OCTOBER TERM 2020

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED BOURGEOIS,
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

PETITION FOR A WRIT OF CERTIORARI

--- CAPITAL CASE ---
EXECUTION SCHEDULED FOR DECEMBER 11, 2020

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QUESTIONS PRESENTED

Does the Federal Death Penalty Act, which provides that a "sentence of death shall not be carried out upon a person who is mentally retarded," prohibit the government from executing a federal prisoner who is intellectually disabled under current legal and diagnostic standards?

If so, does 28 U.S.C. § 2241 provide a remedy for such a prisoner when a court had previously denied his claim using now-rejected judge-made criteria instead of clinically accepted diagnostic standards?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Southern District of Indiana, *Bourgeois v. Warden, et. al.*, 2:19-cv-00392-JMS-DLP. Stay of execution granted March 10, 2020.

United States Court of Appeals for the Seventh Circuit, *Bourgeois v. Watson, et. al.*, No. 20-1891. Stay vacated December 1, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfred Bourgeois respectfully requests that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Seventh Circuit ordering dismissal of his 28 U.S.C. § 2241 petition and vacating the district court's stay of execution.

Two congressional commands intersect in this case. The first, the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3596, prohibits the "[i]mplementation" or "carry[ing] out" of a sentence of death against a person who "is" intellectually disabled. The second, 28 U.S.C. § 2241, ensures a citizen's access to habeas corpus to stop the unlawful *carrying out* of a sentence, notwithstanding a 28 U.S.C. § 2255 court's prior affirmation that the sentence was *imposed* lawfully. Neither statute has been followed here.

Alfred Bourgeois is intellectually disabled under the current diagnostic standards of the American Psychiatric Association ("APA") and the American Association on Intellectual and Developmental Disabilities ("AAIDD"), which were made binding by this Court's decisions in *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) ("*Moore-I*"), and *Moore v. Texas*, 139 S. Ct. 666, 668 (2019) ("*Moore-II*").

The district court found that Mr. Bourgeois made a "strong showing" of intellectual disability under current legal and diagnostic standards. PA22–25.[1]

According to the Seventh Circuit, however, none of that matters. The court ordered his petition dismissed because Mr. Bourgeois "was able to litigate his intellectual-disability claim in his § 2255 motion," and thus, the dispositive "question in this appeal is *not* whether Alfred Bourgeois is intellectually disabled." PA15 (emphasis added). Under this reasoning, no development—legal, factual, or otherwise—and no defect in the initial § 2255 proceedings—no matter how egregious—would justify § 2241 review. The Seventh Circuit's ruling misapprehended both the right that the FDPA confers and the reach of the savings clause in 28 U.S.C. § 2255.

Petitioner's first question asks whether the Seventh Circuit's decision contravenes the FDPA's statutory command, creating a rule whereby some federal prisoners who are intellectually disabled *will be executed*. The FDPA's section on "Implementation of a sentence of death" instructs that "[a] sentence of death shall not be carried out upon" pregnant prisoners, 18 U.S.C. § 3596(b), or upon prisoners lacking "[m]ental capacity," *id.* § 3596(c). Congress defined the latter category to include "a person who is mentally retarded." *Id.* This Court should consider whether,

[1] Mr. Bourgeois has filed an Appendix contemporaneously with this Petition. It shall be cited as "PA" followed by the relevant page number.

and recognize that, this language bestows an actionable right upon prisoners like Mr. Bourgeois who can prove that carrying out their execution would *now* violate § 3596(c)'s intellectual-disability provision. The Seventh Circuit's blanket ruling denied Mr. Bourgeois that right.

Petitioner's second question asks whether the writ of habeas corpus provides a remedy against the unlawful implementation of his sentence, when the court presiding over his § 2255 proceedings denied his claim of intellectual disability using standards that have since been rejected. Among other defects, the § 2255 court rejected the diagnostic framework of the "psychological profession" and instead applied a "legal" standard that denied relief to Mr. Bourgeois in spite of his clinically-qualifying IQ scores and adaptive deficits, on the basis of lay opinions of intellectual disability, and the presence of perceived adaptive strengths as counters to Mr. Bourgeois's weaknesses. *See, e.g.*, PA88–91, 99, 103–04. But this Court has since made clear that current clinical standards apply to an intellectual-disability determination. *Moore-I*, 137 S. Ct. at 1053. Those clinical standards establish: that IQ scores of 70 and 75, such as those obtained by Mr. Bourgeois, are in the range for intellectual disability; that contrary to the § 2255 court's analysis, an adaptive behavior determination is based on deficits, not strengths; and that the lay opinions and other inaccurate stereotypes relied on by the § 2255 court have no place in an

intellectual-disability diagnosis. *Id.* at 1050–53; *see also* PA548–49 (AAIDD-2012)[2] (rejecting stereotypes that persons with intellectual disability cannot drive, attain vocational skills, live independently, or support their families).

Certiorari should be granted because the Seventh Circuit "decided [two] important question[s] of federal law that ha[ve] not been, but should be, settled by this Court." Sup. Ct. R. 10(c). In addition to deciding that the FDPA means what it says when it forbids the execution of a prisoner who "is" intellectually disabled, the Court should consider whether, and hold that, § 2241 provides a potential remedy for Mr. Bourgeois's FDPA claim, and that Mr. Bourgeois's rights under the FDPA are not and cannot be overridden by the mere fact of a previous adjudication under since-rejected standards. Both holdings are necessary to effectuate the FDPA's commands.

OPINIONS BELOW

The opinion of the Court of Appeals vacating the district court's granting of the motion for stay of execution and ordering Mr. Bourgeois's § 2241 petition to be dismissed is reported at *Bourgeois v. Watson*, 977 F.3d 620, 624 (7th Cir. 2020), and included in the Appendix. *See* PA1–16. The orders of the district court granting a

[2] The AAIDD's 2010 *Intellectual Disability: Definition, Classification, and Systems of Supports* shall be referred to as "AAIDD-2010." The AAIDD's 2012 *User's Guide* to AAIDD-2010 shall be referred to as "AAIDD-2012."

stay of execution and denying the Government's motion to reconsider are unreported and included in the Appendix at PA17–31 and PA32–36, respectively.

JURISDICTION

The Court of Appeals issued its opinion vacating the stay of execution and ordering the § 2241 petition to be dismissed on October 6, 2020. The mandate was issued on December 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 3596 provides:

> **Implementation of a sentence of death**
>
> (a) **In general.** – A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.
>
> (b) **Pregnant woman** – A sentence of death shall not be carried out upon a woman while she is pregnant.
>
> (c) **Mental capacity** – A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

STATEMENT OF THE CASE

A. Mr. Bourgeois's Evidence of Intellectual Disability

In his petition, Mr. Bourgeois alleged that he meets all three criteria for intellectual disability ("ID"): deficits in intellectual functioning ("prong one"); deficits in adaptive functioning ("prong two"); and onset before the age of eighteen ("prong three"). PA284. His allegations were supported by two IQ tests, two neuropsychological assessments, broad-based achievement testing, formal tests of adaptive behavior, and accounts from over twenty collateral witnesses.

Intellectual Functioning. Prong one is established with an IQ score of 70 or below with a confidence interval for measurement error taken into account. Because the measurement error for most IQ tests is ± 5, the presumptive range for ID extends to scores of 75. *See* PA526 (Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition* (2013) ("DSM-5")) (prong one "involves a score of 65–75 (70 ± 5)"). Mr. Bourgeois was given IQ tests in 2007 and 2004. He received scores of 70 (encompassing scores as low as 65) and 75 (encompassing scores as low as 70), respectively. Individually and collectively, these scores satisfy prong one. PA287–89.

Diagnostic standards require IQ scores to be corrected for the Flynn Effect.[3] When so corrected, Mr. Bourgeois's IQ scores drop to 67 and 68, which fall even deeper into the ID range and again satisfy prong one. PA286–88.

Adaptive Functioning. Prong two is satisfied when there is a significant limitation in at least one of three domains: conceptual, social, or practical. *See* PA524. Mr. Bourgeois has significant deficits in all three. PA289–311.

In the *conceptual* domain, Mr. Bourgeois struggled academically from early childhood through adulthood. He had trouble learning the alphabet, reading, and counting, despite efforts by his friends and family to help him progress. PA294–95. He failed the third grade and moved on to the fourth grade only after attending summer school. Tr. 9/21/10 at 323–24, *Bourgeois v. Warden*, No. 19-cv-392 (S.D. Ind. Aug. 15, 2019), ECF No. 1-4. He was then made to repeat the fourth grade, was placed in his school district's equivalent of special education, and still did poorly. *Id.*; PA295. His adult academic functioning was similarly deficient. On a broad-ranged achievement test administered when he was forty-five years old, he scored at the elementary school level in eleven of thirteen areas. PA550. The only area where he functioned age-appropriately—spelling—was conceptually unsophisticated and involved rote learning only. PA298, 550.

[3] The Flynn Effect establishes that IQ scores inflate at a rate of 0.3 points per year after generation of the data upon which the IQ test was based. PA283–85.

Mr. Bourgeois's abilities to comprehend, communicate, retain information, and solve problems were similarly impaired. Before age 18, he was described as "slow" and as someone who "couldn't catch on." PA298–99. He was "pretty much silent and non-communicative," had difficulty explaining himself, and needed speech therapy for stuttering. PA301. He had trouble following directions and performing simple tasks like buttoning his shirt, or frying toast. PA299. Although he spent much of his childhood living with an elderly neighbor who "had a lot of patience with Alfred," Mr. Bourgeois's problems with comprehension and memory made him a target when he was living with his abusive mother. *Id.* His sister recalled: "He would get beat [by our mother] for the same thing over and over like he just couldn't learn." *Id.*

Mr. Bourgeois's conceptual problems continued into adulthood. PA299–300. Friends and family described him as "slow like a child," having problems "catching on to" things, and needing repeated instructions. *Id.* He would inevitably repeat his mistakes because he "could not reason things out and change his behavior." PA300. He had problems maintaining attention, and could address only what was "right in front of his face." Decl. & Affidavit of Claudia Mitchell at A-202, *Bourgeois v. Watson*, No. 19-cv-392 (S.D. Ind. Aug. 16, 2019), ECF No. 1-3. His communication deficits remained and he still had difficulties with comprehension. PA299–300.

He eventually became a cross-country truck driver, but was able to do so only after being spoon-fed the profession by the employer who first hired him as a driver—a chain of grocery stores with a training program designed so that the intellectually disabled, otherwise developmentally disabled, and illiterate could succeed. Tr. 9/21/10 at 324–35, *Bourgeois*, No. 19-cv-392, ECF No. 1-4. And Mr. Bourgeois received additional assistance from his cousin, who also worked there and gave him repeated instructions on his duties. *Id.* Even with this level of support, Mr. Bourgeois still had difficulty, and had to be closely chaperoned by experienced employees before he could advance. *Id.*

Direct testing confirmed Mr. Bourgeois's conceptual deficits. Neuropsychological assessments conducted in 2004 and 2007 found impairments in executive functioning (decision making, comprehension, and problem solving) and memory. PA296–98, 300. In addition to the academic impairments discussed above, the 2009 achievement testing showed deficits in language and oral communication. PA301–02.

In the *social* domain, Mr. Bourgeois was an awkward, emotionally fragile child who had difficulty fitting in with his peers. PA302–03. He was delayed in learning childhood activities like riding a bike and had trouble understanding sports and games. PA302. His neighborhood peers recognized that he was slow, and they were protective of him for that reason. Tr. 9/21/10 at 102–03, *Bourgeois*, No. 19-cv-

392, ECF No. 1-4. Outside of that supportive community, he was socially victimized and often lacked the coping skills to do anything but break down into tears. *Id.* He was emotionally unstable, and stood out from other maturing children for his tantrums. PA302; Decl. & Affidavit of Michelle Armont at A-180–81, *Bourgeois*, No. 19-cv-392, ECF No. 1-3.

He remained impaired socially throughout adulthood. He was emotionally unstable and unable to negotiate relationships. PA303–04. He has been married four times, and all four of these relationships were "chronically unstable due to his inability to regulate his emotions." *Id.* Like many people with ID, his behavior was skewed by attempts to conceal or "mask" his impairments. Whether by misrepresenting his accomplishments or relying on others for support, he has made a concerted effort throughout his life to appear more functional than he actually is. PA307–09.

Mr. Bourgeois was similarly impaired in the *practical* domain. As noted above, he was delayed in basic areas of self-care such as tying his shoes or dressing himself properly, simple chores that his peers had long since mastered, and basic activities such as riding a bike, playing games, and counting money. PA302, 304. Mr. Bourgeois's practical impairments persisted into adulthood, where he had problems cooking for himself, dressing appropriately, and filling out applications and other paperwork. PA304–05. He worked steadily, but was frequently in debt

because he bought expensive things without any idea how he would pay for them. PA305–06.

Psychologist Victoria Swanson, Ph.D., administered a formal adaptive behavior measure that returned ID-range scores in all three domains and in the composite score capturing overall functioning. PA311. These scores were confirmed by an adaptive behavior measure given by one of the Government's experts, psychologist Roger B. Moore, Jr., Ph.D., who again returned ID-range scores in all categories. PA498–99. The Government's additional adaptive behavior testing involved three individuals whose contact with Mr. Bourgeois was limited—generally to a work setting—and whose scores were invalidated by guessing on responses. *Id.*

Age of onset. As set forth above, Mr. Bourgeois's impairments were present from early childhood and correspond to the intellectual and adaptive impairments observed during adulthood. PA311–12. Mr. Bourgeois's history includes several well-recognized risk factors for ID, *see* PA528, 535, including childhood physical and sexual abuse, poverty, impaired parenting, and a family history of neurological and developmental impairments, PA312–18.

B. The § 2255 Proceedings

In 2004, Mr. Bourgeois was convicted of murder and sentenced to death in the Southern District of Texas. The United States Court of Appeals for the Fifth

Circuit affirmed his conviction and sentence. *United States v. Bourgeois*, 423 F.3d 501, 512 (5th Cir. 2005), *cert. denied sub nom. Bourgeois v. United States*, 547 U.S. 1132 (2006). Mr. Bourgeois then filed a § 2255 motion that included a claim of intellectual disability. After a hearing, the district court denied the claim.

The § 2255 court found that prong one was not met. The court recognized that Mr. Bourgeois's IQ test results of 70 and 75 would have satisfied prong one under the standards employed by "the psychological profession." PA88–90, 526. However, relying on then-binding Fifth Circuit precedent in *United States v. Webster*, 421 F.3d 308, 351–52 (5th Cir. 2005), and *Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006), the court explained that "[i]n the *legal context*, whether an inmate had significantly subaverage intellectual functioning is a question of fact that the Court decides." PA90. Under this "legal" standard, the § 2255 court determined that Mr. Bourgeois's "true" IQ did not "fall at the lower . . . end of the confidence interval" for either of his scores. PA91–101.

In discussing its "true" IQ finding, the § 2255 court explained that it employed a "lay assessment" of Mr. Bourgeois based on its "own observations." PA99. The court further opined that Mr. Bourgeois "answers the questions asked of him, engages in conversation, has logical thoughts, and does not otherwise give any impression of mental retardation"; "worked for many years as a long haul truck driver"; "bought a house, purchased cars, and handled his own finances"; and

"otherwise carried himself without any sign of intellectual impairment." PA78, 95, 97.

The § 2255 court credited the Government expert's opinion that Mr. Bourgeois's "inability to test well" could be explained by the fact that he "is someone who has been somewhat culturally deprived, didn't profit from education as much as someone else, [and did] not experience things that were intellectually academically enriching." PA94. In analyzing prong one, the § 2255 court declined to correct for the Flynn Effect. PA89 n.37.

In finding that prong two was not met, the § 2255 court again differentiated between "legal" and "psychological" approaches to assess adaptive functioning. The court explained that, although the "mental health community ignores an individual's strengths when looking at adaptive functioning," the court's "inquiry into adaptive deficits takes on a much different flavor." PA103–04. Dispensing with the "psychological" approach, the court adopted a "legal" approach to weigh Mr. Bourgeois's perceived strengths against his weaknesses. PA104. These perceived strengths included: working as a trucker, which the court deemed "inconsistent with mental retardation," PA97; having acquaintances who "did not suspect that he was mentally retarded," *id*.; appearing well-groomed, PA117; writing letters from prison, PA97–98; and "engag[ing] in the give-and-take of normal conversation," PA126.

When addressing Mr. Bourgeois's specific adaptive deficits, the § 2255 court minimized their import by speculating about alternate explanations for his impairments. The court faulted Mr. Bourgeois's evidence as failing to "*conclusively link*" his impairments "to mental retardation rather than a culturally deprived upbringing, poverty, or abuse." PA126 (emphasis added); *see also* PA120–21. The court similarly speculated that other mental health diagnoses could explain his poor adaptive behavior. PA122.

Based on its analysis of prongs one and two, the § 2255 court also found prong three not to be present.

As discussed, *infra*, all the court's reasoning is inconsistent with, and has been rejected by, currently accepted legal and diagnostic standards. Rejecting the "psychological" approach in favor of a purported "legal" approach, it was also contrary to the diagnostic standards in place at that time.

C. Subsequent Legal Developments

The FDPA and *Atkins v. Virginia*, 536 U.S. 304 (2002), impose a bar on the execution of the intellectually disabled but do not define methods to determine if the diagnosis is present. *See* 18 U.S.C. § 3596(c); *Atkins*, 536 U.S. at 317. This changed in 2017 when this Court held in *Moore-I* that the "medical community's *current standards*" are binding when assessing a claim of intellectual disability. 137 S. Ct. at 1050–53 (emphasis added). Citing the current manuals from the APA and the

AAIDD, the Court explained that, "[r]eflecting improved understanding over time, current manuals offer the 'best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id.* at 1053 (citations omitted) (quoting DSM-5, at xli).

Moore-I rejected the approach taken by the Texas state courts in *Ex parte Briseño*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), and invalidated a number of practices employed by the Texas courts as contrary to the medical community's current standards. *Moore-I*, 137 S. Ct. at 1053. *Moore-I* likewise abrogated Fifth Circuit precedent incorporating unscientific practices in ID determinations, including *Webster* and *Clark*, both of which the § 2255 court relied on. *See infra* at 31–32.

Moore-I ruled that any IQ score with a "standard error of measurement" range that has a "lower end" that includes "scores at or below 70" is an ID-level score and satisfies prong one. *Id.* at 1049–50. *Moore-I* rejected the state court's attempt to "discount[] the lower end of the standard-error range" in an ID determination. *Id.* at 1047, 1049.

Moore-I also clarified the prong two analysis. The Court rejected: (1) making an adaptive behavior determination based on an individual's strengths, rather than his or her weaknesses; (2) relying on erroneous stereotypes regarding the intellectually disabled, citing the list of stereotypes that were rejected by the AAIDD,

see infra at 17; (3) viewing risk factors for intellectual disability as evidence undermining the diagnosis of ID, rather than appropriately noting them as recognized causes of the disorder; (4) employing "lay perceptions of intellectual disability" rather than the clinical definitions; (5) using co-occurring disorders to explain away deficits, rather than appropriately recognizing that such disorders are common in the intellectually disabled; (6) relying on behavior in prison and other highly-structured environments as part of an adaptive behavior analysis; and (7) using the *Briseño* factors[4] employed by the state court in *Moore-I*. 137 S. Ct. at 1050–53.

In general, *Moore-I* rejected procedures like those used by the § 2255 court that "create an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051 (brackets and internal quotation marks omitted). In doing so, the Court relied extensively on AAIDD-2010, AAIDD-2012, and the DSM-5. *Id.* at 1050–53.

Two years later, this Court considered Moore's case again. *See Moore-II*, 139 S. Ct. at 666. On remand, the state court had purported to employ current clinical standards, but again found Moore not to be intellectually disabled based on

[4] Initially set forth by the Texas Court of Criminal Appeals in *Briseño*, 135 S.W.3d at 8–9, the *Briseño* factors reflected stereotypes and misimpressions of intellectual disability that made *Atkins* relief virtually unattainable for capitally convicted defendants.

credibility findings of experts. *Id.* at 670. *Moore-II* re-affirmed the binding nature of current diagnostic standards and overruled the lower court's credibility determinations where they were inconsistent with those standards. *Id.* at 670–71.

D. Subsequent Diagnostic Developments

Major diagnostic developments post-dated the § 2255 court's adjudication of Mr. Bourgeois's ID claim.

In 2012, the AAIDD identified numerous commonly held, but erroneous, stereotypes relating to individuals with intellectual disability that "are unsupported by both professionals in the field and published literature," "incorrect," and "must be dispelled." PA548–49 (AAIDD-2012). These false stereotypes included misconceptions, such as those relied upon by the § 2255 court, that individuals with ID: "look and talk differently from persons from the general population," "cannot do complex tasks," "cannot get driver's licenses, buy cars, or drive cars," "cannot acquire vocational and social skills necessary for independent living," and "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations." PA549.

The DSM-5, published in 2013 by the APA, mandated that the Flynn Effect be taken into account for IQ tests utilized in the prong one clinical determination. PA526 (DSM-5) ("Factors that may affect test scores include . . . the 'Flynn effect' (i.e., overly high scores due to out-of-date test norms)."). The DSM-5 also set forth

clinical summaries as to what level of functioning satisfied prong two in each domain, and clarified that intellectually disabled individuals can engage in many activities in each domain while still having significant deficits in that domain. *See* PA523–25.

E. Subsequent Procedural History

Following *Moore-I*, Mr. Bourgeois requested authorization from the Fifth Circuit to file a second motion under § 2255(h)(2), based on a new, retroactive rule of constitutional law that was previously unavailable. Mr. Bourgeois argued that *Moore-I* abrogated the Fifth Circuit precedent upon which the § 2255 court relied, rendered the § 2255 court's analysis legally invalid, and made the previously unavailable protections of *Atkins* newly available to him. *See Bourgeois v. United States*, No. 18-40270 (5th Cir.). On August 23, 2018, the Fifth Circuit denied the application. PA262–64. The court did not question the merits of Mr. Bourgeois's ID claim or his argument that *Moore-I* abrogated Fifth Circuit precedent endorsing the type of analysis the § 2255 court employed, but held that he was barred from raising his intellectual-disability claim a second time under 28 U.S.C. § 2244(b)(1). *Id.*

On July 25, 2019, the Government scheduled Mr. Bourgeois's execution for January 13, 2020. PA276. That date was subsequently stayed in connection with challenges to the manner of Mr. Bourgeois's execution that are unrelated to this Petition. That stay was ultimately vacated on April 7, 2020. *See In re Fed. Bureau*

of Prisons Execution Protocol Cases, 955 F.3d 106, 108 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, 19-1348, 2020 WL 3492763, at *1 (U.S. June 29, 2020). Meanwhile, while the stay was in place, on August 15, 2019, Mr. Bourgeois filed a § 2241 petition in the Southern District of Indiana. As relevant here, he alleged that he is intellectually disabled under current legal and diagnostic standards; that the FDPA therefore bans the carrying out of his death sentence; and that § 2241 review is warranted to protect his rights under the FDPA. PA283–318, 344–46.

On March 10, 2020, after the January execution date had been vacated by the stay issued in the lethal injection proceedings, the § 2241 court stayed Mr. Bourgeois's then-pending execution, finding that Mr. Bourgeois made a "strong showing" that he is ID under current diagnostic standards and that a hearing should be held to fully develop the evidence. PA21–28. The court concluded that the Government had waived any argument against the cognizability of Mr. Bourgeois's challenge to the carrying out of his death sentence based on the FDPA, as the Government had failed to respond to this specific claim. PA21–22. The court did not reach Mr. Bourgeois's related challenge to the imposition and execution of his sentence under the Eighth Amendment. *See* PA21–28.

On October 6, 2020, the Seventh Circuit ordered the stay vacated and the petition dismissed. PA15. The court ruled that whether Mr. Bourgeois was ID under

current standards was irrelevant. Despite the FDPA's plain language, the court ruled that the statute does not require application of the medical and legal standards in place at the time of execution. PA14–15. The court held that the savings clause of § 2255(e) did not permit review of Mr. Bourgeois's challenge to the implementation of his sentence where he had litigated an ID claim in the past. *Id.* Because he had not been "formally prevented" from pursuing an ID claim in § 2255 proceedings, Mr. Bourgeois was not entitled to habeas review of his ID under current standards. *Id.* In the Seventh Circuit's view, § 2241 did not provide a mechanism to independently challenge the unlawful implementation of his sentence. *Id.*

Mr. Bourgeois filed a timely petition for en banc reargument, and the Government filed a response after the court requested one. On November 20, 2020, while that petition was still pending, and even though the Seventh Circuit had yet to issue its mandate, the Government set Mr. Bourgeois's execution for December 11, 2020. Reargument was denied on December 1, 2020, with two judges dissenting.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, CONSISTENT WITH ITS PLAIN LANGUAGE, THE FEDERAL DEATH PENALTY ACT PROHIBITS THE CARRYING OUT OF A DEATH SENTENCE ON A PRISONER WHO IS INTELLECTUALLY DISABLED UNDER CURRENT STANDARDS.

Congress meant for § 3596(c) to do what it says: prevent the carrying out of a death sentence on an intellectually disabled prisoner like Mr. Bourgeois. The language, structure, and legislative history of § 3596 support Mr. Bourgeois's

contention that the FDPA independently restricts the government from implementing a death sentence against an intellectually disabled person, even where the underlying conviction and sentence may be lawful. The Seventh Circuit's decision ignored this statutory command, giving no present-tense effect to the FDPA, and creating a blanket rule whereby some federal prisoners who are ID will inevitably be executed. Because Seventh Circuit precedent governs in Terre Haute, Indiana—where all federal executions take place and thus where all such challenges are likely to be raised—this Court should grant certiorari to decide this important federal question.

A. The FDPA's Plain Language Bars the Carrying Out of a Death Sentence on Any Prisoner Who Is Intellectually Disabled under Current Legal and Diagnostic Standards.

A statute is to be interpreted "in accord with the ordinary public meaning of its terms," as "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1738 (2020). The plain text of 18 U.S.C. § 3596(c) bars the "carr[ying] out" of a "sentence of death" on a person who "is" intellectually disabled. This provision presumes the existence of a valid "sentence of death" but nonetheless categorically bans implementation of the sentence on the intellectually disabled. The FDPA's plain language thus requires an analysis of Mr. Bourgeois's ID based on the legal and diagnostic standards in place now, rather than standards employed in the past.

First, the Dictionary Act, 1 U.S.C. § 1, "ascribes significance to verb tense" of a federal statute and "[b]y implication . . . instructs that the present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010). As with the sex offender statute at issue in *Carr*, Congress enacted a present-tense prohibition in the FDPA—"a person who is mentally retarded," 18 U.S.C. § 3596(c)—and this language is "not readily understood" to refer to past ID determinations. *Carr*, 560 U.S. at 448. Indeed, the present tense of the contested term in *Carr* was a "striking indicator" of its "prospective orientation," all the more so because it was set forth in a series of other present-tense verbs that could also trigger the statute's requirements. *Id.* at 449 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987)). The same is true here. The ID language is grouped with other exemptions that arise at the time of execution—for pregnant and mentally incompetent defendants—in §§ 3596(b) and (c).

Had Congress intended for the prohibition on executing ID prisoners to turn on whether the defendant had been found to be ID in the past, it easily could have "varied the verb tenses to convey this meaning." *Carr*, 560 U.S. at 450. But Congress instead placed the ID provision in the same subsection as the competency provision and used identical language barring the "carrying out" of a death sentence upon a person who "is" exempt. It is beyond dispute that claims under the competency provision arise when the death sentence is to be implemented. *See infra* at 35.

Nothing in the language of either clause in § 3596(c) distinguishes between the two, or provides any basis for making one determination in the present but the other in the past. Rather, consistent with this plain language, this Court has noted that § 3596(c) prohibits the intellectually disabled "from being sentenced to death *or executed*." *Atkins*, 536 U.S. at 314 n.10 (emphasis added). The FDPA's plain language bars execution of a prisoner who meets the definition of ID at the time of implementation.

Second, the structure of the FDPA makes equally clear that the ID provision applies when a death sentence is to be implemented. Section 3596 is devoted to and entitled "Implementation of a death sentence." It sets forth a series of directives for how to carry out a federal death sentence in accordance with state law and under a United States marshal's supervision. *See* 18 U.S.C. § 3596(a). The entire section is triggered "[w]hen the sentence is to be implemented." *Id*. By contrast, the FDPA's preceding sections govern "[i]mposition of a sentence of death," *id.* § 3594, and "[r]eview of a sentence of death," *id*. § 3595. The language and structure of the FDPA make clear that the ID provision relates to the time at which a death sentence is to be implemented, notwithstanding the prior "[i]mposition" and "[r]eview" of a valid death sentence.

B. Legislative History Confirms the FDPA's Plain Language.

The text of § 3596 is clear and unambiguous. Thus, there is no need to go beyond its plain language, and its legislative history is not controlling. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). Nonetheless, to the extent the legislative history is relevant, the common law, the history of the Anti-Drug Abuse Act of 1988 ("ADAA"), and the history of the FDPA all confirm that § 3596(c) turns on a defendant's ID status at the time of execution.

This Court "generally presume[s] that Congress legislates against the backdrop of the common law," *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1016 (2020), and "may take it as a given that Congress has legislated with an expectation that the common law principle will apply except when a statutory purpose to the contrary is evident," *United States v. Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks and brackets omitted). Here, Congress adopted the age-old common law prohibitions on implementing death sentences on pregnant and mentally incompetent prisoners, with only one "evident" change: it expanded the mental capacity prohibition to include intellectual disability.

Congress was well aware that it was expanding the prohibition on executing persons lacking "[m]ental capacity" to include the intellectually disabled. As Representative Edwards explained regarding his proposed amendment to the ADAA's sub-section (*l*), "[t]he Gekas amendment already prohibits the execution of

mental incompetents," and the amendment by Representative Levin "implements that." 134 Cong. Rec. H7259-02 (Sept. 8, 1988), 1988 WL 175612, at *64. The amendment Representative Edwards offered, and which the House adopted immediately after his explanation, "expands the language in the Gekas amendment so that it conforms to the definition of incompetence recommended by both the American Bar Association and the American Association on Mental Retardation." *Id.*

The impetus for including the ID provision in the ADAA was Georgia's execution, two years earlier, of a person recognized to be intellectually disabled. *Id.* Representative Levin, who sponsored the amendment, sought to ensure that the Federal Government would never conduct such an execution: "The purpose of this is very much confined to prohibit *execution* of those who are mentally retarded." *Id.* (emphasis added).

Congress made no changes to the tradition that these prohibitions were judged at the time of execution. At common law, these prohibitions barred the *carrying out*, as opposed to the imposition, of a death sentence; focused on *the present-tense condition* of the prisoner; and were enforced through collateral judicial proceedings. *See* William Blackstone, 4 Commentaries 388–89 (1769). These common law traditions continued throughout American history. *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986); *see also id.* at 401, 408–09 & n.2.

When Congress later imported the prohibition on the execution of those with ID into the FDPA, the Congressional Record again reflected broad awareness—by both the proponents and the opponents of the ID provision—that the prohibition focused on the time of execution, not the time of sentencing.[5] Indeed, Senator Hatch introduced an amendment to remove the ID provision because it would enable defendants to raise ID claims "at any time." 136 Cong. Rec. S6873-03 (May 24, 1990), 1990 WL 69446, at *S6876 (comments by Sen. Hatch). Senator Hatch's amendment failed. Instead, Congress, aware that the FDPA's prohibition on the execution of ID prisoners could be raised "at any time," adopted the provision.

In short, at the time of the passage of the FDPA, Congress banned the execution of those with intellectual disability, along with those who were pregnant or mentally incompetent, well aware that such prohibitions would be judged at the time of execution. The legislative history elucidates Congress's choice of present-tense language in enacting those prohibitions and undermines the Seventh Circuit's backward-looking interpretation of § 3596(c).

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[5] *See* 136 Cong. Rec. S6873-03 (May 24, 1990), 1990 WL 69446, at *S6873 (opposing the ban and arguing that proponents of the ban "suggest that there is a national consensus against *executing* any, and all, capital murderers who are retarded") (Sen. Thurmond); *id.* at *S6875 ("I say that we should ban the *execution* of the retarded, period. It is barbaric.") (Sen. Biden); *id.* at *S6877 (supporting the ban and describing the debate over the ID-related passage as debating "whether we are going to *execute* the mentally retarded") (Sen. Kennedy) (emphases added as to all quotes).

C. Mr. Bourgeois Is Intellectually Disabled.

Because the plain language and clear purpose of the FDPA prohibit implementation of a death sentence against a person who "is" ID, the Seventh Circuit's ruling that "[t]he question in this appeal is not whether Alfred Bourgeois is intellectually disabled," PA15, and "it is not for us to decide whether the § 2255 court got it right or wrong," PA13, cannot stand. The FDPA confers a categorical right to prisoners, like Mr. Bourgeois, who are ID under standards prevailing "[w]hen the sentence is to be implemented." 18 U.S.C. § 3596(a). Because Mr. Bourgeois's ID claim has never been considered under current standards, this case presents an appropriate vehicle for the Court to address the scope and meaning of the FDPA.

Two comprehensive tests of IQ, two separate neuropsychological assessments, broad-based achievement testing, twenty third-party reporters, school records, and formal tests of adaptive behavior demonstrate that Mr. Bourgeois is intellectually disabled. *See supra* at 6–11. Even without being corrected for the Flynn Effect, his IQ scores of 70 and 75 both fall within the range of intellectual disability pursuant to *Moore-1*. *See supra* at 6–7. He has suffered lifelong adaptive deficits in each of the conceptual, practical, and social domains. *See supra* at 7–11. In light of this evidence, the § 2241 court correctly determined that Mr. Bourgeois has made a "strong showing" that he is ID under current standards, and issued a stay

so that an evidentiary hearing could be held to determine the question conclusively. PA25.

It bears emphasis that Mr. Bourgeois has never had his ID claim considered under current legal standards, and never had his claim considered under *any* diagnostic standards. Instead, in assessing Mr. Bourgeois's intellectual and adaptive functioning, the § 2255 court rejected the diagnostic standard employed by the "psychological profession" in favor of a "legal" standard that did not correspond to diagnostic requirements. PA88–91, 103–04. As set forth above, *Moore-I* later mandated the use of the diagnostic standards as binding in an ID determination. 137 S. Ct. at 1053.

The § 2255 court also engaged in a number of practices that were later rejected in *Moore-I* and are inconsistent with current diagnostic standards, including the following examples. First, the § 2255 court found that prong one had not been met, in spite of Mr. Bourgeois's two ID-range IQ scores of 70 and 75. The § 2555 court did not "invalidate" these scores but acknowledged that they would meet prong one under psychological standards. Instead of applying those standards, the § 2255 court attempted to parse out where in the standard error range Mr. Bourgeois's "true" IQ was and determined that this "true" IQ did not fall into the low end of that range. PA88–91; *see also* PA526. Years later, *Moore-I* rejected analyses that "discounted the lower end of the standard-error range," and clarified that, where "the lower end

of [the] score range falls at or below 70," the first prong of ID is met. *Moore-I*, 137 S. Ct. at 1047, 1049. No court has ever considered Mr. Bourgeois's intellectual functioning consistent with this standard—other than the § 2241 district court below, which held that he likely satisfied that standard and was entitled to a stay of execution.

Second, the § 2255 court relied on lay assessments of Mr. Bourgeois's functioning. The Court opined that it "had sufficient interaction with Bourgeois to make a lay assessment of whether he functions at the low level described by his expert witnesses. . . . Based on this Court's own observations, the testimony that Bourgeois has significant intellectual limitations is not credible or persuasive." PA99; *see also* PA97 ("[T]hose who knew [Mr. Bourgeois] as an adult did not suspect that he was mentally retarded."). *Moore-I* rejected such lay assessments of ID as unscientific and improper. 137 S. Ct. at 1051–52.

Third, the § 2255 court rejected the psychological approach to assessing adaptive behavior that focused solely on deficits. Instead, it adopted a "legal" approach to adaptive deficits that weighed a defendant's perceived strengths against his deficits. PA103–04 ("The law will compare the deficiencies to positive life skills, presuming that adaptive successes blunt the global effect of reported insufficiencies."). *Moore-I* rejected this practice and, consistent with current medical

and scientific standards, confirmed that an adaptive behavior analysis was based on deficits, not strengths. 137 S. Ct. at 1050.

Fourth, in assessing adaptive deficits, the § 2255 court relied on stereotypes of the intellectually disabled, including that Mr. Bourgeois "lived a life which, in broad outlines, did not manifest gross intellectual deficiencies"; "answers questions asked of him"; "engages in conversation"; "worked for many years as a long haul truck driver"; "bought a house, purchased cars, and handled his own finances"; had "logical thoughts"; did not "operate as a child"; and did not appear to the Court to "function[] at an intellectual level equal to that of a child." PA78, 95, 97, 99, 100. Such an analysis aligns with the erroneous but commonly held stereotypes since identified by the AAIDD and rejected in *Moore-I*. 137 S. Ct. at 1052 (citing AAIDD-2012 at 25–27). The AAIDD-2012 describes erroneous stereotypes to include that persons with ID: "look and talk differently from persons from the general population"; "cannot acquire vocational and social skills necessary for independent living"; "cannot get driver's licenses, buy cars, or drive cars"; and "do not (and cannot) support their families." PA549; *see also* PA523 (DSM-5 recognizing that individuals with ID can engage in many activities in each domain while still having significant deficits in that domain).

Fifth, the § 2255 court viewed the dysfunctional aspects of Mr. Bourgeois's upbringing as alternate explanations for Mr. Bourgeois's "inability to test well" on

IQ tests and adaptive deficits. *See* PA94 (crediting an expert opinion that Mr. Bourgeois's low IQ scores derived from cultural and education deprivation); PA120 (theorizing that Mr. Bourgeois's poor academic performance may have been due to "his unstable home life" or "the hampering effects of a deprived home environment"); PA126 (reasoning that the "record does not *conclusively link*" Mr. Bourgeois's problems as a child "to mental retardation rather than a culturally deprived upbringing, poverty, or abuse") (emphasis added). This methodology was also later rejected in *Moore-I* because these are risk factors for ID that *explain* and *cause* the diagnosis; they do not undermine it. *Moore-I*, 137 S. Ct. at 1051.

Although now invalid in the wake of *Moore-I*, the § 2255 court's practices were legally acceptable at the time they were employed. *See Webster*, 421 F.3d at 313; *Clark*, 457 F.3d at 446–47. *Moore-I* abrogated this Fifth Circuit precedent and rejected practices such as discounting the lower end of the standard error range, relying on adaptive strengths rather than weaknesses, and applying erroneous stereotypes that the Fifth Circuit had endorsed in cases such as *Webster* and *Clark*. This Court held that such diagnostically invalid practices created an "unacceptable risk" that an ID claim would be erroneously denied and an intellectually disabled person would be executed. *Moore-I*, 137 S. Ct. at 1051.

Yet the Seventh Circuit eschewed current science and standards in favor of the unscientific approach followed by the § 2255 court. Should the Seventh Circuit's

ruling be permitted to stand, all opportunity for Mr. Bourgeois to receive review under scientifically valid standards will be closed and he will be slated for execution based solely on the diagnostically invalid analysis employed by the § 2255 court. By precluding additional review, the Seventh Circuit has prevented Mr. Bourgeois from receiving any scientifically valid review of his ID claim and allowed the same unacceptable risk of an unlawful execution that this Court rejected in *Moore-I*. Effectuating Mr. Bourgeois's rights under § 3596(c) requires that his ID be considered under current standards. That has never happened in his case, and the only prior judicial consideration of his ID utilized since-rejected standards. Because Mr. Bourgeois meets the current legal and diagnostic standards for intellectual disability, the FDPA prohibits the carrying out of his sentence.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER 28 U.S.C. § 2241 AUTHORIZES REVIEW OF A CLAIM THAT THE FDPA PROHIBITS CARRYING OUT THE EXECUTION OF AN INTELLECTUALLY DISABLED PRISONER NOTWITHSTANDING PRIOR REVIEW OF HIS INTELLECTUAL-DISABILITY CLAIM UNDER 28 U.S.C. § 2255.

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803). If this Court agrees to consider whether the FDPA prohibits the execution of a prisoner who is ID under current standards, then it should likewise consider whether § 2241 is the appropriate vehicle to decide such a claim.

Habeas corpus under § 2241 is the traditional remedy sought for claims challenging the execution of a sentence, and is appropriate whenever it "appears that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Here, § 2255 is inadequate and ineffective because Mr. Bourgeois challenges the carrying out of his sentence, a challenge that cannot be raised under § 2255, and because the timing of *Moore-I* made it impossible for Mr. Bourgeois to receive § 2255 review for his ID claim under current diagnostic standards instead of judge-created "legal ones."

A. Mr. Bourgeois's Claim Is Cognizable under § 2241 Because He Challenges the Implementation of His Death Sentence.

Mr. Bourgeois's FDPA claim is cognizable under § 2241 because § 3596(c) governs the implementation, as opposed to the imposition, of his death sentence. The writ of habeas corpus has always been available to challenge the implementation of a sentence, and § 2241 has long been accepted as the proper avenue for such challenges. This Court should consider whether, and decide that, these traditions apply here.

The United States Courts of Appeals have long recognized that "Section 2255 may be utilized to attack a sentence . . . as imposed, as distinct from the sentence as it is being executed. [Where a prisoner's] sentence is being executed in a manner contrary to law, . . . he may seek habeas corpus in the district of his confinement."

Freeman v. United States, 254 F.2d 352, 353–54 (D.C. Cir. 1958).[6] This "clearly prevailing rule" makes "claims attacking the execution of the sentence . . . cognizable solely under § 2241," *Cohen v. United States*, 593 F.2d 766, 770 (6th Cir. 1979) (quoting *Wright v. U.S. Bd. of Parole*, 557 F.2d 74, 77 (6th Cir. 1977)), and was firmly entrenched when Congress adopted the categorical prohibitions on carrying out death sentences in the ADAA and, later, the FDPA. Indeed, the jurisdictional distinction derives from centuries-old common law, *see Ford*, 477 U.S. at 406–10 (discussing the "impressive historical credentials" of the rule that a "[p]etitioner's allegation of insanity in his habeas corpus petition, if proved . . . would bar his execution"), and remains in force today.[7]

In contrast to § 2241, § 2255 is exclusively backward-looking and encompasses only challenges to the *imposition* of a sentence in the first place. *See* 28 U.S.C. § 2255(a) (authorizing § 2255 review on the grounds that "the sentence

[6] *Accord Martorana v. United States*, 873 F.2d 283, 285 (11th Cir. 1989); *United States v. Snow*, 748 F.2d 928, 933–34 (4th Cir. 1984); *United States v. Janis*, 599 F.2d 266, 267 (8th Cir. 1979); *Cohen v. United States*, 593 F.2d 766, 770 (6th Cir. 1979); *United States v. DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976); *Soyka v. Allredge*, 481 F.2d 303, 304 (3d Cir. 1973); *Robinson v. United States*, 474 F.2d 1085, 1091 (10th Cir. 1973); *Zaffarano v. Fitzpatrick*, 404 F.2d 474, 478 (2d Cir. 1968); *Allen v. United States*, 327 F.2d 58, 59 (5th Cir. 1964); *Halprin v. United States*, 295 F.2d 458, 459 (9th Cir. 1961).

[7] *See, e.g.*, *Fontanez v. O'Brien*, 807 F.3d 84, 86 (4th Cir. 2015); *Francis v. Maloney*, 798 F.3d 33, 36 (1st Cir. 2015); *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1352 n.1 (11th Cir. 2008).

was *imposed* in violation of the Constitution or laws of the United States," "the court was without jurisdiction to *impose* such sentence," or that the sentence was in excess of the statutory maximum (emphasis added)). Section 2255 contains no provision for challenges to the legality of the carrying out of a sentence; it is "inadequate" and "ineffective" to address such challenges by design.

This jurisdictional distinction takes on great significance where, as here, Congress has plainly conferred a right with respect to the carrying out of a death sentence. *See supra*, part I. The Seventh Circuit, however, overlooked the distinction entirely and recast Mr. Bourgeois's FDPA claim as seeking nothing more than a second bite at the § 2255 apple. By first giving no weight to Congress's decision to bar the "carry[ing] out" of a death sentence against a person who "is" intellectually disabled, the panel then overlooked the core role that § 2241 plays in effectuating precisely that type of command.

This Court has already recognized that a state prisoner's mental competency claims are appropriately litigated in separate proceedings when an execution becomes imminent, regardless of whether a similar claim has been raised in the past. *See Panetti v. Quarterman*, 551 U.S. 930, 934–35 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644–45 (1998); *Ford*, 477 U.S. at 418. Earlier this year, the United States further asked this Court "to respect Congress's choice to confer jurisdiction over *Ford* claims only on the district court for the district in which a

federal prisoner is confined." *See* Application for a Stay or Vacatur of the Injunction Issued by the United States District Court for the District of Columbia, *United States v. Purkey*, No. 20A9, 20 (U.S. July 15, 2020); *see also id*. at 19 ("[T]he government has consistently maintained throughout this case that respondent could seek relief on his *Ford* claim in the Southern District of Indiana . . . ."). Because the FDPA uses the same language and imposes the same ban on executing persons who are incompetent under *Ford* and those who are ID, § 2241 is an appropriate vehicle to raise both claims.

B. The Post-Conviction Remedy in § 2255 Is Inadequate for FDPA Claims Because It Does Not Address Whether a Prisoner Is Intellectually Disabled at the Time of Execution in Light of Materially Changed Legal and Diagnostic Standards.

The Seventh Circuit ruled that a death row prisoner must have been "formally prevented" from raising an ID claim in § 2255 proceedings in order to raise such a claim in § 2241 proceedings. PA14. This blanket rule makes no allowances for substantial legal or factual developments, or even for egregious defects in § 2255 proceedings, that would justify additional review of an ID claim under § 2241. This rule conflicts with the FDPA because, if allowed to stand, it will permit the execution of federal prisoners who are currently and correctly diagnosed with ID.

This problem becomes even more significant when considered in conjunction with the procedural barriers to a successor § 2255 motion. Title 28 U.S.C. § 2244 precludes *any* attempt to relitigate an ID claim in subsequent § 2255 proceedings.

See 28 U.S.C. § 2244(b). Thus, under the Seventh Circuit's view, once a federal capital prisoner litigated any ID claim in § 2255 proceedings, the courthouse doors would remain shut regardless of whether subsequent developments demonstrated that the prisoner was actually ID. The Seventh Circuit never explained how that bar could be consistent with the FDPA's dictates.

The structural problems remain even in cases when § 2244 is not implicated. Section 2255(h) authorizes successive § 2255 motions only when they are based on (1) compelling evidence of the defendant's innocence of the offense or (2) a new, previously unavailable, rule of constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h). So, under the Seventh Circuit's analysis, if new developments conclusively demonstrate that a person is ID, habeas corpus would be unavailable under § 2241, and the execution would be carried out. Likewise, when diagnostic standards have so changed as to render a court's previous analysis invalid—regardless of how drastic that change might be or how pertinent to a particular case—the Seventh Circuit's rule cuts off any resort to habeas corpus. But current diagnostic standards are the "best available description of how mental disorders are expressed and can be recognized" and impose "one constraint" on the leeway of legislatures and courts to define ID as they choose. *Moore-I*, 137 S. Ct. at 1053. Section 2255 offers petitioners like Mr. Bourgeois no opportunity to enforce that constraint.

Were there any doubt, the Fifth Circuit removed it here. The Fifth Circuit has twice ruled that changes in the law or diagnostic standards can render *Atkins* "newly available," and each time allowed a prisoner who had *never* raised an *Atkins* claim to bring one in a successive petition. *See In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019); *In re Cathey*, 857 F.3d 221, 232 (5th Cir. 2017). By contrast, the Fifth Circuit here refused to permit consideration of the merits of Mr. Bourgeois's ID claim, or his argument that *Moore-I* abrogated the precedent on which the § 2255 court had based its decision. Instead, the Fifth Circuit held that § 2244(b)(1) barred him from again using § 2255 to raise an intellectual-disability claim. PA262–64. In other words, Mr. Bourgeois was prevented from filing a successive motion because he was *more* diligent than Cathey and Johnson.

The Seventh Circuit, however, denied § 2241 review simply because Mr. Bourgeois had a prior opportunity to raise his claim. It did so regardless of the "strong showing" that Mr. Bourgeois is intellectually disabled, which included two ID-range IQ scores, brain impairments in executive functioning and memory, elementary-school-level academic functioning at forty-five years of age, and twenty third-party reporters describing deficits across all three domains of adaptive behavior. The Seventh Circuit's ruling also bars review irrespective of whether the § 2255 court rejected the "psychological" standard and employed diagnostically inappropriate practices such as relying on the belief that being able to "engage[] in

conversation" and failing to "operate as a child" are inconsistent with ID. PA 78, 95, 97. Neither of these determinations can be squared with the FDPA.

The Seventh Circuit's holding provides no avenue for people such as Mr. Bourgeois to obtain a current, science-based review of intellectual disability. In so ruling, the Seventh Circuit made its precedent as inequitable as the Fifth Circuit's. The Seventh Circuit is the only circuit that has addressed the availability of § 2241 review as it relates to claims of intellectual disability in federal capital cases, and it has done so twice—here and in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015). In *Webster*, the petitioner had raised a claim of intellectual disability at trial and in his initial § 2255 proceedings. *Id.* at 1125–35. After § 2255 proceedings, Webster discovered evidence of intellectual disability that predated his trial, but could not have been uncovered by diligent counsel. *Id.* at 1132–35. Like Mr. Bourgeois, Webster was barred from proceeding on a successive § 2255 petition. *Id.* at 1134–35. But in contrast to its handling of Mr. Bourgeois's case, the Seventh Circuit upheld § 2241 review of Webster's intellectual-disability claim because "[t]o hold otherwise would lead in some cases—perhaps Webster's—to the intolerable result of condoning an execution that violates the Eighth Amendment." *Id.* at 1139. The *Webster* court correctly identified the structural defect in § 2255, but the Seventh Circuit's holding in *Bourgeois* confined § 2241 review in ID claims to cases involving newly discovered evidence that predated the trial. PA14. There is no

reasoned basis for this distinction: a defendant whose intellectual disability becomes apparent after legal developments, diagnostic advancements, or factual developments that post-date trial is just as exempt from execution as the defendant in *Webster*.

Section 2255 contains no provision for defendants like Mr. Bourgeois, who are ineligible for execution under the FDPA, but were denied relief under the now-obsolete standards in place during their initial § 2255 proceedings. Section 2255 is therefore ineffective and inadequate to enforce Mr. Bourgeois's rights under the FDPA. This is precisely the sort of structural defect that the savings clause of § 2255(e) was meant to fix. For this reason, § 2241 is the proper vehicle for Mr. Bourgeois to litigate his claim of intellectually disability and the Court should grant certiorari to settle this question.

CONCLUSION

For all of the reasons set forth above, this Court should grant the writ of certiorari and stay Mr. Bourgeois's execution (which he has requested by separate application). It should then either set the case for full briefing, or vacate the Seventh Circuit's decision and remand for further proceedings in the district court.

Respectfully submitted,

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