

No. 25-1003

In the Supreme Court of the United States

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS
DIVISION,

Petitioner,

v.

DEXTER JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

**BRIEF OF NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers, or NACDL, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes and misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many amicus briefs each year in this Court and other federal and state courts, seeking to assist in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal legal system as a whole.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) balances competing interests in finality, comity, and federalism. On the one hand, it rests on the presumption that state courts are competent to evaluate state and federal claims and protect federal rights. *Woods v. Donald*, 575 U.S. 312, 316–317 (2015) (per curiam). On the other, AEDPA does not “undermin[e] basic habeas corpus principles,” which “play[] a vital role in protecting constitutional rights.” *Holland v. Florida*, 560 U.S. 631, 649 (2010)

¹ No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

(citation omitted). Accordingly, Congress preserved the ability of federal courts to protect federal rights when claims and their factual predicates were previously unavailable. The Fifth Circuit’s decision here is fully consistent with AEDPA and balances the rights of all parties based on advances in scientific and clinical judgments to ensure that claims of intellectual disability are fully vetted based on the best available science.

1. Because the death penalty is the “ultimate punishment” the Eighth Amendment applies to it “with special force.” *Roper v. Simmons*, 543 U.S. 551, 568, 593 (2005). This Court has accordingly developed an objective framework to ensure that the death penalty is enforced only against the most culpable offenders. In *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), this Court applied that framework and held that objective evidence based on state legislation prohibiting the execution of the intellectually disabled showed that “a national consensus has developed” against executing the intellectually disabled.

This Court has consistently required *Atkins* claims to be evaluated based upon the best scientific evidence available. Thus, in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017), this Court rejected state rules that did not comport with the scientific community’s definitions in assessing whether a defendant was intellectually disabled. As this Court explained, whether a defendant is intellectually disabled “must be ‘informed by the medical community’s diagnostic framework.’” *Moore*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 721).

2. The Fifth Circuit duly considered the stakes of Johnson’s claim and correctly recognized that a claim is previously unavailable when scientific and clinical techniques would not provide any reasonable chance of success. Based on the techniques and diagnostic criteria at the time of Johnson’s original habeas petition, his claim of intellectual disability did not have a reasonable chance of success. But since that time the medical community has advanced those techniques, and under current diagnostic criteria, Johnson’s adaptive deficits support a viable *Atkins* claim.

Johnson’s claim based on new scientific and medical advances is similar to claims frequently evaluated by federal courts in subsequent habeas petitions. For instance, courts have evaluated changes in microscopic hair comparison analysis, arson science, and shaken baby syndrome. See *In re Wogenstahl*, 902 F.3d 621, 625–626 (6th Cir. 2018); *Lee v. Houtzdale SCI*, 798 F.3d 159, 167 (3d Cir. 2015); *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016). Courts have recognized that “it’s particularly important to permit claims of constitutional error grounded in faulty science in a second or successive petition” because “flawed analytical methods may not be debunked until well after” the deadlines for an original habeas petition. *Gimenez*, 821 F.3d at 1144. The Fifth Circuit correctly allowed Johnson to present his claim based on changes in scientific and medical standards.

If the Government is correct that 28 U.S.C. § 2244(b)(2)(A) relates solely to the legal predicate for the rule at issue, it will risk the execution of individuals in violation of the Eighth Amendment. Here, the

medical and scientific community has improved techniques for identifying intellectual disability, and courts must evaluate that new evidence. Indeed, this Court has recognized that courts must rely on the medical community for the proper methods of “determining who qualifies as intellectually disabled.” *Hall*, 572 U.S. at 710. The Fifth Circuit appropriately implemented that mandate and correctly concluded that Johnson’s claim was previously unavailable based on the scientific methods at the time of his original habeas petition, and this Court should affirm the Fifth Circuit’s decision to authorize a full investigation of Johnson’s *Atkins* claim.

ARGUMENT

I. The Eighth Amendment restricts the death penalty to the most culpable offenders.

The death penalty is the “the most severe punishment,” and is reserved for a narrow category of crimes and offenders. *Roper v. Simmons*, 543 U.S. 551, 568 (2005). Because of the severity of the punishment, “the Eighth Amendment applies to [the death penalty] with special force.” *Ibid.* For over a century, this Court has recognized that the Eighth Amendment’s prohibition on “cruel and unusual punishments” reflects the progress of our society, and “may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v. United States*, 217 U.S. 349, 378 (1910). The limits of the Eighth Amendment necessarily refer to “the evolving standards of decency that mark the progress of a maturing society.” *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion)).

To police the boundaries of the Constitution, this Court developed an objective framework and has reliably applied that framework in multiple contexts to reserve the death penalty for the most culpable offenders. For instance, this Court has limited its reach based on the nature of the offense. *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (impermissible as punishment for the rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (impermissible for felony murder where defendant did not kill, attempt to kill, or intend to kill). Likewise, it has limited the reach based on the nature of the offender, such as by age or insanity. *Roper*, 543 U.S. at 568 (juveniles under age 18); *Thompson v. Oklahoma*, 487 U.S. 815,

838 (1988) (plurality opinion) (juveniles under age 16); *Panetti v. Quarterman*, 551 U.S. 930, 954–960 (2007) (insanity). This Court’s 2002 decision in *Atkins v. Virginia* carefully applied that framework to conclude that objective indicia mandated that the intellectually disabled are likewise exempt from execution under the Eighth Amendment. 536 U.S. 304 (2002).

1. To determine whether punishments offend evolving standards of decency, this Court looks to “objective evidence of how our society views a particular punishment today,” of which “[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (citing *Coker*, 433 U.S. at 593–597 (1977) (plurality opinion)); see also *Enmund*, 458 U.S. at 789–792. In addition, the Court has “also looked to data concerning the actions of sentencing juries.” *Penry*, 492 U.S. at 331 (citing *Enmund*, 458 U.S. at 794–796; *Thompson*, 487 U.S. at 831). Further, this Court applies its own independent judgment to determine whether there is “reason to disagree with the judgment reached by the citizenry and its legislators.” *Atkins*, 536 U.S. at 313. Reviewing those objective indicia, *Atkins* concluded that executions of intellectually disabled offenders violate the Eighth Amendment. *Id.* at 321.

First, the Court surveyed the changed legislative landscape. At the time the Court decided *Penry v. Lynaugh* in 1989, only two state statutes (Georgia and Maryland) prohibited execution of the intellectually

disabled.² 492 U.S. at 334. Accordingly, the *Penry* Court determined that executing the intellectually disabled did not violate the Eighth Amendment. *Ibid.* But in the thirteen years that followed, the legislative landscape shifted, with numerous states enacting legislation that prohibited the execution of the intellectually disabled: Kentucky and Tennessee in 1990; New Mexico in 1991; Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994; New York in 1995; Nebraska in 1998; and South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina in 2000 and 2001. See *Atkins*, 536 U.S. at 314–315.³ Congress also expressly prohibited execution of the intellectually disabled in the federal death penalty statutes of 1988 and 1994.⁴ *Id.* at 314 & n.10. The Court reasoned that the “consistency of the direction

² Ga. Code Ann. § 17-7-131(j) (Supp. 1988); Md. Ann. Code, Art. 27, § 412(f)(1) (1989).

³ Ky. Rev. Stat. Ann. §§ 532.130, 532.135, 532.140; Tenn. Code Ann. § 39-13-203; N.M. Stat. Ann. § 31-20A-2.1 (repealed 2009); Ark. Code Ann. § 5-4-618; Colo. Rev. Stat. § 18-1.3-1103; Wash. Rev. Code § 10.95.030; Ind. Code §§ 35-36-9-2 through 35-36-9-6; Kan. Stat. Ann. § 21-6622; N.Y. Crim. Proc. Law § 400.27; Neb. Rev. Stat. § 28-105.01; S.D. Codified Laws § 23A-27A-26.1; Ariz. Rev. Stat. Ann. § 13-703.02; Conn. Gen. Stat. § 53a-46a; Fla. Stat. § 921.137; Mo. Rev. Stat. § 565.030; N.C. Gen. Stat. § 15A-2005.

⁴ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(l), 102 Stat. 4181, 4390, 21 U.S.C. § 848(l) (1988) (repealed 2006); Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c).

of change” made it “fair to say that a national consensus has developed” against executing the intellectually disabled. *Id.* at 315–316.⁵

Next, the Court considered the relationship between execution of the intellectually disabled and the penological purposes served by the death penalty and concluded those factors support the national consensus. *Atkins*, 536 U.S. at 317–321. Because of the diminished capacity of intellectually disabled offenders to “understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses,” the Court reasoned that such offenders are less personally culpable and are also less likely to “control their conduct based upon” the information that they may be executed for committing certain crimes. *Id.* at 320. Accordingly, neither retribution nor deterrence was meaningfully advanced by executing such offenders. *Id.* at 319–320. The Court also observed that intellectually disabled defendants face a “special risk of wrongful execution” owing to, among other things, the possibility of false confessions, their lesser ability to assist counsel, and the fact that “their demeanor may create an unwarranted impression of lack of remorse for their crimes.” *Id.* at 320–321.

⁵ When the Court decided *Atkins*, bills that prohibited the execution of intellectually disabled offenders had passed at least one house in Virginia and Nevada, respectively. *Atkins*, 536 U.S. at 315 & n.17. Nevada ultimately codified the prohibition in 2003, and Virginia banned the death penalty outright in 2021. *See* Nev. Rev. Stat. § 175.554(5); 2021 Va. Acts, Spec. Sess. I ch. 344-345 (effective July 1, 2021) (codified as amended in scattered sections of the Code). New Mexico also abolished the death penalty outright in 2009, which repealed its law prohibiting the execution of the intellectually disabled. *See* 2009 N.M. Laws, ch. 11, §§ 5–7.

2. The Court has also ensured that *Atkins* is meaningfully enforced by requiring sentencing courts to adhere to clinical and scientific judgments to make factual determinations about intellectual disability.

In *Hall v. Florida*, 572 U.S. 701 (2014), the Court struck down Florida’s rigid IQ-score rule that prevented defendants who had a score above 70 from presenting additional evidence of their intellectual impairment. It explained that although “the States play a critical role in advancing protections and providing the Court with information that contributes to an understanding of how intellectual disability should be measured and assessed,” *Atkins* did not “give the States unfettered discretion to define the full scope of the constitutional protection.” *Id.* at 719. The Court warned that if “the States were to have complete autonomy to define intellectual disability as they wished, the Court’s decision in *Atkins* could become a nullity, and the Eighth Amendment’s protection of human dignity would not become a reality.” *Id.* at 720–721.

In *Moore v. Texas*, 581 U.S. 1 (2017), and again in *Moore v. Texas*, 586 U.S. 133 (2019), the Court twice vacated the Texas Court of Criminal Appeals’ refusal to find an offender intellectually disabled. In the 2017 case, the Court found that the state court failed to “adequately to inform itself of the medical community’s diagnostic framework” for assessing intellectual disability. 581 U.S. at 20–21 (citation modified). The Court emphasized that “[e]ven if the views of medical experts do not dictate a court’s intellectual-disability determination, * * * the determination must be informed by the medical community’s diagnostic framework.”

Id. at 13 (citation modified); see also *Moore*, 586 U.S. at 142 (holding that the Texas Court of Criminal Appeals again failed to apply the medical community’s diagnostic framework).

II. Scientific advances are a common basis for successive habeas applications, and the Fifth Circuit correctly allowed Johnson’s successive habeas petition to vindicate his rights.

Johnson’s successive habeas petition properly relies on scientific and clinical advances to vindicate his Eighth Amendment rights. Indeed, scientific advances are frequently the basis for habeas relief.

Congress permits advances in technology to be considered in habeas proceedings by allowing second or successive habeas corpus petitions. Under AEDPA, successive habeas petitions may be filed in cases where a “claim rel[ying] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, * * * was previously unavailable,” or where a claim’s factual predicate “could not have been discovered previously through the exercise of due diligence” and the underlying facts “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(A)–(B). Allowing an opportunity for technological and scientific advances to be considered in the judicial process as they are discovered is particularly important in capital cases where “fact[s] must be determined with the high regard for truth that befits a decision affecting

the life or death of a human being.” *Panetti v. Quarterman*, 551 U.S. 930, 948–949 (2007) (quoting *Ford v. Wainwright*, 477 U.S. 399, 411 (1986)). The Fifth Circuit correctly treated Johnson’s claims consistently with how other circuits have addressed subsequent habeas petitions based on changes in scientific and clinical judgments.

1. Johnson’s habeas claim relies upon advances in the measurement and detection of intellectual disability. At the time of Johnson’s trial, Johnson’s *Atkins* claim had no possibility of merit under then-existing clinical and diagnostic criteria which focused primarily on IQ. At trial, Dr. Dale Watson presented testimony that Johnson’s intellectual functioning was roughly equivalent to that of a ten-year-old, but Johnson’s IQ was greater than 70. Pet. App. 13a & n.2. Likewise, when Johnson filed his initial federal habeas petition in June 2011, the diagnostic criteria made it impossible for Johnson to succeed on an *Atkins* claim. Pet. App. 14a–15a.

But while that petition was pending, the DSM-5 was published, “recogniz[ing] that an individual with an IQ score over 70 may still qualify as intellectually disabled.” *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019). That diagnostic update coincided with other improvements in definitions and clinical tools to “reflect a better understanding of intellectual functioning and adaptive behavior, [and] advances in the measurement” of those criteria. Robert Schalock et al., *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 20 (12th ed. 2021). These techniques and advancements led to “greater precision in the diagnostic process.” Robert Schalock

et al., *An Overview of Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* (12th ed.), 126 AM. J. ON INTELL. & DEV. DISABILITIES 439, 440 (2021) (*Overview of Intellectual Disability*).

Since then, Johnson has received a comprehensive forensic neuropsychological report and a declaration from his physician that he meets the criteria for an intellectual disability. Pet. App. 17a–18a. Based on this new evidence, the Fifth Circuit found that an *Atkins* claim was previously unavailable and authorized Johnson to file a second habeas petition. Pet. App. 17a.

2. Scientific and medical advances are frequently the basis of subsequent habeas petitions. Indeed, subsequent petitions are frequently authorized in the context of technological and forensic advances, such as advances in the fields of DNA testing and arson science.

In *In re Wogenstahl*, the Sixth Circuit granted a successive petition where a new U.S. Department of Justice letter indicated that some of the FBI lab statements had “exceeded the limits of the science of microscopic-hair-comparison analysis.” 902 F.3d 621, 625–626 (6th Cir. 2018) (citation modified). The defendant had, in part, been convicted based on a hair sample that an FBI agent testified reasonably linked the defendant to the crime. *State v. Wogenstahl*, No. C-140683, 2015 WL 9392744, at *4 (Ohio Ct. App. Dec. 23, 2015). The prosecuting attorney later received a letter from the FBI noting that the agent may have “overstat[ed] the conclusions that may appropriately be drawn from” the hair sample. *Id.* at *5. The purpose

of the letter was to ensure that evidence “met accepted scientific standards.” *Ibid.* Though the underlying hair comparison science was not invalidated, the Sixth Circuit found that “newly discovered scientific inaccuracies in the testimony regarding the hair analysis” and potential *Brady* violations showed the defendant’s claims “warrant[ed] a fuller exploration in the district court.” *In re Wogenstahl*, 902 F.3d at 629 (citation omitted).

The Third Circuit similarly affirmed a grant of habeas relief based on advances in arson science. *Lee v. Houtzdale SCI*, 798 F.3d 159, 167 (3d Cir. 2015). The government’s case against the defendant “relied heavily on fire-science and gas-chromatography evidence to argue that [the defendant] intentionally set the fire.” *Id.* at 161. This argument was based on expert testimony regarding, in part, “the then-dominant scientific theory that arson fires burn at higher levels of heat and intensity” than “normal” fires. *Id.* at 167. At the time of the defendant’s petition, the government conceded that, “due to scientific developments since [the defendant’s] trial in 1990, the basis for all of [the fire-science] evidence is now invalid” and “that subsequent scientific developments and retesting of surviving materials from the crime scene” undermined the reliability of expert testimony. *Ibid.* Without that evidence, the Third Circuit found there was not sufficient evidence and granted habeas relief. *Id.* at 169.

In *Gimenez v. Ochoa*, the Ninth Circuit discussed new scientific evidence challenging expert testimony that the victim died from shaken baby syndrome

(SBS). 821 F.3d 1136, 1143 (9th Cir. 2016). The defendant argued that “no longer do forensic pathologists diagnose SBS simply by noting the presence of the telltale triad of injuries. Now, the medical community requires evidence of impact injuries before diagnosing SBS.” *Ibid.* Though the court ultimately denied the successive petition because a jury still could have convicted based on other evidence, it noted that recognizing “a challenge brought in a successive petition to expert testimony about discredited forensic principles or other junk science * * * is essential in an age where forensics that were once considered unsailable are subject to serious doubt.” *Id.* at 1143–1144. The court further stated that “it’s particularly important to permit claims of constitutional error grounded in faulty science in a second or successive petition. After all, flawed analytical methods may not be debunked until well after the expiration of a petitioner’s one-year deadline to file a habeas petition under AEDPA.” *Id.* at 1144.

Likewise, courts have recognized how clinical and scientific advances have altered the factual bases for intellectual disability. For example, the Fifth Circuit considered how the Flynn Effect, “a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population,” provided a basis for an *Atkins* claim that was previously unavailable, even though *Atkins* had already been decided by the time of the first habeas petition. *In re Cathey*, 857 F.3d 221, 227–228 (5th Cir. 2017) (per curiam) (citation omitted). The court agreed with the defendant’s argument that, at the

time of his first petition, “he did not know about the ‘problem of aging norms’ * * * and thus ‘had no reason to pursue an *Atkins* claim that nobody else had won and only one person had even tried.’” *Id.* at 228. The court continued, “[i]n the same way we would not expect someone who, based on evidence, believed he was nineteen-years-old at the time of his crime to bring a *Roper* claim, we cannot expect someone who, based on evidence, believed his IQ was 77 to bring an *Atkins* claim two years after *Atkins* was decided in a state that had declared 70 as the benchmark IQ score.” *Id.* at 232 (footnote omitted). The Fifth Circuit pointed to this Court’s “skepticism of IQ cut-offs” because “experts in the field would consider other evidence,” *id.* at 237–238 (citing *Hall*, 572 U.S. at 712), and found that the defendant “ha[d] made a sufficient showing of possible merit of significant subaverage intellectual functioning to warrant a fuller exploration by the district court,” despite his specific IQ. *Ibid.* (citation modified).

In this way, advances in technology can significantly impact the availability of claims and evidence because availability “relates to whether something is ‘capable of use for the accomplishment of a purpose’ or ‘is accessible.’” *Munoz v. United States*, 28 F.4th 973, 979 (9th Cir. 2022) (quoting *Ross v. Blake*, 578 U.S. 632, 642 (2016)); cf. *Cherrix v. Braxton*, 131 F. Supp. 2d 756, 776 (E.D. Va. 2001) (order granting DNA re-testing because defendant “could not have previously discovered through the exercise of due diligence the quality of DNA test results he now seeks because DNA technology had not advanced to the level of accuracy and precision it has now achieved”). And defendants

must be given an opportunity to submit evidence that was previously unavailable because of advances in science and technology. Cf. *Panetti*, 551 U.S. at 951 (holding Texas erred by failing to give defendant an opportunity to submit his own expert evidence in a *Ford* claim); see also *Ford*, 477 U.S. at 414 (plurality opinion) (“It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.”). This is particularly true “where, as here, petitioners ‘run the risk’ * * * of ‘forever losing their opportunity for any federal review of their unexhausted claims.’” *Panetti*, 551 U.S. at 931–932 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

3. Considering new scientific advances often does not require altering judicial standards. Instead, the scientific advances may identify a previously unavailable factual basis for a claim under established legal principles. As an example, new DNA testing does not change the standard of proof beyond a reasonable doubt. See *Cherrix*, 131 F. Supp. 2d at 787 (“once the DNA tests are performed, the testing could re-affirm that Cherrix committed the crimes of which he was convicted”). Rather, the new scientific methods ensure that those standards are met and have led to the exoneration of at least 375 individuals based on DNA testing alone. Innocence Project, *DNA Exonerations in the United States (1989-2020)*, <https://perma.cc/H7AX-RQ76> (last visited Sept. 23, 2026).

Similarly, recognizing advancements in scientific and clinical diagnostic tools does not change the fundamental prohibition on execution of the intellectually disabled. Indeed, the definition of intellectual disability has not substantially changed since at least the 1980s. In *Penry v. Lynaugh*, the Court noted the medical definition of individuals with intellectual disabilities as those “having ‘significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.’” 492 U.S. 302, 308 n.1 (1989) (quoting *Classification in Mental Retardation* 1 (H. Grossman ed. 1983)). *Atkins* likewise cited definitions from the American Association on Mental Retardation and the American Psychiatric Association to explain that intellectual disabilities are “characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Atkins*, 536 U.S. at 308 n.3 (2002) (quoting *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992)).

That core definition is still used by this Court: “As the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circum-

stances), and onset of these deficits during the developmental period.” *Hall*, 572 U.S. at 710. The Court has also emphasized it is “unsurprising” that this definition was “informed by the work of medical experts in determining intellectual disability” because “[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue.” *Ibid.* It is likewise unsurprising that society relies on the medical community for the proper methods for “determining who qualifies as intellectually disabled.” *Ibid.*

What has changed is that the scientific bases for understanding which offenders are intellectually disabled has significantly advanced. Clinicians have recognized that the improved diagnostic tools and criteria have led to “greater precision in the diagnostic process.” *Overview of Intellectual Disability* 440. Accordingly, Johnson’s successive habeas claim based on advances in clinical and scientific methodologies is consistent with habeas practice, and the Fifth Circuit correctly allowed Johnson to pursue a claim that was previously unavailable.

CONCLUSION

The Court should affirm the Fifth Circuit, and hold that a claim is previously unavailable when it had no reasonable chance of success of prevailing under the clinical and scientific methodologies existing at the time of a prior habeas petition’s filing.

Respectfully submitted.

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