No. 20-6500

IN THE SUPREME COURT OF THE UNITED STATES

ALFRED BOURGEOIS, PETITIONER

v.

T.J. WATSON, WARDEN, ET AL.

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND TO APPLICATION FOR A STAY OF EXECUTION

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ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Tex.):

United States v. Bourgeois, No. 02-cr-216 (Mar. 25, 2004)

Bourgeois v. United States, No. 07-cv-223 (Aug. 27, 2018)

United States Court of Appeals (5th Cir.):

United States v. Bourgeois, No. 04-40410 (Aug. 25, 2005)

United States v. Bourgeois, No. 11-70024 (Aug. 5, 2013)

In re Bourgeois, No. 18-40270 (Sept. 24, 2018)

Supreme Court of the United States:

Bourgeois v. United States, No. 05-8657 (May 15, 2006)

Bourgeois v. United States, No. 13-8397 (Oct. 6, 2014)

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Petitioner savagely beat and murdered his two-year-old daughter, after having abused her for more than a month. Following a jury trial, petitioner was convicted of first-degree murder and sentenced to death in the Southern District of Texas. He then filed a motion under 28 U.S.C. 2255 to collaterally attack his sentence, asserting that he is intellectually disabled. The district court in the Southern District of Texas held a week-long evidentiary hearing and rejected that claim. Petitioner declined to seek review of that decision. A decade later, however, after the government initially scheduled his execution for January 2020, petitioner filed a habeas petition under 28 U.S.C. 2241, presenting the same intellectual-disability claim that he had previously

raised in his Section 2255 motion. The Seventh Circuit determined that Section 2241 did not permit relitigation of that claim.

Now, 16 years after petitioner's trial, the government is prepared to carry out petitioner's lawful sentence. Petitioner seeks a stay of execution pending this Court's consideration of his petition for a writ of certiorari seeking review of the Seventh Circuit's decision. Petitioner's application for a stay lacks merit, and both it and the accompanying petition for a writ of certiorari should be denied. The decision below is correct and does not conflict with any decision of this Court or another court of appeals, and neither extraordinary relief nor further review is warranted.

As a threshold matter, Congress has established Section 2255, not Section 2241, as the principal means of bringing a federal postconviction challenge, and it has provided that a prisoner may bring a claim under Section 2241 only if "the remedy by motion [under Section 2255] is inadequate or ineffective." 28 U.S.C. 2255(e). As the court of appeals recognized, petitioner's current claim does not satisfy that standard. Petitioner could have brought his intellectual-disability claim under Section 2255; indeed, he did bring that claim under Section 2255, and it was rejected. The court of appeals correctly determined that petitioner may not invoke Section 2241 to relitigate that claim now. This Court has recently rejected last-minute stays of

execution, and petitions for writs of certiorari, by federal death-row inmates who similarly sought to avoid the limitations on successive federal collateral attacks. See Hall v. Watson, No. 20-697 (20A101) (Nov. 19, 2020); Purkey v. United States, No. 20-26 (20A12) (July 16, 2020); Lee v. Watson, No. 20-5032 (20A7) (July 14, 2020). The same result is warranted here.

In any event, even if petitioner's reasserted intellectual-disability claim were cognizable, it lacks merit. Petitioner contends that the district court that denied his Section 2255 motion failed to review his intellectual-disability claim in accordance with clinical diagnostic standards. But as the court of appeals here correctly recognized, the district court "identified, and applied, the most recent medical guidance on intellectual disabilities." Pet. App. 13. And in determining that petitioner had not shown that he is intellectually disabled, the district court relied on the opinions of psychological experts.

Finally, the balance of equities weighs against a stay. Petitioner was convicted more than 16 years ago. He has already "had a full and fair opportunity to litigate his intellectual-disability claim." Pet. App. 15. And his current version of that claim is barred and legally and factually meritless. No further delay in the execution of his sentence -- which was initially scheduled for 11 months ago -- is warranted. Petitioner's lawful sentence for a horrific murder should be carried out promptly.

His application for a stay of execution, together with his petition for a writ of certiorari, should be denied.

STATEMENT

1. Petitioner's daughter, JG, was born in 1999. Pet. App. 4. "For the first two and a half years of her life, JG lived with her mother and grandmother in Texas." Ibid. In April 2002, however, "a paternity test established that [petitioner] was JG's biological father." 537 Fed. Appx. 604, 606. "At the time, [petitioner] was a truck driver living in Louisiana with his wife, Robin, and their two children." Pet. App. 4. "After a court ordered [petitioner] to pay child support for JG," petitioner and JG's mother agreed that he "could take custody of JG for the summer." 537 Fed. Appx. at 606-607. When JG left her mother to stay with petitioner, JG was a "healthy, happy child." Id. at 607.

"For the next month -- the last of JG's life -- [petitioner] tortured and abused JG." Pet. App. 4. He "punched her in the face hard enough to give her black eyes"; "whipped her with an electrical cord and beat her with a belt"; "struck her on the head with a plastic baseball bat so many times that her head swelled in size"; "threw her against walls"; "burned the bottom of her foot with a cigarette lighter"; and "prevented anyone from treating her injuries." Ibid. Petitioner also subjected JG to emotional and sexual abuse, 423 F.3d 501, 503-504, and turned her potty training

into a "source of torment for her," Pet. App. 4. Petitioner forced JG to "spend almost every moment" on "a potty chair, both at their residence and while the family traveled throughout the country in his 18-wheeler." 537 Fed. Appx. at 607 (footnote omitted). And "when JG would fall asleep and fall off the potty chair, [petitioner] would make her get back on." Id. at 607 n.9.

In June 2002, petitioner "drove his family in his truck to Corpus Christi Naval Air Station, where [he] was delivering a shipment." Pet. App. 5. As petitioner backed the truck into a loading dock on the naval base, JG tipped over her potty chair in the truck. 423 F.3d at 505. "Enraged, [petitioner] started yelling at JG and spanking her." Pet. App. 5. "He then grabbed her by the shoulders and slammed the back of her head into the truck's front windows and dashboard four times." Ibid.

Robin, who had been asleep inside the truck, woke up and saw that JG was motionless. 537 Fed. Appx. at 608. She demanded that petitioner take JG to the emergency room. Pet. App. 5. Petitioner "replied that he would take her to the emergency room when he was done unloading the truck." Ibid. When Robin began to perform CPR, fluid came out of JG's mouth. Id. at 50. Petitioner removed JG from the truck and laid her on the ground, ibid., instructing Robin to "tell anyone who asked that JG had fallen out of the truck," 537 Fed. Appx. at 608. Robin begged nearby workers to call for an ambulance, and she performed CPR until she was relieved

by paramedics, who transported JG to the hospital. Pet. App. 44, 50.

JG died in the hospital the following day. Pet. App. 5. A medical examiner determined that the cause of death was "an impact to the head resulting in a devastating brain injury." Ibid. Although Robin initially repeated petitioner's story that JG had fallen from the truck, she eventually admitted that the story was a lie, and petitioner was arrested. Id. at 50.

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of first-degree murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 7 and 1111(b). C.A. App. 21. The jury recommended a sentence of death, and the district court imposed that sentence. Ibid. The Fifth Circuit affirmed. 423 F.3d 501. Observing that "[t]his is not a close case," the Fifth Circuit determined that petitioner had "fail[ed] to prove that there was any error * * * in any aspect of his trial." Id. at 512. This Court denied petitioner's petition for a writ of certiorari. 547 U.S. 1132 (No. 05-8657).

2. In 2007, petitioner filed a motion under 28 U.S.C. 2255 in the Southern District of Texas to vacate his conviction and sentence. 02-cr-216 D. Ct. Doc. 396 (May 14, 2007). In that motion, petitioner contended, among other things, that he is intellectually disabled and therefore ineligible for the death

penalty under the Eighth Amendment and the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq., which provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded," 18 U.S.C. 3596(c). 02-cr-216 D. Ct. Doc. 396, at 3.

Following a week-long evidentiary hearing, Pet. App. 74, the district court denied petitioner's Section 2255 motion "in a thorough 225-page opinion that devoted 53 pages to analyzing [his] intellectual-disability claim," id. at 5; see id. at 37-261. The court analyzed both petitioner's Eighth Amendment and his FDPA arguments using the framework for evaluating intellectual disability set forth in Atkins v. Virginia, 536 U.S. 304 (2002). Pet. App. 79-84. In particular, the court applied the standards for intellectual disability found in the eleventh edition of the American Association on Intellectual and Developmental Disabilities clinical manual (AAIDD-11), and the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association (DSM-IV). Id. at 81 & n.27. The court explained that, "[t]ogether," the AAIDD-11 and DSM-IV standards "contain three indispensable criteria for arriving at a diagnosis of [intellectual disability]: (1) significantly subaverage intellectual functioning; (2) related significant limitations in adaptive skill areas; and (3) manifestation of those limitations before age 18." Id. at 82. After reviewing the

evidence, the court found that petitioner "failed to meet all three prongs of the Atkins analysis," id. at 128, and thus failed to show "by a preponderance of the evidence that he is [intellectually disabled]," id. at 131. The court rejected the other claims raised in petitioner's Section 2255 motion, and declined to issue a certificate of appealability (COA). Id. at 128-261.

Although petitioner applied for a COA from the Fifth Circuit on three claims of ineffective assistance of counsel, he did not request a COA on his intellectual-disability claim under the Eighth Amendment or the FDPA. 537 Fed. Appx. 610 n.17. The Fifth Circuit denied a COA on his ineffective-assistance-of-counsel claims, finding that petitioner had "not made a substantial showing of the denial of a constitutional right." Id. at 605. This Court denied petitioner's petition for a writ of certiorari. 574 U.S. 827 (No. 13-8397).

In March 2018, petitioner sought authorization from the Fifth Circuit to file a second Section 2255 motion. 18-40270 C.A. Mot. (Mar. 28, 2018). Petitioner argued that this Court's decision in Moore v. Texas, 137 S. Ct. 1039 (2017) (Moore I), had rendered his Atkins claim viable. 18-40270 C.A. Mot. 2. In August 2018, the Fifth Circuit denied authorization to file a second Section 2255 motion, explaining that petitioner was "barred from relitigating his Atkins claim." C.A. App. 369.

3. In July 2019, the federal government announced the completion of an "extensive study" that it had undertaken to consider possible revisions to the Federal Bureau of Prisons' lethal injection protocol to account for the scarcity of drugs required by the prior three-drug procedure. In re Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 110 (D.C. Cir. 2020) (per curiam) (Execution Protocol Cases), cert. denied, No. 19-1348 (June 29, 2020). Following a deliberate investigation that had commenced when the prior drug became unavailable in 2011, the government published a revised addendum to its protocol, in which it adopted a single-drug procedure (also used by many States) that would allow the federal government to resume executions. Ibid.

Alongside its adoption of this revised lethal injection protocol, the government also set execution dates for five federal inmates, including petitioner, who had previously received capital sentences for murdering children. Execution Protocol Cases, 955 F.3d at 111; see id. at 127 (Katsas, J., concurring). Initially, petitioner's execution was scheduled for January 13, 2020. Pet. App. 16 n.2. After petitioner and several of the other capital prisoners challenged the federal execution protocol, however, the United States District Court for the District of Columbia entered a preliminary injunction in November 2019 barring the government from carrying out the executions as scheduled. Execution Protocol

Cases, 955 F.3d at 111. In April 2020, the D.C. Circuit vacated that preliminary injunction, id. at 108, and this Court subsequently denied certiorari, Bourgeois v. Barr, No. 19-1348 (June 29, 2020).[1]

4. a. Meanwhile, in August 2019 -- "a month after he received an execution date" -- petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, as well as a motion to stay his execution, in the Southern District of Indiana, the district in which he was confined. Pet. App. 6. In his petition, petitioner again argued that he is intellectually disabled and thus ineligible for the death penalty under the Eighth Amendment and the FDPA. 19-cv-392 D. Ct. Doc. 1, at 14-49 (Aug. 15, 2019). And he argued that his successive assertion of an intellectual-disability claim could proceed under Section 2241 because, according to him, his claim (1) relied on decisions -- namely, Moore I and Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam) (Moore II) -- that had not been "available" at the time of his initial Section 2255 proceedings and (2) challenged the "execution" of his sentence. 19-cv-392 D. Ct. Doc. 1, at 72, 75.

[1] In September 2020, the district court in the District of Columbia granted summary judgment to the government on most of the asserted claims and denied injunctive relief on petitioner's remaining claim. In the Matter of Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, 2020 WL 5594118, at *1 (D.D.C. Sept. 20, 2020). The D.C. Circuit affirmed the denial of injunctive relief. In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5329, 2020 WL 6750375, at *1 (D.C. Cir. Nov. 18, 2020) (per curiam).

In March 2020, the district court granted petitioner's motion for a stay. 2020 WL 1154575. The court observed that petitioner had brought claims under both the Eighth Amendment and the FDPA, but it determined that petitioner was "entitled to a stay based on his FDPA claim alone," without addressing his Eighth Amendment claim. Id. at *1. The court took the view that the government had waived any argument that petitioner's FDPA claim could not proceed under Section 2241 because the government's responsive filings had referred only to an "Atkins claim." Id. at *3. And it believed that petitioner had "made a strong showing that he is intellectually disabled and thus the FDPA forbids his execution." Id. at *1. Finding the remaining stay factors satisfied, the court granted a stay of petitioner's execution pending resolution of his Section 2241 petition. Id. at *1, *5-*6.

b. On October 6, 2020, the Seventh Circuit "vacate[d] the stay" and remanded the case to the district court with instructions to dismiss the Section 2241 petition. Pet. App. 1-16.

Rejecting the district court's view that the government had waived or forfeited the issue, the court of appeals explained that petitioner's FDPA claim was not cognizable under Section 2241. Pet. App. 8-15. The court observed that petitioner "already has fully litigated an intellectual-disability claim under § 2255," id. at 4, and that Section 2255(e) precludes habeas petitions by federal prisoners under Section 2241 unless the "case fits within

a narrow exception known as the 'saving[] clause,'" ibid., which applies only when Section 2255 is "inadequate or ineffective" to test the legality of a conviction or sentence, 28 U.S.C. 2255(e). The court noted that it had "recently examined the scope of the saving[] clause in two cases," Pet. App. 10: Purkey v. United States, 964 F.3d 603 (7th Cir. 2020), cert. denied, No. 20-26 (July 16, 2020), and Lee v. Watson, 964 F.3d 663 (7th Cir. 2020), cert. denied, No. 20-5032 (July 14, 2020). The court further observed that, in those cases, it had "explained that 'the words "inadequate or ineffective," taken in context, must mean something more than unsuccessful.' Instead, 'there must be a compelling showing that, as a practical matter, it would be impossible to use section 2255 to cure a fundamental problem.'" Pet. App. 11 (citations omitted).

Turning to the particular circumstances of this case, the Seventh Circuit noted, as an initial matter, its disagreement with petitioner's contention that the Texas district court that denied his Section 2255 motion had "made essentially the same errors that the [lower court] made in Moore I and Moore II" when it rejected his intellectual-disability claim. Pet. App. 12. The Seventh Circuit explained that, contrary to petitioner's assertions, the Texas district court had "identified, and applied, the most recent medical guidance on intellectual disabilities"; had "found [petitioner's] alleged adaptive deficiencies to be slight and uncorroborated, without regard to his adaptive strengths"; had

"not view[ed] adaptive impairments as a zero-sum game, attributable to either one cause (e.g., childhood abuse) or another (e.g., intellectual disability), but not both"; and had "not view[ed] [petitioner's] other childhood problems as evidence that he was not intellectually disabled." Id. at 13. The Seventh Circuit also explained that the Texas district court's decision not to accept petitioner's IQ scores "at face value" was not contrary to Moore I or Moore II, particularly given expert testimony that petitioner had not put forth his best efforts on those tests. Ibid. The Seventh Circuit was thus "not convinced that the district court's analysis ran afoul of clinical diagnostic standards." Ibid.

The Seventh Circuit emphasized, however, that the issue before it was not "whether the § 2255 court got it right or wrong," but "whether there was something 'structurally inadequate or ineffective about section 2255 as a vehicle'" for petitioner to raise his intellectual-disability claim. Pet. App. 13. The Seventh Circuit explained that "[t]here plainly was not." Ibid. It observed that "Atkins was on the books when [petitioner] filed his § 2255 motion in 2007," and that although subsequent decisions like Moore I and Moore II "elaborated on the measurements of intellectual function and the evaluation of adaptive deficits," the "importance of applying medical standards * * * has been evident since Atkins and was evident to the § 2255 court in this

case." Ibid. The Seventh Circuit thus determined that petitioner "had the chance to litigate his intellectual-disability claim under clinical diagnostic standards"; that "[t]he § 2255 court set forth, and applied, the same three-part test for intellectual disability that now prevails"; and that "'nothing formally prevented [petitioner] from raising each of the . . . errors he now seeks to raise in his petition under 2241.'" Id. at 13-14 (citation omitted). "Indeed," the Seventh Circuit stressed, "[petitioner's] § 2255 motion did raise the errors that he now seeks to correct," and the fact that he was "'unsuccessful'" does not mean that Section 2255 was "'inadequate or ineffective'" to test the legality of his sentence. Id. at 14 (citation omitted).

The Seventh Circuit rejected petitioner's contention that he could nevertheless bring his FDPA claim under Section 2241 because the FDPA prohibits "executing a person who 'is' intellectually disabled." Pet. App. 14 (citation omitted). The court found "no support" for petitioner's argument that "the word 'is'" means that he must be given an opportunity to demonstrate that he "is presently intellectually disabled, as determined by current legal and diagnostic standards -- including those reflected in Moore I and Moore II." Ibid. The court observed that "[i]ntellectual disability is a permanent condition that must manifest before the age of 18" and is thus different from "the temporary condition of incompetency, which may come and go," thereby explaining why

Congress would naturally use the word "is," rather than "was" or "will be," in reference to it. Ibid. "And with no textual (or other) support," the court was "unwilling to accept [petitioner's] sweeping argument that a fresh intellectual-disability claim arises every time the medical community updates its literature." Ibid.

Having determined that petitioner "is not eligible for savings-clause relief on either his Atkins claim or his FDPA claim," the Seventh Circuit reversed the district court's determination that he is likely to succeed on the merits of his Section 2241 petition, and remanded with instructions for the district court to deny his motion for a stay of execution and his Section 2241 petition. Pet. App. 15. The Seventh Circuit noted that the government had asked at oral argument that the court issue its mandate immediately upon rendering a decision, but the Seventh Circuit declined that request. Ibid. It instead gave petitioner seven days to file a petition for rehearing en banc and stated that it would "stay issuance of the mandate until disposition of the petition." Ibid.

c. On October 13, 2020, petitioner filed a petition for rehearing en banc. C.A. Doc. 43. Two weeks later, the Seventh Circuit requested that the government file a response, C.A. Doc. 46 (Oct. 27, 2020), and the government did so within three days, C.A. Doc. 47 (Oct. 30, 2020).

On November 20, 2020, the government set December 11, 2020, as the new date for petitioner's execution. C.A. Doc. 54, at 5 (Nov. 20, 2020). On December 1, 2020, the Seventh Circuit denied rehearing en banc and issued its mandate. Pet. App. 265-268. Judges Wood and Rovner dissented on the "view that petitioner is entitled to a hearing on his claim that his execution will violate the [FDPA]." Id. at 266. In accordance with the Seventh Circuit's mandate, the district court on December 3, 2020, issued an order vacating the stay of execution and dismissing petitioner's Section 2241 petition. 19-cv-392 D. Ct. Doc. 37, at 1.[2]

ARGUMENT

Petitioner's application for a stay, and his petition for a writ of certiorari, should be denied. A movant seeking a stay pending review must establish "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). The movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). And once the movant satisfies those

[2] Petitioner has also moved for another preliminary injunction in the execution-protocol litigation. See Doc. No. 336, In the Matter of Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (D.D.C. Nov. 25, 2020). That motion remains pending before the district court in the District of Columbia.

prerequisites, the Court considers whether a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009).

Petitioner cannot satisfy those standards. First, petitioner has failed to establish a reasonable probability that this Court will review and reverse the court of appeals' determination that 28 U.S.C. 2241 is an inappropriate vehicle for his intellectual-disability claim. The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals, and certiorari should be denied. Second, petitioner's underlying intellectual-disability claim -- which is simply a reassertion of the claim that was rejected a decade ago -- lacks merit, rendering both a stay and certiorari unwarranted. Finally, a stay would undermine the government's and the public's interest in the timely enforcement of petitioner's lawful sentence.

I. PETITIONER HAS FAILED TO SHOW THAT THIS COURT IS LIKELY TO REVIEW AND REVERSE THE COURT OF APPEALS' DECISION

The court of appeals correctly recognized that Section 2241 is an inappropriate vehicle for petitioner to bring his intellectual-disability claim under the FDPA. Pet. App. 1-16. Petitioner has not identified any court of appeals that would have allowed a federal prisoner to pursue habeas relief in the circumstances of this case. And no substantial likelihood exists that this Court would grant certiorari and reinstate his claim. Indeed, in three recent cases, the Court has denied petitions for

writs of certiorari, and accompanying stay applications, by capital prisoners who sought to litigate claims under the saving clause. See Hall v. Watson, No. 20-697 (20A101) (Nov. 19, 2020); Purkey v. United States, No. 20-26 (20A12) (July 16, 2020); Lee v. Watson, No. 20-5032 (20A7) (July 14, 2020). The same result is warranted here.

A. Congress enacted Section 2255 in 1948 in order to make federal postconviction challenges more efficient by requiring federal prisoners to bring such challenges in the district of their conviction rather than the district in which they happened to be confined. See United States v. Hayman, 342 U.S. 205, 210-219 (1952) (discussing the legislative impetus for enactment of Section 2255). A half-century later, in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1220, Congress sought to further streamline such federal postconviction challenges by imposing a one-year statute of limitations (generally running from the date that a prisoner's conviction becomes final) and barring second or successive challenges outside of certain narrowly drawn circumstances that are inapplicable here. See 28 U.S.C. 2255 (Supp. II 1996).

In order to ensure that federal prisoners do not circumvent the Section 2255 framework specifically enacted for federal postconviction challenges by instead seeking relief under the general federal habeas statute, 28 U.S.C. 2241, Congress has also

provided since 1948 that a federal prisoner who could seek -- or has sought -- relief by motion under Section 2255 may not instead pursue an application for a writ of habeas corpus under Section 2241. See 28 U.S.C. 2255(e). Section 2255(e) allows a federal prisoner to pursue relief under Section 2241 only if he can show that "the remedy by motion [under Section 2255] is inadequate or ineffective to test the legality" of his conviction or sentence. Ibid.

The court of appeals correctly determined that petitioner cannot make that showing here. Pet. App. 12-15.[3] Petitioner not only could, but did, raise an intellectual-disability claim under the FDPA in his Section 2255 motion. Moreover, his current claim does not rely on any new evidence or any retroactive change in the law. Petitioner asserts that "he never had the chance to litigate his intellectual-disability claim under clinical diagnostic standards," Pet. App. 13, but even assuming that assertion bears on the inquiry into whether the Section 2255 remedy is "inadequate or ineffective," the assertion lacks merit. The "FDPA provides the same substantive protection as Atkins [v. Virginia, 536 U.S.

[3] The government has argued that the court of appeals' prior decisions take an overly expansive view of Section 2255(e)'s saving clause, in at least certain respects. See Pet. at 14-25, United States v. Wheeler, 139 S. Ct. 1318 (2019) (No. 18-420). Even the court of appeals' view does not allow for resort to Section 2241 in a case like this one -- as the court itself recognized. Nor has petitioner identified any other circuit whose precedent would.

304 (2002)] and its progeny"; the "importance of applying medical standards" in determining whether a capital defendant is intellectually disabled "has been evident since Atkins"; and "when [petitioner] filed his § 2255 motion in 2007," Atkins was already "on the books." Pet. App. 11, 13. And the Texas district court in petitioner's Section 2255 proceedings "set forth, and applied, the same three-part test for intellectual disability that now prevails." Ibid.

Contrary to petitioner's contention (Pet. 36-40), the fact that this Court had not yet decided Moore v. Texas, 137 S. Ct. 1039 (2017) (Moore I), or Moore v. Texas, 139 S. Ct. 666 (2019) (per curiam) (Moore II), at the time of petitioner's Section 2255 proceedings did not render his Section 2255 motion "inadequate or ineffective" to test the legality of his sentence, 28 U.S.C. 2255(e). As the court of appeals explained, this Court's decisions in Moore I and Moore II did not announce any "retroactive" change in the law, Pet. App. 14; rather, they merely "elaborated on the measurements of intellectual function and the evaluation of adaptive deficits," id. at 13. And "the saving[] clause does not apply every time [this] Court clarifies the law that governed a prisoner's § 2255 motion, or, where intellectual disability is at issue, every time the medical community updates its diagnostic standards." Id. at 13-14. "Were that the case," habeas courts

"would truly be facing 'a never-ending series of reviews and re-reviews.'" Id. at 14 (citation omitted).

In any event, "nothing formally prevented [petitioner] from raising each of the . . . errors he now seeks to raise in his petition under 2241" in his original Section 2255 motion. Pet. App. 14 (citation omitted). "Indeed," as the court of appeals observed, "[petitioner's] § 2255 motion did raise the errors that he now seeks to correct." Ibid. For example, petitioner "hired an expert to testify to precisely what [this] Court eventually clarified in Moore I and Moore II -- namely, that the adaptive functions inquiry focuses on adaptive deficits." Ibid. Citing United States v. Webster, 421 F.3d 308, 313 (5th Cir. 2005), cert. denied, 549 U.S. 828 (2006), petitioner asserts (Pet. 31) that Fifth Circuit precedent at the time of his Section 2255 proceedings prevented the Texas district court from properly evaluating whether he is intellectually disabled. But Webster merely affirmed a district court's fact-bound analysis in that particular case; it did not foreclose petitioner's Section 2255 motion from including the arguments that he now seeks to raise a decade later through Section 2241. And even assuming that Fifth Circuit precedent stood in the way of petitioner's arguments, that would still "not demonstrate that it was 'impossible' for [petitioner], armed with Atkins and the latest clinical diagnostic standards, to demonstrate that he was intellectually disabled." Pet. App. 14.

As the court of appeals recognized, the "words 'inadequate or ineffective,' taken in context, must mean something more than unsuccessful." Ibid. (citation omitted).

Thus, far from being "impossible to use section 2255" to raise his intellectual-disability claim under the FDPA, Pet. App. 11 (citation omitted), petitioner "was able to litigate his intellectual-disability claim in his § 2255 motion" -- "and he did," id. at 15. The Texas district court issued "a 225-page written order that dedicated more than 50 pages to analyzing his intellectual-disability claim alone." Id. at 13. Following that decision, petitioner declined to request a COA from the Fifth Circuit for further review of that claim. 537 Fed. Appx. at 610 n.17. The court of appeals in this case thus correctly determined that petitioner may not now channel his FDPA claim through the saving clause and seek to relitigate it under Section 2241.

B. Petitioner's contention (Pet. 20-26, 32-36) that he may pursue his FDPA claim under Section 2241 because he is challenging the execution of his sentence lacks merit and does not warrant this Court's review. The FDPA provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. 3596(c). Petitioner argues (Pet. 32-36) that, even if a capital prisoner has previously litigated an intellectual-disability claim under the FDPA in his Section 2255 proceedings, he may relitigate the same claim again under Section 2241, simply

by recharacterizing his claim as a challenge to the execution of his sentence. The court of appeals correctly rejected that argument, Pet. App. 14, and petitioner has identified no circuit that would accept it.

The Section 2255 motion that petitioner filed in the Texas district court was not an "inadequate or ineffective" vehicle for litigating his FDPA claim. 28 U.S.C. 2255(e). Irrespective of how his FDPA claim is labeled, "the FDPA provides the same substantive protection as Atkins and its progeny" under the Eighth Amendment. Pet. App. 11; see id. at 23 (observing that "[t]he only apparent difference between an Atkins claim and an FDPA claim is the legal source -- the Constitution and a statute, respectively"). Thus, just as petitioner's Section 2255 motion was adequate to litigate his Eighth Amendment claim based on Atkins, it was adequate to litigate a "substantively identical" claim under the FDPA. Id. at 11. Indeed, that is precisely what petitioner did in his Section 2255 motion, invoking both the FDPA and the Eighth Amendment. And as explained above, "he had a full and fair opportunity to litigate his intellectual-disability claim" in those proceedings. Id. at 15.

Petitioner therefore errs in now asserting (Pet. 33) that an FDPA claim "cannot be raised under § 2255." Although a federal prisoner would not be able to use Section 2255 to challenge "the deprivation of good-time credits" and "parole determinations,"

McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1092-1093 (11th Cir.) (en banc), cert. denied, 138 S. Ct. 502 (2017), a federal prisoner is able to use Section 2255 to claim that he is intellectually disabled under the framework set forth in Atkins or the substantively identical framework incorporated into the FDPA. Petitioner contends (Pet. 21) that, regardless of whether he was able to, and did, litigate an intellectual-disability claim under the FDPA in the past, the FDPA's prohibition on executing a person who "is" intellectually disabled means that he must be given the opportunity to bring a new intellectual-disability claim today, based on current "legal and diagnostic standards." But as the court of appeals explained, petitioner's reliance on the verb tense is misplaced. Pet. App. 14. Congress's use of the present tense simply reflects the fact that "[i]ntellectual disability is a permanent condition that must manifest before the age of 18." Ibid. (emphasis added); see Atkins, 536 U.S. at 318.

Given the early manifestation and continuous nature of intellectual disability, it would not have made sense for Congress to have phrased the statute differently, so as to proscribe, for example, "the execution of someone who merely 'was' intellectually disabled when they were sentenced, or who 'will be' intellectually disabled when their sentence is carried out." Pet. App. 14. As a permanent and continuing condition that must have manifested

during youth, intellectual disability differs from "the temporary condition of incompetency, which may come and go." Ibid.; see Ford v. Wainwright, 477 U.S. 399 (1986).[4] Thus, unlike a competency claim -- which challenges the implementation of the sentence during a particular, potentially transient, period of time -- a claim of intellectual disability asserts that the sentence can never be carried out and is thus fundamentally unlawful. Such a challenge to the inherent lawfulness of the sentence is the proper subject of a Section 2255 motion, see 28 U.S.C. 2255(a), and petitioner errs in suggesting that his claim that he "is" intellectually disabled is different from the claim adjudicated in his Section 2255 proceedings. The Texas district court in those proceedings considered whether petitioner "is" intellectually disabled and determined that petitioner failed to prove that he "is." Pet. App. 131.

The legislative history of the FDPA does not suggest otherwise. The provision at issue here, Section 3596(c), derives from language in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. A, § 7001(l), 102 Stat. 4390. See, e.g., Atkins, 536 U.S. at 314 & n.10. During debate on that legislation, the sponsor of the amendment that added the pertinent language

[4] Intellectual disability likewise differs from pregnancy, which Congress addressed separately in 18 U.S.C. 3596(b). Notably, although Congress provided that a death sentence could not be carried out "upon a woman while she is pregnant," 18 U.S.C. 3596(b) (emphasis added) -- implying a transient condition -- it did not use the same language in Section 3596(c).

stated that a defendant's intellectual-disability claim "would be handled as any other defense would be when it came to this kind of a crime or the sentencing thereof." 134 Cong. Rec. 22,993 (1988) (statement of Rep. Levin) (emphasis added). That statement undermines petitioner's "sweeping argument that a fresh intellectual-disability claim arises every time the medical community updates is literature." Pet. App. 14. There is likewise no indication that Congress embraced petitioner's view of Section 3596(c) when it adopted the current version of the FDPA.[5] The broader debate in Congress centered on streamlining and shortening the federal appeals process, not lengthening it. See, e.g., 140 Cong. Rec. 10,238-10,240 (1994) (statement of Sen. Specter) ("appeals process has been vastly overdone").

Petitioner notes (Pet. 26) that, at one point during congressional debate, Senator Hatch expressed concern that the intellectual-disability provision would allow federal prisoners to raise the issue of intellectual disability "at any time," 136 Cong. Rec. 12,254 (May 24, 1990), and supported an amendment that would have modified the intellectual-disability provision to prohibit only the execution of intellectually disabled persons "who do not know the difference between right and wrong," id. at 12,251 (statement of Sen. Thurmond); see id. at 12,254-12,255. Petitioner

[5] From 1989 to 1994, Congress debated several iterations of the legislation that ultimately became the FDPA and based Section 3596(c) on language from the Anti-Drug Abuse Act of 1988. See S. Rep. No. 170, 101st Cong., 1st Sess. 23 (1989).

suggests that because the FDPA does not include that proposed language, Congress necessarily agreed with Senator Hatch that the provision would permit federal prisoners to raise the issue of intellectual disability "at any time." Pet. 26 (citation omitted). But this Court has cautioned against attributing the views of a single legislator to the entire Congress and against drawing inferences from proposed, but unenacted, legislation. See, e.g., Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990). Both of those admonitions apply here, and in any event, the most natural inference to be drawn from the history highlighted by petitioner is that Congress wished to prohibit the execution of all intellectually disabled persons, not just those "who do not know the difference between right and wrong." 136 Cong. Rec. at 12,251.

C. Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals. He acknowledges (Pet. 39) that "[t]he 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." The decision below, however, is consistent with other courts of appeals' decisions that have rejected similar attempts to relitigate intellectual-disability claims.

In Williams v. Kelley, 858 F.3d 464 (8th Cir. 2017) (per curiam), for example, a state habeas petitioner attempted to raise

an intellectual-disability claim, arguing that the procedural restrictions of the Antiterrorism and Effective Death Penalty Act (AEDPA) did not apply "because intellectual disability, like incompetency to be executed, not only prohibits the imposition of a death sentence but also prohibits his actual execution." Id. at 472. The Eighth Circuit rejected the argument that the latter claim did not ripen until the issuance of an execution warrant because, unlike an incompetency claim under Ford v. Wainwright, supra, "an Atkins claim ripens before an execution is imminent and thus is governed by the requirements of [AEDPA] if raised in a second or successive habeas petition." Williams, 858 F.3d at 472. In contrast, "Ford and its progeny focus on the inmate's competency at the time of execution," which "makes sense because competency can be lost or regained over time." Ibid. (internal quotation marks omitted).

The Fifth Circuit has similarly recognized the difference between Ford claims and intellectual-disability claims. In Busby v. Davis, 925 F.3d 699 (2019), cert. denied, 140 S. Ct. 897 (2020), the Fifth Circuit explained that a defendant might raise a Ford claim in multiple proceedings because incompetence "may recede and later reoccur," and a "finding that an inmate is incompetent to be executed does not foreclose the possibility that she may become competent in the future and would no longer be constitutionally ineligible for the death penalty." Id. at 713. In contrast, the

court explained, intellectual disability is "a permanent condition that must have manifested before the age of 18," and "[a] person who is found to be intellectually disabled is permanently ineligible to be executed." Ibid.

The consensus view of the circuits that have addressed this issue is correct. And the existence of such a consensus further undercuts petitioner's suggestion that this Court would, or should, grant certiorari and reverse the Seventh Circuit's decision here.

II. PETITIONER HAS FAILED TO ESTABLISH THAT HIS UNDERLYING INTELLECTUAL-DISABILITY CLAIM IS MERITORIOUS

Petitioner also cannot establish a sound basis for a stay or writ of certiorari because his underlying intellectual-disability claim lacks merit. The Texas district court that denied his Section 2255 motion "set forth, and applied, the same three-part test for intellectual disability that now prevails." Pet. App. 13; see id. at 82-84. And after reviewing the evidence from a week-long hearing, the court found that petitioner "failed to meet all three prongs of the Atkins analysis." Id. at 128. Petitioner's challenges to that finding lack merit.

With respect to the first prong, petitioner contends (Pet. 28) that the Texas district court erred in discounting his IQ scores of 70 and 75. The court properly determined, however, that those "test scores did not accurately measure his intellectual abilities." Pet. App. 6; see id. at 85-101. In reaching that

determination, the court relied on the expert opinion of Dr. J. Randall Price, a trained psychologist who had "performed a probing psychological examination" of petitioner in 2010. Id. at 91-92. Dr. Price determined that petitioner's "cognitive abilities exceeded his measured cognitive intelligence." Id. at 92 (citation omitted). Dr. Price further determined that petitioner had "not put[] forth full effort" on his IQ tests. Id. at 93. The court credited that expert opinion, and nothing "in Moore I or Moore II * * * say[s] that a court must accept an IQ score at face value, especially when a psychological expert credibly testifies that the subject did not put forth his best effort on the test." Id. at 13. In any event, the court made clear that "[t]his is not a case where a man's life depends on a few points' difference in test results," and determined that petitioner likewise could not satisfy the second prong of the intellectual-disability analysis. Id. at 100.

With respect to the second prong, petitioner contends (Pet. 29-30) that the Texas district court eschewed diagnostic standards and instead relied on lay assessments of petitioner's functioning and stereotypes of persons with intellectual disability. "Far from rejecting medical standards," however, "the district court identified, and applied, the most recent medical guidance on intellectual disabilities." Pet. App. 13. And it engaged in a detailed analysis to determine which of the psychological experts

it would credit and ultimately determined that the testing conducted by the government's expert, Dr. Roger Bryan Moore, "more credibly measured [petitioner's] functioning." Id. at 113. The lay testimony discussed by the court, as well as its own observations, "supported the conclusions from Dr. Moore's testing"; they did not supplant them. Ibid.

Petitioner also contends (Pet. 29) that the Texas district court erred in "adopt[ing] a 'legal' approach to adaptive deficits that weighed [his] perceived strengths against his deficits." But as the court of appeals explained, the Texas district court's "references to its 'legal' approach" do not indicate that "its treatment of adaptive functioning was inconsistent with Moore I because the court found [petitioner's] alleged adaptive deficiencies to be slight and uncorroborated, without regard to his adaptive strengths." Pet. App. 13. And contrary to petitioner's contention (Pet. 30), the court did not "view[] the dysfunctional aspects of [petitioner's] upbringing" as evidence that he is not intellectually disabled. That is, it "did not view adaptive impairments as a zero-sum game, attributable to either one cause (e.g., childhood abuse) or another (e.g., intellectual disability), but not both." Pet. App. 13. Rather, the court found "a lack of evidence" that intellectual disability was "what caused [petitioner's] alleged impairments." Ibid.

No sound basis exists to grant certiorari, or to delay petitioner's execution, when his underlying intellectual-disability claim lacks merit.

III. EQUITABLE CONSIDERATIONS WEIGH AGAINST A STAY

This Court has repeatedly emphasized that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019) (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)). Once post-conviction proceedings "have run their course," "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). Delaying petitioner's execution "would frustrate the [government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). That interest is particularly strong in a case, like this one, where the prisoner is seeking to circumvent statutory limitations enacted to streamline postconviction challenges and thereby prevent delays in the execution of capital judgments. And the government's interest is further magnified in this case by the heinous nature of petitioner's crime.

Petitioner brutally murdered his two-year-old daughter after she tipped over her potty chair in his truck. Pet. App. 5. Petitioner was convicted of that horrific crime more than 16 years

ago. He has already pursued direct review and "had a full and fair opportunity to litigate his intellectual-disability claim before the district court that decided his § 2255 motion." Id. at 15. His execution date was initially announced 17 months ago, and his execution was initially scheduled to occur 11 months ago. The other four federal death-row inmates whose executions were scheduled at the same time -- all of whom, like petitioner, murdered children -- have since been executed. No further review of petitioner's case, or further delay of his sentence, is warranted.

CONCLUSION

The application for a stay and the accompanying petition for a writ of certiorari should be denied.

Respectfully submitted.

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