

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*

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

ROBERT C. OWEN
Counsel of Record
Member, Supreme Court Bar
Law Office of Robert C. Owen, L.L.C.
53 W. Jackson Blvd., Ste. 456
Chicago, Illinois 60604
(512) 577-8329 Tel.
robowenlaw@gmail.com

SHANE P. CANTIN
Carver, Cantin
& Mynarich, L.L.C.
901 St. Louis St., Ste. 1600
Springfield, Missouri 65806
(417) 831-6363 Tel.
shane@carvercantin.com

BARRY J. FISHER
Federal Public Defender Office
39 North Pearl Street, 5th Floor
Albany, New York 12207
(518) 650-9031 Tel.
barry_fisher@fd.org

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

PRAYER FOR RELIEF 3

TABLE OF AUTHORITIES

CASES

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	1
<i>Brumfield v. Cain</i> , 576 U.S. 305 (2015)	1
<i>Hall v. Florida</i> , 572 U.S. 701 (2014)	1
<i>Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co.</i> , 520 U.S. 893, 896 (1997)	2
<i>Moore v. Texas</i> , 137 S. Ct. 1039 (2017)	1

CONSTITUTION, STATUTES AND RULES

U.S. Const. Amend VIII	2
------------------------------	---

ARGUMENT IN REPLY

The parties agree that this Court should grant certiorari, vacate the judgment below, and remand for further consideration of Petitioner’s claim that he is intellectually disabled and thus ineligible for the death penalty (“GVR”). *See* Petitioner’s Supplemental Brief in Support of Petition for Writ of Certiorari, at i (supplemental question presented), 5-8 (supplemental argument); Brief for the United States (U.S. Brf.) at 12-15, 31.¹

As support for a GVR, the government notes that the Eighth Circuit rested its rejection of Petitioner’s claim on the premise that, while his impairment dated from a traumatic brain injury at age 20, clinical diagnostic criteria required that intellectual disability arise during the developmental period, which then meant “before age 18.” U.S. Brf. at 10, *quoting* Pet. App. at 11. But, as the government recognizes, that premise has been superseded by the recent revision of the clinical definition by the American Association of Intellectual and Developmental Disabilities (AAIDD).² U.S. Brf. at 12 (“neither the AAIDD nor the APA [American Psychiatric Association] now retain the express onset-before-age-18 criterion for intellectual disability”). Thus, the government agrees, “a GVR would be appropriate in light of a

¹ The United States has not conceded that Petitioner should be granted a hearing on intellectual disability, let alone prevail on that issue, but only that further review is warranted

² The Court has often cited the AAIDD’s manual as representing current clinical standards for diagnosing intellectual disability. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 308 n.3; *id.* at 309 n.5 (2002); *Hall v. Florida*, 572 U.S. 701, 713 (2014); *Brumfield v. Cain*, 576 U.S. 305, 319–20 (2015); *Moore v. Texas*, 137 S. Ct. 1039, 1049, 1051–52 (2017).

significant intervening factual change that affects a central predicate of the court of appeals' Eighth Amendment analysis." *Id.* For it follows that if given the opportunity for further consideration, the Eighth Circuit likely would now reject that erroneous premise, and such a change might determine the ultimate outcome of Petitioner's appeal. *See id.* at 13–14 (citing *Lords Landing Vill. Condo. Council of Unit Owners v. Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (*per curiam*)). As the government acknowledges, those are the criteria the Court has previously identified as supporting a GVR and they are met here. *Id.*³

³ The Eighth Circuit assumed Petitioner's intellectual-disability claim was adequately preserved and might well so conclude on remand when revisiting the issue. *See* U.S. Brf. 9-10, 15 (citing Pet. App. 12); *see also* U.S. C.A. Br. 51-52, 64-67 (disputing whether statutory claim was preserved, but not whether constitutional one was); Pet. C.A. Rep. Br. 1-3 (replying that statutory claim was also preserved and that, in any event, statute and decisional law allow it to be raised for the first time post-judgment).

PRAYER FOR RELIEF

The Court should GVR this case for further proceedings in light of the intervening change in the AAIDD's clinical standard for the age of onset for intellectual disability. In the alternative, the 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,

/s Robert C. Owen

ROBERT C. OWEN

Counsel of Record

Member, Supreme Court Bar

Law Office of Robert C. Owen, L.L.C.

53 W. Jackson Blvd., Ste. 456

Chicago, Illinois 60604

(512) 577-8329 Tel.

robowenlaw@gmail.com

BARRY J. FISHER

Federal Public Defender Office

39 North Pearl Street, 5th Floor

Albany, New York 12207

(518) 650-9031 Tel.

barry_fisher@fd.org

SHANE P. CANTIN

Carver, Cantin & Mynarich LLC

901 St. Louis St., Ste. 1600

Springfield, Missouri 65806

(417) 831-6363 Tel.

shane@carvercantin.com

Counsel for Petitioner