No. 19-7862

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

SUPPLEMENTAL QUESTION PRESENTED

In the court below, on direct appeal from his federal death sentence, Petitioner claimed that the Eighth Amendment forbids his execution because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002). The Court of Appeals held that Petitioner had not shown a consensus in the scientific community that intellectual disability can arise after age 18, and thus that Petitioner's severe intellectual impairment, caused by a traumatic brain injury at age 20, did not qualify. In so concluding, the court relied significantly on the then-current clinical standard from the leading professional organization in the field, the American Association on Intellectual and Developmental Disabilities (AAIDD).

Two weeks ago, however, the AAIDD issued the 12th edition of its authoritative manual on intellectual disability. Based on advances in brain science, the AAIDD now recognizes that the developmental period, and thus the window for onset of intellectual disability, extends to age 22. It thereby joined the American Psychiatric Association, which likewise abandoned a fixed age-18 cutoff for the developmental period several years ago.

This Court's decisions recognize the need to rely on up-to-date clinical standards in assessing claims of intellectual disability. Given that requirement, should the Court grant certiorari, vacate the decision below, and remand to the Court of Appeals for further consideration of Petitioner's *Atkins* claim in light of the AAIDD's revised, previously unavailable, and authoritative clinical standard, under which Petitioner is intellectually disabled and thus may not constitutionally be executed?

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SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERIORARI

Pending before the Court in this federal capital direct appeal is the Petition for Writ of Certiorari filed last year by Petitioner Wesley P. Coonce, Jr. The first question presented by the Petition relates to the application of *Atkins v. Virginia*, 536 U.S. 304 (2002).[1] This supplemental brief calls the Court's attention to "intervening matter" relevant to that question which was "not available" when the Petition was filed. *See* Sup. Ct. R. 15.8. Namely, two weeks ago the American Association on Intellectual and Developmental Disabilities (AAIDD), which the Court has recognized as the leading professional organization in the field, changed its clinical standard for the age of onset in diagnosing intellectual disability (ID). The AAIDD's revised standard renders Petitioner eligible for an ID diagnosis, which under the Eighth Amendment would preclude his execution. Given this intervening development, the Court should vacate the judgment below and remand for further consideration of Petitioner's *Atkins* claim. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (*per curiam*) ("We have GVR'd in light of a wide range of developments").

[1] *See* Petition at i ("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?").

STATEMENT

Petitioner, who had displayed average intelligence as a child, was involved in a high-speed auto crash at age 20. He suffered a severe traumatic brain injury that left him with a dramatically diminished I.Q. and unable to function normally in the world. Tr. 2959-67. Shortly thereafter, he committed a kidnapping and sexual assault, for which a federal court sentenced him to life imprisonment. At age 29, while incarcerated at the U.S. Medical Center for Federal Prisoners in Springfield, Missouri, he was involved in the murder of a fellow prisoner. Petitioner and a codefendant were charged in the Western District of Missouri and the government sought the death penalty against both.

The jury convicted Petitioner of first-degree murder and murder by a federal prisoner serving a life sentence.[2] During his capital-sentencing hearing, Petitioner moved the district court to preclude a death sentence on intellectual-disability grounds. *See* ECF #795 at 1. The motion cited Petitioner's 71 I.Q. as demonstrating significantly subaverage intellectual functioning and pointed out that extensive evidence of Petitioner's deficits in adaptive functioning had been presented during the mitigation case. *Id*. at 3. Those showings, Petitioner contended, met the first two criteria for a diagnosis of intellectual disability. *Id*.[3] As to the third criterion, age of onset, Petitioner argued that even though his severe impairment originated at age

[2] *See* 18 U.S.C §§ 1111, 1118.

[3] The extensive evidence supporting both these prongs is summarized in the Petition. *See id*. at 6–8.

20, the Eighth Amendment should preclude his execution, just as it would for an intellectually disabled offender whose condition manifested prior to age 18. *Id*. at 4–5. The district court denied the motion without further explanation or a hearing. Tr. 4984. *See* App. 12.

On appeal, Petitioner argued that because he met every criterion for a medical diagnosis of intellectual disability but the age of onset, and because he experienced all the features of that disability that are relevant to moral culpability, there was no principled basis for treating him differently from someone who acquired the same impairments prior to age 18. *See* Pet. C.A. Brf. at 89–90; *see also id*. at 92 (arguing that upholding his death sentence would violate both the Eighth Amendment and the Equal Protection component of the Fifth Amendment).

In response, the government did not assert that the evidence of Petitioner's significantly subaverage intellectual functioning and adaptive deficits was insufficient to warrant a hearing; instead, it challenged his case on the third prong, arguing that impairments like Petitioner's, when "developed later in life," do not qualify as intellectual disability and do not necessarily implicate the concerns this Court identified in *Atkins*. *See* Resp. C.A. Brf. at 84–86. As to the age of onset, the government relied primarily on the (then-current) 11th edition of the AAIDD's manual ("AAIDD-11"), and the fact that it included "an age-18 diagnostic criterion" for the end of the "developmental period." Resp. C.A. Brf. at 80; *see also id*. at 71 (under AAIDD-11, "disability originates before 18"), 72 (AAIDD-11 recognized that "18 is still the best upper limit"). The government also noted that both this Court

and Congress had relied on the AAIDD as the leading authority on the definition of intellectual disability. *Id.* at 74-79. The government thus concluded that "[t]here is … no conflict between" an "age-18 standard and the governing medical standards; they are, in fact, one and the same." *Id*.

The Court of Appeals did not deny that but for the age of onset, Petitioner's evidence met the diagnostic criteria to be exempt from execution under *Atkins*. App. 12. It also acknowledged that the American Psychiatric Association (APA) had recently abandoned a fixed age of 18 for the onset of intellectual disability in favor of the more flexible "during the developmental period" standard. But the court emphasized that "the AAIDD … still defines the age of onset as before eighteen." App. 12. As such, even if the AAIDD" might "eventually shift" to a different age of onset, that prospect was "not sufficient" for the court to "divine" any "current" scientific consensus other than treating 18 as the cutoff for an intellectual-disability diagnosis. *Id*. Accordingly, it concluded: "Because we agree with the district court that the age of onset is eighteen, we affirm its decision not to hold an *Atkins* hearing and not to consider whether Coonce satisfies the other factors for intellectual disability." *Id*.

Petitioner sought review in this Court, asking it to determine "whether the Constitution permits" his execution "though he was intellectually disabled at the time of the crime, because his intellectual disability arose after age 18." Pet. at 13. After his petition was filed, the AAIDD, just two weeks ago, issued the latest (12th) edition of its authoritative manual *Intellectual Disability: Definition, Diagnosis,*

Classification, and Systems of Supports (12th ed. 2021).[4] On its very first page, the manual announces (as part of the "Definition of Intellectual Disability") that, as to the third prong, the developmental period and thus the age of onset for intellectual disability are now understood to extend beyond 18: "This disability originates during the developmental period, which is defined operationally as before the individual attains age 22." *Id*. at 1.[5]

ARGUMENT

If Petitioner is a person with intellectual disability, he cannot be executed consistent with the Eighth Amendment. *Atkins*, *supra*. In the trial court, Petitioner made a substantial showing that he satisfies two of the three criteria for an ID diagnosis: he has significant limitations in both intellectual functioning and adaptive behavior. Thus, the question whether Petitioner may constitutionally be put to death turns on the third prong of the diagnosis: age of onset.

The district court concluded that because Petitioner's impairment dates from age 20, rather than manifesting prior to age 18, he could not satisfy the age of onset requirement for an ID diagnosis, and accordingly denied Petitioner's *Atkins* motion without a hearing. In upholding that decision, the Court of Appeals relied explicitly

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[4] The manual was published and made available for order by the AAIDD only two weeks ago. As soon as undersigned counsel learned of the age-of-onset change, he obtained copies the relevant pages and prepared this supplemental brief.

[5] A copy of the title page, publication information page, and first page of the 12th edition are attached as Appendix A. The AAIDD has also updated its web page "Frequently Asked Questions on Intellectual Disability" to reflect the change. See https://www.aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited January 29, 2021).

on the fact that under then-existing clinical standards embraced by the AAIDD, Petitioner was ineligible for a diagnosis of intellectual disability because his impairment dated from age 20 rather than preceding age 18. *See* App. 13. Neither the district court nor the Court of Appeals questioned Petitioner's evidentiary showings on the other two prongs of the diagnosis.

The AAIDD has now formally announced a new clinical standard for the age of onset of intellectual disability. Under this new standard, the condition must manifest during the "developmental period," which extends to age 22. Together with the recognition of a comparable standard by the APA (the other leading professional organization in the field, *see, e.g., Hall v. Florida*, 572 U.S. 701, 710, 712-13 (2014)), a scientific consensus has emerged rejecting the fixed age-18 cutoff that the Court of Appeals applied to deny Petitioner's *Atkins* claim. Given the opportunity to consider the revised AAIDD manual and apply the current clinical standard to Petitioner, it is significantly likely that the Court of Appeals will find that Petitioner is a person with intellectual disability, or at least that an evidentiary hearing on that question is now necessary.

This Court's decisions confirm the importance of employing up-to-date clinical standards in assessing intellectual disability. In *Hall*, for example, the Court found that Florida's strict requirement of a sub-70 I.Q. score for a finding of intellectual disability was outdated and incompatible with the prevailing view of medical experts. *See* 572 U.S. at 723. Similarly, in *Moore v. Texas*, 581 U.S. ___, 137 S. Ct. 1039 (2017), the Court vacated a decision that had "overemphasized Moore's perceived adaptive

strengths" because "the medical community focuses the adaptive-functioning inquiry on adaptive deficits." *Id*. at 1050; *see also id*. at 1053 (lower court failed adequately to inform itself of the "medical community's diagnostic framework"). And the Court has recognized the AAIDD's manual as the leading authority on such current clinical standards. *See, e.g., Atkins*, 536 U.S. at 308 n.3; *id*. at 309 n.5; *Hall*, 572 U.S. at 713; *Brumfield v. Cain*, 576 U.S. 305, 319–20 (2015); *Moore*, 137 S. Ct. at 1049, 1051–52.

While medical standards do not dictate judicial outcomes, decisions like *Hall* and *Moore* reflect the Court's longstanding recognition that "in determining intellectual disability," courts "are informed by the work of medical experts." *Hall*, 572 U.S. at 721. In summarily rejecting Petitioner's *Atkins* claim, the court below rested on the view that no intellectual impairment, regardless of its nature or severity, can qualify as "intellectual disability" if it arises after age 18 — and specifically on the fact that the AAIDD in particular continued to embrace an age-18 cutoff for the developmental period. That view is squarely at odds with the diagnostic framework now employed by the AAIDD, the most prominent professional association concerned with intellectual disability, as reflected in its authoritative manual.

As in *Hall* and *Moore*, the Court should act to ensure that Petitioner's claim is reviewed and decided according to current medical standards. Here, that means giving the Court of Appeals an opportunity to consider whether the AAIDD's expert conclusion that the developmental period should be understood to extend to age 22 requires a full hearing on Petitioner's intellectual-disability claim. *Cf. Brumfield v. Cain*, 576 U.S. 305, 321 (2015) (where "the evidence from trial provide[s] good reason

to think [the defendant] suffered from an intellectual disability," there is "even greater cause to believe he might prove such a claim in a full evidentiary hearing").

A final word about timing. Petitioner's case remains on direct appeal, which this Court has recognized should be "the primary avenue for review" of his death sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Now — rather than in a post-conviction proceeding that might take place years in the future — is the appropriate time for the lower court to consider the impact of the AAIDD's new clinical standard on Petitioner's *Atkins* claim. A remand for that purpose may result in a finding of intellectual disability and thus eliminate the need for further proceedings to consider other challenges to Petitioner's death sentence. Ensuring that Petitioner receives the benefit of up-to-date clinical standards now, on direct review, would also avoid any subsequent dispute over whether they were applied. *Cf. Bourgeois v. Watson*, 977 F.3d 620 (7th Cir.) (considering issue on eve of execution), *cert. denied*, 141 S. Ct. 507 (2020).

PRAYER FOR RELIEF

For the foregoing reasons, this Court should grant certiorari, vacate the judgment of the Court of Appeals for the Eighth Circuit affirming Petitioner's death sentence, and remand for further consideration of his *Atkins* claim in light of the AAIDD's current standard for the age of onset as extending through the "developmental period," *i.e.*, up to age 22.

In the alternative, the Court should grant plenary review to decide the questions presented in Petitioner's Petition for Writ of Certiorari, or grant such other relief as justice requires.

Respectfully submitted,

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Appendix A

Intellectual Disability

Definition, Diagnosis, Classification, and Systems of Supports

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12TH EDITION

American Association on Intellectual and Developmental Disabilities

aaidd

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The suggested citation for the AAIDD Manual is as follows:

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Definition of Intellectual Disability and Assumptions Regarding Its Application

Intellectual disability (ID) is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates during the developmental period, which is defined operationally as before the individual attains age 22.

The following five assumptions are essential to the application of this definition:

1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.
2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.
3. Within an individual, limitations often coexist with strengths.
4. An important purpose of describing limitations is to develop a profile of needed supports.
5. With appropriate personalized supports over a sustained period, the life functioning of the person with ID generally will improve.

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