Wood's finding of a 71 IQ was consistent with earlier and admittedly imprecise estimates of Petitioner's post-crash IQ (79 in 2000 and 77 in 2006) that were based on non-IQ tests. *See* Tr. 2964-66, 2971-73.

malingering, saw any signs of malingering. (Tr.2975-78, 3013-14). The government's evidence essentially supported Dr. Wood on the key issues.[6]

In addition to Petitioner's 71 IQ score,[7] the evidence overwhelmingly showed that after the crash, Petitioner's adaptive life skills were dramatically impaired. He experienced problems with attention, reasoning, and memory, and his behavior changed dramatically. He was easily confused and could not remember things or govern his emotions and impulses. During that period, Petitioner could not function independently; as defense psychiatrist Dr. Dudley put it, his life was "extremely unstable and often chaotic." He could not maintain a job or effectively pursue mental health treatment. His ability to cope with daily challenges sharply deteriorated, and

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[6] Prosecution psychiatrist Dr. Dietz testified that he accepted the judgment of his own specialist, psychologist Dr. Martell, who had reviewed Wood's work and found no evidence of malingering and no reason to reevaluate Petitioner's intellectual ability. Dietz also agreed that Petitioner's traumatic brain injury was "significant" and caused permanent cognitive impairment. Dietz did feel, based on speaking with Petitioner, that the 71 IQ score Wood obtained was "somewhat lower" than Dietz's own informal estimate, but never questioned the earlier estimates of Petitioner's IQ as falling somewhere in the 70s. Thus, Dietz appeared to agree that Petitioner's IQ had dropped precipitously after his brain injury at age 20 and remained far below normal, even if not necessarily as low as 71. (Tr.5009-21, 5124-30; GEX #464, at 10-22).

[7] Although jurors did not find as a mitigating factor that brain damage had reduced Petitioner's IQ to 71, they appear to have credited the score but believed it lacked mitigating value. The prosecutor urged that view in summation, citing Petitioner's responsibility for the auto accident that caused his injuries. *See* Tr. 5286-89. Likewise, as the Court of Appeals acknowledged, the instructions authorized jurors to decide for any reason that a factually proven, instructed-on factor was not actually "mitigating." *See Coonce*, 932 F.3d at 635-36. And the trial court confirmed after a private post-verdict meeting with the jurors that some had "put zero" for "some factors that they felt had been proved" but which they felt deserved "no weight." Tr. 5379.

he attempted suicide. Shortly thereafter, he committed the kidnapping and rape that landed him in federal prison.[8] The evidence showed little improvement in Petitioner's adaptive behavior over the ensuing 21 years, even in the highly structured BOP environment. His inability to adapt has led to frequent moves, and in virtually every setting he has displayed limited interpersonal skills, been unable to effectively communicate or get along with staff, been victimized by and fought with other inmates, engaged in self-mutilating and self-destructive behavior, proved unable to comply with medication to reduce his psychiatric symptoms, repeatedly acted on impulse and failed to anticipate consequences. In short, his record shows what Dr. Dudley accurately called "broad-based instability in . . . important areas of functioning."[9]

The government opposed Petitioner's ID motion solely on the merits, arguing that *Hall* applied uniquely to the Florida statute, and dismissing Petitioner's other arguments. Tr. 4983-84. The trial court denied the motion without explanation. Tr. 4984.

On appeal, Petitioner argued that because he met every criterion for a medical diagnosis of intellectual disability except for the age of onset, there was no principled basis for treating his moral culpability differently from that of someone with that diagnosis. He pointed out that he suffered the 'disability' of intellectual disability –

[8] *See* Tr.3244-47, 3264-65, 3753-54, 3962-65, 4711-14; DEX #616-81, #618-10, #1344, at 4-5; #1352, at 4-5; GEX ##427, #428, #429, #430.

[9] *See* Tr.2110-2219, 2269-72, 2277-2366, 3965-68, 3971-72, 4028-29; DEX #1352, at 5-6.

exhibiting generally diminished comprehension, communication, and impulse control; experiencing problems with planning and deliberation; and tending to be a "follower," all traits that this Court identified in *Atkins* as reducing such persons' moral culpability – and thus that he should receive the same protection. *See* Pet. C.A. Brf. at 89-90. Likewise, he pointed out, even though his intellectual disability dated from age 20, he faced the same challenges in the courtroom – problems testifying, assisting counsel, and regulating his own demeanor, as well as jurors' tendency to see his condition as increasing dangerousness. *Id*. (citing, *inter alia*, *Atkins*, 536 U.S. at 320-21 and *Hall*, 134 S. Ct. at 1992-93, 1999). Because the only thing distinguishing him was an "age of onset" criterion with no bearing on moral culpability, Petitioner asserted, upholding his death sentence "would violate the Eighth Amendment as well as the Equal Protection component of the Fifth Amendment." Pet. C.A. Brf. at 92.

The Court of Appeals rejected this argument without elaborating its rationale. *See Coonce*, 932 F.3d at 634; *id*. at n. 8. It nowhere disputed Petitioner's evidentiary showing that, but for the age of onset, he met the diagnostic criteria for an exemption from execution under *Atkins*. Likewise, Respondent did not argue that the evidence of Petitioner's significantly subaverage intellectual functioning and adaptive deficits was insufficient to warrant a hearing in district court, disputing only whether such impairments, when "developed later in life," necessarily implicate the concerns this Court identified in *Atkins*. Resp. C.A. Brf. at 85, 84-86.

Question 2 - Confrontation

Prior to trial, Petitioner moved on Sixth Amendment confrontation grounds to exclude all anticipated testimonial hearsay at sentencing. The court agreed with Respondent that confrontation rights should not apply, and later granted Petitioner a continuing objection under *Crawford*. (ECF #638, at 4-11; Tr. 4/14/14, p.13; *see also* ECF #763, at 5-6; Tr.2037-38, 2040, 2650).

At sentencing, the government called Benjamin Ramos, a Bureau of Prisons (BOP) officer at FMC Springfield, whose job was to investigate "disciplinary" and "criminal" matters, to testify in support of the future-dangerousness aggravating factor. At the prosecutor's request, Ramos had brought Petitioner's BOP "disciplinary files." (Tr.2110-11). As the prosecutor began reviewing those files with Ramos, defense counsel renewed his confrontation objection; the court again overruled it, granting the defense a continuing objection. (Tr.2136-37).[10]

Ramos' testimony about Petitioner's prison disciplinary files spans more than 100 transcript pages. (Tr.2110-19, 2269-72). He summarized and read excerpts from correctional officer reports and disciplinary records covering more than 60 different incidents over 12 years at various BOP facilities. The reports and records themselves comprised 1000 pages, all of which the government introduced and published to the

[10] Defense counsel nevertheless continued to object to Ramos' testimony on the same grounds, without success. (Tr.2204-06, 2260-63).

jury. (GEX #341, #343-350, #352-367, #369-378, #380-387, #502-503; ECF #815, at 13-15, 19).

While many incidents alleged in the records were relatively minor, some were serious. *See* Resp. C.A. Brf. at 33 (characterizing two of them as "involving serious physical violence" and others as manifesting "assaults, threats, or sexual aggression"). Those included allegations that Petitioner sexually assaulted another inmate; fought with other prisoners; threatened, threw things at, or improperly touched BOP staff; and possessed two "shanks" (sharpened pieces of plastic found in his cell).[11] (Tr.2110-19, 2269-72; GEX #346, #347, #348, #349, #350, #352, #353, #356, #368, #369, #372, #377, #380, #382, #387, #502, #503).

While most of the incidents resulted in disciplinary charges and sanctions, some did not, including the one for possessing the shanks.[12] (GEX #349, #352, #353, #380, #387, #503). Moreover, the allegations in the records were sometimes broader than the misconduct ultimately found. For example, the records and Ramos' testimony detailed a 2006 allegation by another inmate that Petitioner had raped him (Tr.2190-92; GEX #372, at 26-28), but the disciplinary officer found only that Petitioner had choked and punched the inmate, based on another officer's report of what he saw upon entering their cell. (GEX #372, at 2-3).

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[11] While the shanks themselves (as well as a photograph) were identified by Ramos and admitted (Tr.2218-19; GEX #194, #195), BOP records reflect that another officer discovered them, and neither the records nor Ramos' testimony mention Ramos as having been involved in the search or seizure. (Tr. 2218-19; GEX #387).

[12] The trial court refused even to limit the government to allegations that had been substantiated by a finding following a disciplinary hearing. (Tr.2204).

All the serious allegations against Petitioner in the BOP records came from BOP correctional and disciplinary officers the government never suggested were unavailable, yet did not call to testify.[13] Thus, the jury knew nothing about these declarants other than their names and job titles. The allegations all took the form of reports and forms in which those absent officers recounted what they claimed to have seen or heard, or what other BOP employees, Petitioner, or other inmates had purportedly told them. Some of the statements were double or triple hearsay. (*See* Tr.2110-19, 2269-72; GEX #346, #347, #348, #349, #350, #352, #353, #356, #368, #369, #372, #377, #380, #382, #387, #502, #503).[14]

Petitioner argued on appeal that admitting his BOP disciplinary records violated the Sixth Amendment's Confrontation Clause. *See Coonce*, 932 F.3d at 640. The Court of Appeals noted that it had not previously decided whether confrontation rights apply at capital sentencing, and that several circuits, relying on *Williams v. New York*, 337 U.S. 241 (1949), have found that they do not. *Coonce*, 932 F.3d at 640-41 (citations omitted). It declined to address *Williams*' continuing vitality, disclaiming any duty to scrutinize *Williams* "even if it appears suspect." *Id.* at 641 (citation omitted). Because the district court was likewise "bound by *Williams*," the Court of Appeals found no error. *Id.* (citing *Williams*, 337 U.S. at 250–52).

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[13] The only exception was one threatening incident that Ramos testified he personally witnessed. (Tr. 2145-47; GEX #356).

[14] Respondent never disputed, either at trial or in the Court of Appeals, that the documents and testimony challenged here qualified as "testimonial" within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. *See* Resp. C.A. Br. 195-208.

REASONS FOR GRANTING THE PETITION

I. The Court should decide whether the Constitution permits the execution of a defendant, though he was intellectually disabled at the time of the crime, because his intellectual disability arose after age 18.

A. This Court barred the execution of intellectually disabled offenders in *Atkins* because the *relevant* features of that condition, all of which Petitioner exhibits – significantly sub-average intellectual functioning and associated deficits in adaptive functioning – reduce moral culpability and create special risks at trial.

Atkins catalogued the traits of intellectually disabled offenders that are relevant to the Eighth Amendment question whether they generally display the extreme level of moral culpability necessary to support a death sentence:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.

Atkins, 536 U.S. at 318 (footnotes omitted). All these features "diminish [such offenders'] personal culpability." *Id.*

The Court also canvassed the ways in which people with ID are distinctly disadvantaged at trial, increasing the risk of a death sentence notwithstanding their reduced culpability. In addition to the "possibility of false confessions," the Court pointed out that such defendants

> may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. [M]oreover, reliance on [intellectual disability]as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury

Id. at 320-21. In sum, offenders with ID "in the aggregate face a special risk of wrongful execution." *Id*. at 321.

Because of these characteristics and associated risks, the Court concluded, an intellectually disabled offender is categorically less culpable than "the average murderer" who lacks such impairments. *Id*. at 320. Executing such categorically-less-culpable offenders makes no measurable contribution to either retribution or deterrence, the purposes that separate constitutionally acceptable capital punishment from the infliction of "purposeless and needless … pain and suffering." *Id*. at 319 (citation omitted). Thus, the Eighth Amendment forbids imposing "the most extreme sanction" upon such offenders. *Id*.

B. The age of onset itself is irrelevant to moral culpability.

Two of the three criteria for a medical diagnosis of intellectual disability – significantly sub-average intellectual functioning coexisting with deficits in adaptive functioning – bear directly on an affected individual's moral culpability for his actions, for the reasons the Court explained in *Atkins*. *See supra*. By contrast, the third criterion – that the condition manifested itself during the developmental period, which the court below interpreted as ending squarely at age 18 – does not. For that reason, the Court of Appeals erred in treating the age of onset as disqualifying Petitioner from protection under *Atkins*.

Judges and commentators have expressed skepticism whether the age-of-onset criterion should enjoy constitutional status. *See*, *e.g.*, *State ex rel. Clayton v. Griffith*, 457 S.W. 3d 735, 758-59 (Mo. 2015) (Stith, Draper & Teitelman, JJ., dissenting) (state's statutory age-18 cutoff violated Eighth Amendment because *Atkins*' mandate "does not depend on when an intellectual disability manifested"); *State v. Anderson*, 996 So. 2d 973, 987 (La. 2008) (while upholding Louisiana's statutory age-18 cutoff, court acknowledges it "can appear arbitrary" rather than "principled" to distinguish between a 19-year-old and a 17-year-old with comparable deficits in IQ and adaptive skills); Mulroy, *Execution by Accident: Evidentiary and Constitutional Problems with the "Childhood Onset" Requirement in Atkins Claims*, 37 VT. L. REV. 591, 594 (Spring 2013) ("'age of onset' requirement is … irrational, unwarranted, and arguably unconstitutional" in the death penalty context).

That criticism has force because the primary functions of the "age of onset" criterion for clinicians are "distinguish[ing] intellectual disability from other mental disabilities that may occur at later points in life"[15] and helping "design[] habilitation plans and systems of supports" for individual patients.[16] Distinguishing intellectual

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[15] Am. Ass'n. on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 27-28 (11th ed. 2010). *See also*, *e.g.*, Gilbert S. Macvaugh, III, and Mark D. Cunningham, *Atkins v. Virginia: Implications and recommendations for forensic practice*, 37 THE JOURNAL OF PSYCHIATRY & LAW 131, 171 (Summer-Fall 2009) (age of onset criterion promotes "proper diagnosis" by "prevent[ing] diagnostic confusion with other disorders that occur later in life"); *see also* Mulroy, *supra*, at 602 (same, citing AAIDD Manual at 27).

[16] James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 13 (2003) ("Mental Retardation").

disability from other, similar mental impairments is medically relevant because "[t]he manner in which medical staff will treat or care for a mentally challenged patient—the use of drugs, the type of support programs to be used, etc.—may vary depending on whether a patient has a developmental disorder versus an adult-onset trauma or disease." Mulroy, *id*. (citing AAIDD Manual, *supra* note 15 at 58). Identifying the age of onset may also point to the disorder's cause (etiology), which in turn may be relevant to, *inter alia*, "genetic counseling; referral to support groups; and statistical comparison of groups of patients for research, administrative, or clinical purposes." Mulroy, *id*. (citing AAIDD Manual at 58).

Arguably, none of those rehabilitative or research considerations apply in the *Atkins* context, where the issue is how the defendant's mental condition affects his thinking and behavior at the time of the crime and the time of trial. *See Atkins*, 536 U.S. at 318-21 (focusing on those aspects of the disorder as legally relevant); Mulroy, *supra*, at 602-603; ABA, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENT. & PHYS. DISAB. L. REP. 668, 669-70 (2006) (age of onset should not matter in *Atkins* cases); Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 422-23 (1985) (origin of the age-of-onset requirement is "obscure" and its relevance to criminal justice "limited"); *see also Hall*, 134 S. Ct. at 1993 (in deciding whether cutoff rule for IQ scores was valid, Court considered psychiatric profession's view of the "purpose and meaning" of such scores).

Madison v. Alabama, 139 S. Ct. 718 (2019), is instructive. There, the state courts had rejected Madison's claim that vascular dementia rendered him mentally incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). In their view, *Ford*'s Eighth Amendment concerns arose only in the presence of a particular mental health diagnosis: a psychotic disorder accompanied by delusions. *Madison*, 139 S. Ct. at 729-30. That was error, this Court found, because the *Ford* standard "focuses on whether a mental disorder has a particular *effect*," namely, "an inability to rationally understand why the State is seeking execution," but the constitutional "standard has no interest in establishing any precise *cause* . . . so long as [the mental disorder] produce[s] the requisite lack of comprehension." *Id.* at 728 (emphases in original). "[I]f and when that failure of understanding is present, the [Eighth Amendment] rationales [for precluding execution] kick in – irrespective of whether one disease or another . . . is to blame." *Id.* at 729; *see also id.* (reviewing court must "look beyond any given diagnosis to [its] downstream consequence[s]").

Just as the nature of the cause was not relevant in *Madison*, the timing of the cause – the fact that Petitioner did not acquire his intellectual disability until age 20 – shouldn't be relevant here. *Madison* plainly implies that for Eighth Amendment purposes, the constitutionality of executing Petitioner turns on whether his adult-onset intellectual disability diminishes his culpability for the crime and puts him at risk in the courtroom in precisely the same ways as youthful-onset intellectual disability. *Cf. Atkins*, 536 U.S. at 319-21. The answer to that question is "yes."

C. Distinguishing between Petitioner and identically situated *Atkins*-eligible offenders would violate equal protection.

Petitioner meets the two criteria for a medical diagnosis of intellectual disability that, according to *Atkins*, are relevant to the appropriateness of a death sentence: significantly sub-average intellectual functioning with related deficits in adaptive functioning. Thus, as to his diminished moral culpability, Petitioner is not just "similarly situated" but *identically* situated to *Atkins*-eligible offenders. Arbitrarily denying Petitioner the protections of *Atkins* thus would violate the Fifth Amendment's equal protection guarantee.[17] *See* Ellis, *Mental Retardation* at 21 n. 33 ("[I]f there were a capital prosecution of an individual who met the definition of mental retardation *except for the age of onset,* principles of equality likely would require comparable exemption from capital punishment") (emphasis in original); *cf*. Mulroy, *supra*, at 629 ("In every important sense," treating strict satisfaction of *Atkins*' diagnostic criteria as essential to invoking the protections of the Eighth Amendment would "constitute[] treating similarly situated persons dissimilarly").

This conclusion follows regardless of the level of scrutiny due such a classification. Not even a "rational basis" exists for distinguishing between someone like Petitioner, who meets the criteria for a medical diagnosis of intellectual disability

[17] *See United States v. Windsor*, 570 U.S. 744, 774 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws") (citation omitted); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process").

except for having acquired that condition, long before the crime, as a result of a traumatic brain injury at age 20, and someone who meets all three criteria as a result of an identical injury at age 17. *See Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) (even in commercial realm, distinction that is "arbitrary or irrational" violates equal protection); *see also Judulang v. Holder*, 565 U.S. 42, 55 (2011) (applying statute based on distinction in no way "tied to the . . . purpose[] of the law" is "arbitrary and capricious"). But furthermore, the fundamental right to life enshrined in the Fifth Amendment itself should trigger heightened scrutiny of such a classification in any event, requiring the government to show that a crucial interest is served by maintaining the challenged classification and that the means it has chosen to do so are closely fit to that purpose. *See generally* Mulroy, *supra*, at 629-650. The government certainly cannot satisfy that rigorous standard here.

II. The Court should decide whether and to what extent the Sixth Amendment's Confrontation Clause applies to testimonial hearsay offered to prove aggravating factors in a capital sentencing hearing, a question that has produced an extensive and stable split of authority.

State and federal courts, largely due to uncertainty about the status of *Williams*, are divided on whether and to what extent Sixth Amendment confrontation rights apply in capital sentencing hearings. *See infra; see also, e.g.,* Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1970 (2005) (calling the question a "fundamental" one over which lower courts disagreed even then). The split over this substantial and recurring constitutional issue is entrenched and unlikely to resolve itself. This Court's

intervention is called for. *See* Sup. Ct. R. 10(a) (certiorari may be warranted where a "court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort"").

A. Some courts hold that the Confrontation Clause applies in full at capital sentencing hearings.

Seven state courts of last resort have extended confrontation rights to evidence introduced in a capital sentencing hearing. Kansas, Texas and North Carolina appear to have addressed the issue for the first time after *Crawford*. *See State v. Carr*, 331 P.3d 544, 723-24 (Kan. 2014) ("confrontation law is applicable to a capital penalty phase"), *rev'd on other grounds*, *Kansas v. Carr*, 136 S. Ct. 633 (2016);[18] *Russeau v. State*, 171 S.W.3d 871, 880-81 (Tex. Crim. App. 2005) (admitting prison "incident" and "disciplinary" reports at sentencing violated capital defendant's confrontation rights); *State v. Bell*, 603 S.E.2d 93, 115–16 (2004) (admission of testimonial hearsay at capital sentencing violated Confrontation Clause, citing *Crawford*). Florida and Mississippi extended the Confrontation Clause to capital sentencing hearings before *Crawford* and maintain that position. *Rodgers v. State*, 948 So.2d 655, 663 (Fla. 2006) (citing *Crawford*); *Rodriguez v. State*, 753 So.2d 29, 43 (Fla. 2000)); *Pitchford v. State*, 45 So. 3d 216, 251-252 (Miss. 2010) (citing *Crawford*); *Lanier v. State,* 533 So.2d 473, 488 (Miss. 1988). Maryland and Pennsylvania recognized confrontation rights at capital sentencing pre-*Crawford*. *See Ball v. State*, 699 A.2d 1170, 1190 (Md. App. 1997) (Confrontation Clause "extends to the sentencing phase of a capital trial")

[18] Kansas unsuccessfully sought review of the Confrontation Clause question in *Carr*. *See Carr*, 136 S. Ct. at 646. The Court's eventual opinion expressed the view that any Confrontation Clause violation was harmless. *Id*.

(quoting *Grandison v. State*, 670 A.2d 398, 413 (Md. App. 1995)); *Commonwealth v. Green*, 581 A.2d 544, 564 (Pa. 1990) (vacating death sentence because defendant could not cross-examine state's mitigation-rebuttal witness).

Three federal district courts have held that the Confrontation Clause applies generally to a capital sentencing hearing, including evidence relevant to the selection decision (*i.e.*, offered to prove non-statutory aggravating factors under the FDPA). The most recent such decision pointed out that the structure of the FDPA requires the jury to make findings regarding all aggravating factors before it ever arrives at the point of exercising sentencing discretion. *United States v. Fell*, No. 5:01-cr-12-01, 2017 WL 9938048 at *7 (D. Vt. May 1, 2017). The jury's pre-sentencing findings thus include both statutory aggravating factors that make the defendant death-eligible as an Eighth Amendment matter, and non-statutory ones alleged by the government to capture the deathworthy aspects of the specific defendant and crime. *Id.* Given that the structure of the FDPA treats statutory and non-statutory aggravating factors identically for purposes of the jury's consideration in sentencing, confrontation rights should extend to evidence offered by the prosecution to prove either type of aggravating factor. *Id.*; *see also United States v. Mills*, 446 F. Supp. 2d 1115, 1130-31 (C.D. Cal. 2006); *id.* at 1134, 1135 (the protections of *Crawford v. Washington*, 541 U.S. 36 (2004), apply to all aggravating factors because jury has no sentencing discretion under the FDPA until it has made its findings on the aggravating factors, whether statutory or non-statutory); *United States v. Concepcion Sablan*, 555 F. Supp. 2d 1205, 1221 (D. Colo. 2007) (the fact that triggers Sixth Amendment

protections is that the jury must make determinations regarding "the existence of all … aggravating factors" before it may exercise any sentencing discretion).

B. Other courts have held that confrontation rights do not apply to evidence offered at the "selection" phase but have held or suggested that these rights would apply to evidence offered to prove death-eligibility.

No court of appeals to consider the question has held that confrontation applies to evidence relevant to the selection decision, but two have suggested a different outcome if death-eligibility were implicated. The Fourth Circuit, for example, has observed that under the FDPA the "constitutionally significant" facts necessary to support a death sentence are found "in the guilt and *eligibility* phases of trial." *United States v. Umana*, 750 F.3d 320, 347-48 (4th Cir. 2014). The Fifth Circuit in *United States v. Fields*, 483 F.3d 313 (5th Cir. 2007), likewise found that testimonial hearsay "relevant only to [the] selection decision" is admissible, while noting that "a stronger argument" supports confrontation rights where the evidence bears on "eligibility-triggering factors." *Id.* at 326, 331 n.18.[19]

Several federal district courts to consider this question post-*Crawford* have bifurcated the penalty phase into a death-eligibility phase where confrontation rights apply and a selection phase where they do not. *See*, *e.g.*, *United States v. Fackrell*, No.1:16-CR-26(2), 2018 WL 7822173, at *2 (E.D. Tex. Feb. 2, 2018) (holding that confrontation rights apply in "the eligibility phase of the capital sentencing

[19] Notably, both *Umana* and *Fields* featured strong dissents arguing that the Confrontation Clause should apply to *all* aggravating factors, both statutory and non-statutory. *Umana*, 750 F.3d at 360 (Gregory, J., dissenting); Fields, 483 F.3d 367-68 (Benavides, J., dissenting).

proceeding," but not "at the selection stage'); *United States v. Con-Ui*, No. 3:13-CR-123, 2017 WL 783437, at *26-27 (M.D. Pa. Mar. 1, 2017) (same).[20]

Three states with capital schemes comparable to the FDPA have drawn or implied similar conclusions. Arizona has extended confrontation rights to testimony used to establish death eligibility, but (relying on *Williams*) has rejected applying *Crawford* to other penalty-phase evidence. *Compare State v. McGill*, 140 P.3d 930, 942 (Ariz. 2006) *with State v. Guarino*, 362 P.3d 484, 490 (Ariz. 2015) (no confrontation rights at "the penalty phase of a capital trial," because "*Crawford* did not overrule *Williams*").[21] Two other states have raised the distinction without resolving the question. *State v. Johnson*, 284 S.W.3d 561, 584 (Mo. 2009) (citing *Fields*); *State v. Berget*, 826 N.W.2d 1, 20-21 & n.11 (S.D. 2013).

C. Some courts have held or implied that the Confrontation Clause does not apply at all in capital sentencing proceedings.

Finally, three courts of appeals and two state high courts have held or suggested that confrontation rights do not extend to any phase of capital sentencing

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[20] *See also United States v. Lujan*, No. 05-0924RB, 2011 WL 13210246, at *8 (D.N.M. Mar. 7, 2011) (same); *United States v. Jordan*, 357 F. Supp. 2d 889, 903-04 (E.D. Va. 2005) (same); *United States v. Bodkins*, 2005 WL 1118158, at *4-5 (W.D. Va. 2005) (same); *cf. United States v. Johnson*, 378 F. Supp. 2d 1051, 1060-1062 & n.5 (N.D. Iowa 2005) (holding that confrontation right does not apply at selection after assuming, without deciding, that it applies at eligibility).

[21] When Illinois had the death penalty, that state appears to have agreed. *Compare People v. Banks*, 934 N.E.2d 435, 462 (Ill. 2010) (no confrontation rights at capital sentencing stage akin to death selection), *with People v. Ramey*, 604 N.E.2d 275, 287 (Ill. 1992) (Confrontation Clause violated where defense counsel could not cross-examine evidence State used "to establish defendant's eligibility" for death).

proceedings. In Petitioner's case, the Eighth Circuit invoked *Williams* to broadly reject Petitioner's arguments, without mentioning any eligibility-selection distinction. *Coonce*, 932 F.3d at 640-41. The Seventh Circuit did likewise in a case on collateral review. *Szabo v. Walls*, 313 F.3d 392, 398 (7th Cir. 2002) (confrontation rights do not apply at sentencing, "even when that sentence is the death penalty"). In another collateral review case, the Eleventh Circuit similarly expressed the broad view that "hearsay is admissible at capital sentencing proceedings," subject to the defendant's right to offer rebuttal. *Muhammad v. Sec'y, Fla. Dept. of Corrections*, 733 F.3d 1065, 1073-77 (11th Cir. 2013).[22] State high courts in Nevada and Idaho take the same position. *See State v. Dunlap*, 313 P.3d 1, 34 (Idaho 2013) ("modern penological policies" favor having "maximum … information about the defendant" at sentencing); *Summers v. State*, 148 P.3d 778, 782 (Nev. 2006) ("most of the information" relied upon to "intelligent[ly]" impose sentence would be unavailable if fact-finders were restricted to evidence given in open court by witnesses subject to cross-examination).[23] *Summers* explicitly noted that "*Crawford* did not overrule *Williams*." 148 P.3d at 783; *see also Dunlap*, 313 P.3d at 34 (similar).

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[22] The dissent argued that the majority mischaracterized relevant contrary language in *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), as dicta, since the court had previously treated *Proffitt* as "binding law" holding that confrontation rights apply in capital sentencing. *Muhammad*, 733 F.3d at 1083 (Wilson, C.J., dissenting).

[23] Three justices dissented in *Summers*, arguing that notwithstanding *Williams*, a defendant should have the right to confront witnesses whose testimony is offered to establish death-eligibility. 148 P.3d at 786 (Rose, C.J., concurring in part and dissenting in part).

This array of conflicting decisions reflects a deep divide among the lower courts over whether and to what extent the Confrontation Clause applies to bar testimonial hearsay at capital sentencing. And uncertainty about *Williams*' status ensures the split will persist. Courts that have read *Williams* broadly have concluded, like the Court of Appeals below, that they are "bound" by *Williams* notwithstanding subsequent developments. *See*, *e.g.*, *Coonce*, 932 F.3d at 641; *Guarino*, 362 P.3d at 490 (following *Williams* until this Court says otherwise); *Summers*, 148 P.3d at 783 (same). Other courts have read this Court's later decisions as undermining *Williams*. This Court alone can resolve the dispute.

D. The decision below is wrong.

Treating *Williams* as drawing a bright line between the guilt and penalty phases of a capital trial – as concluding simply that confrontation rights end where capital sentencing begins – cannot be reconciled with the original understanding of the Confrontation Clause or with the development of Sixth and Eighth Amendment law since *Williams*.

1. The Framers would not have recognized a distinction, for confrontation purposes, between guilt and sentencing.

In capital cases, no historical basis exists for cutting off the confrontation right after conviction or, for that matter, after death "eligibility." When the Sixth Amendment was drafted, for many felonies a guilty verdict mandated a death sentence. As Justice Gorsuch has recently explained, "founding-era prosecutions traditionally ended at final judgment. But at that time, generally, 'questions of guilt and punishment both were resolved in a single proceeding' subject to the Fifth and

Sixth Amendment's demands." *United States v. Haymond*, 139 S. Ct. 2369, 2379 (2019) (plurality opinion) (quoting Douglass, *Confronting Death*, *supra*, at 2011). Juries in such trials were aware of the sentencing consequences of their verdicts, and frequently convicted on lesser offenses or acquitted altogether, precisely to avoid triggering a death sentence. And that practice was accepted as a necessary safeguard against "too much death." Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 334 (2003); *see id*. at 59 (few eighteenth-century criminal trials were "genuinely contested inquiries into guilt or innocence;" instead, "[t]o the extent that trial had a function in [most] cases … it was to decide the sanction."); Douglass, *Confronting Death*, *supra*, at 1972-74, 2011-15; *see also Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (citing Blackstone). The Framers thus expected that no defendant would face death without the safeguard of confrontation.

The Sixth Amendment's text provides that confrontation rights apply "[i]n all criminal prosecutions." U.S. Const. amend VI. Writing for four Members of the Court, Justice Gorsuch recently observed that the Court "recognized in *Apprendi* and *Alleyne*[24] [that] a 'criminal prosecution' continues and the defendant remains an 'accused' *with all the rights provided by the Sixth Amendment*, until a final sentence is imposed." *Haymond*, 139 S. Ct. at 2379 (plurality opinion) (emphasis added).[25] The

[24] *Alleyne v. United States*, 570 U.S. 99 (2013).

[25] On this point, the dissenting Justices and the plurality appeared to agree. *See id*. at 2395 (Alito, J. dissenting) (calling it "exactly right" to say that "all the rights provided by the Sixth Amendment" apply in a criminal prosecution "until a final sentence is imposed").

Haymond plurality found that those Sixth Amendment rights applied in a hearing conducted more than three years after trial, on whether to revoke the term of supervised release imposed as part of the defendant's original sentence. *Id*. at 2374. It would be anomalous, to say the least, for the Sixth Amendment to govern that proceeding but not one conducted before "a final [death] sentence is imposed."[26] Like the right to counsel, which applies at sentencing because sentencing is part of a "criminal prosecution," *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), the right to confrontation should likewise apply at a capital sentencing hearing.[27] No textual basis exists for reaching a different conclusion.

Nor is *Williams* a bar to that conclusion. *Williams* long predated the incorporation of the Confrontation Clause against the states, and thus considered only the broad general protections of due process, rather than the specific confrontation right guaranteed by the text of the Sixth Amendment. 337 U.S. at 245. Moreover, for years after *Williams*, the Confrontation Clause was understood to require only that an out-of-court statement bear adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). *Crawford* returned Confrontation Clause

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[26] The *Haymond* dissenters also suggested that extending the jury-trial right to certain supervised release revocation findings would necessarily entail applying the Confrontation Clause. *Haymond*, 139 S. Ct. at 2388 (Alito, J., dissenting) (expressing concern that given the number of such proceedings in federal court every year, judges could not possibly "empanel enough juries to adjudicate all those proceedings, let alone try all those proceedings in accordance with the Sixth Amendment's Confrontation Clause").

[27] *See also Strickland v. Washington*, 466 U.S. 668, 686-687 (1984) (a capital sentencing hearing is "sufficiently like a trial in its adversarial format" that counsel's role at sentencing is comparable to counsel's role at trial).

jurisprudence to its roots by holding that reliability aside, no testimonial hearsay is admissible unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination. *See* 541 U.S. at 68-69 (overruling *Roberts*).

Put simply, *Crawford* clarified that the constitution mandates "that reliability be assessed in a particular manner," namely, by cross-examination. 541 U.S. at 61. The view that "full information" can "enhance[] reliability" even absent such testing, *see Umana*, 750 F.3d at 346, is precisely what *Crawford* repudiated. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Crawford*, 541 U.S. at 62.

2. The Court has recognized since the 1970s that in capital cases, the Eighth Amendment forbids absolute sentencing discretion and demands heightened reliability; both those developments are in tension with *Williams*.

As an Eighth Amendment matter, the judge in *Williams* had unfettered sentencing discretion. *See* 337 U.S. at 252 ("no federal constitutional objection would have been possible" had he imposed death "giving no reason at all"). But since then, "[t]he constitutional status of discretionary sentencing in capital cases [has] changed." *Lockett v. Ohio*, 438 U.S. 586, 598 (1978) (plurality opinion) (noting that this shift occurred as a result of *Furman v. Georgia*, 408 U.S. 238 (1972), and naming *Williams* as a decision undermined by *Furman*). Today, sentencing discretion must be "directed and limited" to provide a meaningful basis for distinguishing the few cases in which death is imposed from the many in which it is not. *Gregg v. Georgia*, 428 U.S. 153, 188-189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Post-*Furman* decisions have acknowledged that *Williams* fits uneasily within a capital sentencing regime that aims to channel discretion. *See Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality) (recognizing that when *Williams* was decided, judges enjoyed "complete [sentencing] discretion" even in capital cases, and refusing to read *Williams* to permit a death sentence based in part on information defense counsel had no opportunity to rebut or deny). Since *Furman*, the Court has consistently treated capital cases as constitutionally distinct and emphasized that "the sentencing process, as well as the trial" must satisfy due process. *Gardner*, 430 U.S. at 358. Modern death-sentencing schemes, including the FDPA, thus do not permit unguided sentencing discretion, but instead require sentencers to find aggravating factors to meaningfully justify the imposition of the maximum punishment, and to consider mitigation in making the final decision. *Lockett*, 438 U.S. at 604-605.

At the same time, the Court since *Furman* has consistently emphasized a special need for reliability in the determination that death is the appropriate punishment in a given case. *Woodson v. North, Carolina*, 428 U.S. 280, 305 (1976); *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985). In capital cases, this focus on "heightened reliability" of sentencing outcomes is not a policy preference but an Eighth Amendment mandate. This development, too, represents a significant shift since *Williams*, and provides an additional rationale for extending confrontation rights to capital sentencing, as an essential tool for testing and ensuring the reliability of evidence offered to support a death sentence. *Cf. Kennedy v. Louisiana*,

554 U.S. 407, 443-44 (2008) (identifying, as among the "serious systemic concerns" relevant to the constitutionality of making child rape a capital offense, the problem of unreliable child testimony, which raises "heightened concerns" of possible wrongful conviction).

3. A strong textual basis exists in the Sixth Amendment for extending confrontation rights to both statutory and non-statutory aggravating factors and doing so would be consistent with the Court's recent Sixth Amendment jury trial decisions, which emphasize function over form.

Since 2000, the Court has extended the Sixth Amendment right to jury trial to findings previously thought to lie beyond the bright line separating trial from sentencing. *See*, *e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002). A stronger textual basis exists for similarly extending the Sixth Amendment right to confrontation, for that protection applies "[i]n all criminal *prosecutions*" (emphasis added) while the defendant has a "right to a … *trial,* by an impartial jury." U.S. Const. amend. VI (emphasis added). Thus, the right to confront adverse witnesses, like the right to counsel, applies whenever the jury-trial right applies but *may well apply even when the jury-trial right does not*. For that reason, even if a jury need not make the "selection" decision in a capital case as a Sixth Amendment matter, *see McKinney v. Arizona*, ___ U.S. ___, 2020 WL 889190, at *3 (Feb. 25, 2020), a capital defendant should enjoy the right to confront any evidence presented by the prosecution that will be available for consideration by the ultimate sentencer. The FDPA requires the sentencing jury to make specific factual findings before it reaches the point at which it may exercise any sentencing discretion. Those findings include both statutory and *non-statutory* aggravating factors. Thus, the

Confrontation Clause should apply to evidence offered to support either type of finding.

Some courts have described statutory aggravating factors under the FDPA as "constitutionally significant" because they make the defendant death-eligible as an Eighth Amendment matter. *See*, *e.g.*, *Umana*, 750 F.3d at 348. But non-statutory aggravating factors in the FDPA scheme – which are the subject of pretrial notice and included in the verdict form, and as to which the jury must make formal written findings – are equally significant. Dismissing the latter as "not alter[ing] the range of [available] sentences," *id.* at 347, misapprehends the operation of the FDPA. Although the jury must find at least one statutory aggravating factor, it may not impose death based on that finding alone if the government has also alleged non-statutory aggravating factors. In the latter event, before it may even consider imposing death, the jury must first return special findings on each of the additional non-statutory aggravating factors alleged at the selection phase, making any such finding unanimously and beyond a reasonable doubt. 18 U.S.C. § 3593(c), (d).

Here, the allegation that if Petitioner's life were spared, he would probably "commit criminal acts of violence that would constitute a continuing threat to the lives and safety of others,"[28] was a key part of the government's case for death. Without the testimonial hearsay alleging prior prison misconduct by Petitioner, and given the extraordinary mitigating evidence jurors heard, and credited, about his

[28] *See* Add. to Pet. C.A. Br. at 37 (Penalty Phase Jury Instruction Number 8).

severely troubled background and profound mental problems, the jury may well have struck the ultimate balance of aggravation and mitigation against a death sentence.[29]

Because the jury was statutorily required to determine whether Petitioner's future dangerousness had been proven before it could consider what sentence to impose, that aggravating factor, while "non-statutory," was nevertheless constitutionally significant. Confrontation rights should therefore attach to evidence offered by the government in support of that finding. Any contrary conclusion would elevate form over substance, an approach this Court has expressly and rightly repudiated in other Sixth Amendment contexts. Moreover, such formalism would license the government to strategically present the most damning evidence against the defendant at the stage of trial at which he enjoys the fewest protections. The law need not, and should not, invite such gamesmanship.

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[29] Even when one federal prisoner murders another, capital prosecutions are unusual and death sentences relatively rare. Of 24 such defendants tried in the modern era, 13 have been sentenced to life (11 initially, and 2 others after their initial death sentences were set aside) and 2 convicted of lesser sentences. Thus, nearly 2/3 of such cases (15 of 24) did not result in death verdicts. *See* Federal Death Penalty Resource Counsel Website, Completed Federal Capital Cases Involving an Inmate (December 2018) (available at https://tinyurl.com/qs5g92o). That is because highly aggravated facts can be outweighed where significant mitigation is present, as it was here. *See Coonce*, 932 F.3d at 632-33 (noting that numerous jurors found multiple mitigating factors); *cf.*, *e.g.*, Associated Press, "Inmate Spared Death Penalty in Gruesome Murder of Cellmate" (April 6, 2007) (no death verdict for federal inmate with a long history of prior violence, after jury heard mitigating evidence detailing his "history of mental illness, brain injuries and post-traumatic stress disorder"); Greg Bluestein, "Man Spared Death Sentence in Federal Case," Athens (GA) Banner-Herald (Apr. 26, 2012) (no death verdict for federal inmate who stabbed, choked, and strangled his cellmate while serving time for multiple armed robberies, after jury heard evidence that defendant was "mentally ill" and "damaged by [child] abuse").

III. This federal death penalty direct appeal presents two exceptionally important issues and is an ideal vehicle for resolving either or both.

For several reasons, the Eighth and Fifth Amendment issues presented here are important and deserve the Court's attention. First and foremost, allowing Petitioner's fate to turn on a coincidence of timing – that the head injuries that left him intellectually disabled occurred at age 20 rather than at 17 – offends the principle that the death penalty should not be administered arbitrarily. Moreover, the Court has emphasized the importance of limiting capital punishment to those offenders "whose *extreme culpability* makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (emphasis added). Because only the age at which he acquired his intellectual disability separates Petitioner from the offenders protected from execution by 18 U.S.C. § 3596(c) and *Atkins*, no one can seriously maintain that Petitioner manifests the "extreme culpability" *Kennedy* had in mind.

A relatively small number of offenders would be affected by a ruling in Petitioner's favor, since any claimant would need to satisfy the stringent dual requirements of showing significantly sub-average intellectual functioning and coexisting deficits in adaptive functioning. But neither is it likely that Petitioner stands entirely alone.[30] Thus, absent confirmation that *Atkins* and the parallel

[30] For example, traumatic brain injury caused Petitioner's intellectual disability. Over 70% of such injuries are sustained by adults. Elsa Arroyos-Jurado, *et al.*, *Traumatic Brain Injury in School-Age Children: Academic and Social Outcome,* 38 J. SCH. PSYCHOL. 571, 571 (2000)). At least some adults so affected will both meet the substantive criteria for an ID diagnosis (significantly subaverage intellectual functioning and concurrent deficits in adaptive behavior) and become involved in violent crimes like aggravated homicide.

protection in the FDPA cover offenders with adult-onset intellectual disability, there will be an unacceptable risk that severely cognitively impaired defendants will face death sentences that are unconstitutionally excessive in relation to their diminished moral culpability. This Court should decide that question. To do so, it needs a case like this one, where the record conclusively demonstrates that, but for the age of onset, Petitioner meets the medical diagnostic criteria for intellectual disability.

As for the unresolved Sixth Amendment question presented here, the views of the Courts of Appeals clash directly with those of numerous state courts of last resort. In such circumstances, this Court should intervene to bring uniformity to this important area of the law. Whether and to what extent confrontation rights apply in capital sentencing may well be the most significant open legal question that remains regarding the death penalty. The route to an answer is blocked by *Williams*, a decades-old decision addressing a different constitutional provision, which continues to generate confusion and disagreement. It is time to revisit *Williams*, and Petitioner's case, free of the complexities that attend capital cases on habeas review, is an ideal vehicle for doing so. It squarely presents the Confrontation Clause issue because the challenged testimonial hearsay – BOP incident reports and disciplinary records recounting allegations by prison staff that Petitioner had engaged in multiple instances of serious, often violent misconduct – was extensive and prejudicial, and Petitioner's objections to that evidence properly preserved the issue for review.

And that issue has merit. Petitioner was denied the opportunity to confront his accusers at the precise moment when his life was hanging in the balance. The court below held that at that juncture, the method "constitutionally prescribed" for testing the reliability of testimony, *Crawford*, 541 U.S. at 62, does not apply. That is wrong. The scope of the Confrontation Clause should not turn on the venue in which a prosecution is brought, much less on a prosecutor's decision about whether to allege facts as relevant to "eligibility" versus "selection." *See Concepion Sablan*, 555 F. Supp. 2d at 1222 (noting concern that "allowing partial application of confrontation in the penalty phase' would "invite gamesmanship on the part of the government in allocating statutory aggravators between eligibility and selection").

PRAYER FOR RELIEF

For all the foregoing reasons, this Court should grant certiorari to review the Eighth Circuit's judgment affirming Petitioner's death sentence or grant such other relief as justice requires.

Respectfully submitted,

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