No. 10-150

In the Supreme Court of the United States

BRUCE CARNEIL WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review by writ of certiorari the court of appeals' denial of petitioner's request for authorization to file a second or successive collateral attack under 28 U.S.C. 2255.

2. Whether, under 28 U.S.C. 2255(h)(1) (Supp. II 2008), a defendant may file a second or successive Section 2255 motion based on newly discovered evidence that pertains not to his guilt but to his eligibility for the death penalty.

3. Whether, if Section 2255(h)(1) bars a defendant from challenging his death sentence in a second or successive Section 2255 motion based on newly discovered evidence that he is mentally retarded, the statute is to that extent unconstitutional under the Fifth or Eighth Amendment.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-12a) is reported at 605 F.3d 256. The opinion of the court of appeals affirming petitioner's conviction and sentence is reported at 162 F.3d 308. The opinions of the court of appeals reviewing and affirming the denial of petitioner's first motion for postconviction relief are reported at 392 F.3d 787 and 421 F.3d 308.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2010. The petition for a writ of certiorari was filed on July 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1); as explained below, however, this Court lacks jurisdiction to review the decision of the court of appeals. See pp. 12-17, *infra*.

STATEMENT

Following a jury trial in the Northern District of Texas, petitioner was convicted of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (1994); conspiring to commit kidnapping, in violation of 18 U.S.C. 1201(c); and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1994). He was sentenced to death on the charge of kidnapping resulting in death. The court of appeals affirmed, *United States* v. *Webster*, 162 F.3d 308 (5th Cir. 1998), and this Court denied a petition for a writ of certiorari, 528 U.S. 829 (1999). Petitioner then filed a motion for postconviction relief under 28 U.S.C. 2255.[1] The district court denied the motion, *Webster* v. *United States*, No. 4:00-CV-1646, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003); the court of appeals affirmed, *United States* v. *Webster*, 421 F.3d 308 (5th Cir. 2005); and this Court denied a petition for a writ of certiorari, 549 U.S. 828 (2006). Thereafter, petitioner sought authorization from the court of appeals to file a second Section 2255 motion. The court of appeals denied the request. Pet. App. 1a-12a.

1. The evidence at trial showed that in 1994 petitioner, along with Orlando Hall and Marvin Holloway, was running a marijuana trafficking operation in Pine Bluff, Arkansas. They bought marijuana in the Dallas-Fort Worth area with the assistance of Steven Beckley, who transported the marijuana to Arkansas. Hall and Beckley gave two Dallas drug dealers, Neil Rene and Stanfield Vitalis, $4700 for marijuana to be delivered later. Rene and Vitalis failed to appear with the marijuana and later claimed in a phone conversation that they had been robbed of the money and their car. When Orlando Hall subsequently saw the two men enter the

[1] All references to Section 2255 are to the 2008 supplement.

car that they claimed had been stolen, he concluded that they had lied about being robbed. 162 F.3d at 317-318.

A few days later, on September 24, 1994, petitioner, Beckley, Orlando Hall, and his brother Demetrius Hall, all dressed in camouflage clothing, drove to the apartment in Arlington, Texas, from which Rene and Vitalis had telephoned. Petitioner and Orlando Hall were armed with handguns, Demetrius Hall carried a small baseball bat, and Beckley had duct tape and a jug of gasoline. After Rene's 16-year-old sister, Lisa, refused them entry and called the police, petitioner forcibly entered the house, tackled Lisa, and dragged her into the car. The group then changed cars; while they drove around, with petitioner in the front passenger seat and Beckley at the wheel, Orlando Hall raped Lisa in the back seat and forced her to perform oral sex on him. 162 F.3d at 318.

After dropping off Orlando Hall, the group drove to a motel in Pine Bluff. En route, petitioner and Demetrius Hall took turns raping Lisa. At the motel, the group kept Lisa tied to a chair and raped her repeatedly. 162 F.3d at 318.

The next day, Orlando Hall and Holloway arrived at the motel and took Lisa into the bathroom for 15 to 20 minutes. Orlando Hall told Beckley, "She know too much." Petitioner and Orlando Hall went to a park and dug a grave. They and Beckley took Lisa to the park that night, but returned when they could not find the gravesite in the dark. 162 F.3d at 318.

The next morning, petitioner, Orlando Hall, and Beckley drove Lisa back to the park. Petitioner and Orlando Hall led the way to the gravesite, while Beckley guided Lisa, masked and barefoot, by the shoulders. At the gravesite, Orlando Hall turned Lisa's back to the grave and placed a sheet over her head. He then hit her

in the head with a shovel. She screamed and started running. Beckley grabbed her and hit her twice in the head with a shovel. Petitioner and Orlando Hall then took turns with the shovel, beating Lisa into unconsciousness. Petitioner proceeded to gag Lisa and drag her into the grave. He stripped her, covered her naked body with gasoline, and shoveled dirt back into the grave. Although she was unconscious, Lisa likely was still breathing when petitioner put her in the grave, *i.e.*, she died after she was buried alive. 162 F.3d at 318-319.

When police arrested petitioner, he was carrying a key to the motel room in which Lisa had been held. He admitted involvement in the kidnapping and the murder. He led authorities to the gravesite, to the charred bucket that he admitted using to burn Lisa's clothes, and to the place where he burned them. He told an FBI agent that the murder had not been personal but "strictly business." 162 F.3d at 319, 320 n.5, 333, 336 & n.26.

Before trial, the government provided notice of its intent to seek the death penalty on the kidnapping count. The jury found petitioner guilty of kidnapping resulting in death, conspiring to commit kidnapping, and using and carrying a firearm during a crime of violence. 162 F.3d at 319.

2. The trial then proceeded to the penalty phase. Under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, before a jury may sentence a defendant to death, it must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2), to ensure that the defendant acted with a degree of culpability sufficient to justify the death penalty, and at least one of the aggravating factors enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may also consider any non-statutory aggravating factors for which the govern-

ment has provided notice and presented proof beyond a reasonable doubt. The jury then weighs the statutory and non-statutory aggravating factors that it has found to exist against any mitigating factors that any individual juror finds to exist by a preponderance. 18 U.S.C. 3593(c) and (d). The jury is to return a death sentence if it finds that all the aggravating factors found to exist "sufficiently outweigh" all the mitigating factors found to exist that a sentence of death is justified. 18 U.S.C. 3593(e).

In this case, the jury found unanimously that the government had proved beyond a reasonable doubt the requisite intent factor. The jury also found beyond a reasonable doubt three statutory and two non-statutory aggravating factors: that petitioner committed the offense in an especially heinous, cruel, and depraved manner in that the offense involved torture or serious physical abuse; that the offense was committed with substantial planning and premeditation; that Lisa was a particularly vulnerable victim due to her age; that petitioner constituted a future danger to the lives and safety of others; and that the offense had affected the victim's family. 162 F.3d at 319 n.1; 18 U.S.C. 3592(c)(6), (9) and (11). The defense submitted numerous mitigating factors, and nine of them were found to exist by at least one juror. 162 F.3d at 319 n.2. Four jurors found as one mitigating factor that petitioner "is or may be mentally retarded." *Ibid.*

The jury found unanimously that the aggravating factors sufficiently outweighed the mitigating factors to justify a death sentence. See 162 F.3d at 320.[2]

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[2] Orlando Hall was tried separately and also sentenced to death. See *United States* v. *Hall*, 152 F.3d 381 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999).

3. In addition, 18 U.S.C. 3596(c) exempts from the death penalty defendants who are mentally retarded or who, because of a mental disability, lack the mental capacity to understand the death penalty or why it was imposed. At the penalty phase, petitioner argued that he is mentally retarded and, in support, presented testimony from four medical experts regarding his mental capacity and the testimony of a fifth medical expert on surrebuttal to critique the methodology used by the government's experts in testing his cognitive abilities. He also submitted voluminous evidence of the abuse he suffered as a child. See 421 F.3d at 309.

The government presented two medical experts who concluded that petitioner was not mentally retarded. Although the government experts agreed that petitioner has a low I.Q., they concluded that petitioner's I.Q. was higher than petitioner's experts had suggested and, more importantly, that petitioner had sufficient adaptive skills to preclude classifying him as mentally retarded. 421 F.3d at 312-313; 2003 WL 23109787, at *14. The government's experts noted that petitioner had scored higher on intelligence tests administered before this case began, and that he had an incentive not to perform well on the tests administered after his arrest. Furthermore, the government's experts explained that petitioner's experts' testing methodology "was critically flawed and misleading," 421 F.3d at 310, because petitioner's immersion in a criminal subculture and lack of formal education likely resulted in deceptively low scores on the I.Q. and adaptive-skills tests used by petitioner's experts (which, for instance, asked petitioner to define "inflation" and to recognize a picture of Mark Twain). See *id.* at 310, 313 nn.13 & 15; 2003 WL 23109787, at *12-*13, *14. And petitioner's experts had based their conclusions on family members' statements

that petitioner lacked certain skills; the government experts "effectively [rebutted] some of those findings with direct evidence that Webster has adapted to his environment and does possess skills that his family stated that he did not." *Id.* at *14. For instance, petitioner had shown adaptability by working as a drug dealer; by burning his clothes to destroy evidence after the murder; by concocting cover stories and making excuses to the police when he was arrested in possession of a key to the motel room in which Lisa Rene had been held and repeatedly raped; and by sneaking into the women's section of the jail in which he was held (apparently for sexual gratification). See 421 F.3d at 313 & n.15. The government also presented other witnesses who testified that petitioner performed adequately while at school and that, while in custody, petitioner wrote letters to other inmates; received and read aloud from newspapers; appeared to be reading and taking notes from books in the law library; prepared written grievances and wrote request slips for various services; submitted names and addresses of people for his visitation list; and complained because he received the incorrect change from the prison commissary. See *id.* at 310, 313 n.15.

After imposing the death sentence, the district court entered a finding under Section 3596(c) that petitioner is not mentally retarded and therefore not exempt on that basis from the death penalty. See 421 F.3d at 309-310.

4. On direct appeal, petitioner contended, among many other claims, that the district court's finding that he is not mentally retarded was against the weight of the evidence. The court of appeals rejected the claim, observing that "[t]he government presented substantial evidence to support the finding" on mental retardation.

162 F.3d at 353. The court added that "only four of the twelve jurors found that [petitioner] is or may be mentally retarded and that he suffers from low intellectual functioning." *Ibid.* This Court denied a petition for a writ of certiorari. 528 U.S. 829 (1999).

5. In 2000, petitioner filed a motion to vacate his conviction and death sentence under 28 U.S.C. 2255. While that motion was pending in the district court, this Court held in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), that the execution of a mentally retarded individual would violate the Eighth Amendment. In his Section 2255 motion, petitioner contended, among other claims, that the district court's finding that he was not mentally retarded was unsupported by the evidence. Petitioner also presented new evidence that he contended supported his claim of mental retardation.

After reexamining the trial record, the district court again rejected petitioner's claim of mental retardation. The court stated that it is "undisputed" that petitioner has a low I.Q. 2003 WL 23109787, at *14. Nevertheless, the court found that the evidence supported the conclusion that "[petitioner] does not have a deficit in adaptive skills," and therefore that he is not mentally retarded under either *Atkins* or 18 U.S.C. 3596(c). *Ibid.* The court granted petitioner a certificate of appealability (COA) on his claim that there was insufficient evidence to support the court's finding on mental retardation. 421 F.3d at 310.

The court of appeals affirmed. The court concluded that the district court had "proceeded dutifully to reexamine the extensive evidence bearing on [petitioner's] mental capacity" and correctly concluded again that petitioner had not established retardation. 421 F.3d at 312. The court explained that, despite petitioner's concededly low I.Q., the government had "effectively

countered [petitioner's] claimed retardation" by refuting petitioner's evidence that he lacked adaptive skills. *Id.* at 313.[3]

This Court again denied a petition for a writ of certiorari. 549 U.S. 828 (2006).

6. In 2009, petitioner moved the court of appeals for authorization to file a second or successive Section 2255 motion to vacate his death sentence. A second or successive Section 2255 motion may be filed only if authorized by a panel of the court of appeals, and such authorization may be granted only in very limited circumstances. See 28 U.S.C. 2255(h)(1) and (2); see also Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220 (adding this provision). Petitioner sought authorization pursuant to Section 2255(h)(1), which authorizes a second or successive collateral attack based on "newly discovered evidence" only where "[that evidence] would establish by clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty of the offense."

The motion argued that petitioner had discovered new evidence that he is mentally retarded and so ineligible for the death penalty under Section 3596(c) and *Atkins*. The evidence included Social Security records created in connection with petitioner's application, more than a year before the crime, for disability benefits based on a sinus problem. The records showed (1) that three medical professionals had separately found that petitioner was mentally retarded and/or had an ex-

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[3] Petitioner also contended that his trial counsel were constitutionally ineffective in failing adequately to investigate and present evidence of retardation. The district court and the court of appeals denied a COA on that issue, because counsel were "far from constitutionally ineffective" and presented "a significant amount" of such evidence. 392 F.3d at 790-791, 793.

tremely low I.Q.; and (2) that records of petitioner's past enrollment in special education classes had been destroyed years before. The evidence also included declarations from petitioner's family members, friends, and acquaintances offered to prove his "adaptive deficits."

7. The court of appeals denied the request for authorization to file a successive motion under Section 2255. Pet. App. 1a-12a.

a. The court held that, under the plain language of Section 2255(h)(1), the newly discovered evidence must negate guilt of *the offense*; the provision "does not encompass challenges to a sentence." Pet. App. 4a.[4] The court rejected petitioner's argument that Section 2255(h)(1) should be read to permit a claim that the movant is "not guilty of the death penalty." The court explained that "[h]ad Congress wanted the provision to cover challenges to a sentence—even if only to a death sentence—it could easily have referenced sentences explicitly in the text, as it did numerous times throughout § 2255." *Id.* at 6a-7a. Or Congress could have used the term "actual innocence," which, before the enactment of Section 2255(h), had been construed by the courts, in connection with the "actual innocence" exception to the cause-and-prejudice requirement for excusing procedural default, as extending to some capital sentencing challenges. *Id.* at 5a, 7a. But instead, the court of appeals observed, Congress "elected to couch § 2255(h) * * * in the markedly different, unmistakable terms of *guilt of the offense.*" *Ibid.*

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[4] The government had argued that petitioner had not met the burden of showing by clear and convincing evidence that no reasonable factfinder would find him mentally retarded; the government did not address whether such a sentencing challenge may *ever* be brought in a second or successive motion.

The court clarified that it "d[id] not mean to suggest that a prisoner is jurisdictionally barred from seeking successive review where he contests a factual predicate of his capital murder conviction, without which he would be guilty only of non-capital murder." Pet. App. 6a n.5. The court cited a Ninth Circuit case holding that a challenge to the "special circumstance" of rape, which had rendered the defendant death-eligible, was a challenge to the "offense" of capital murder. *Ibid.* (citing *Thompson* v. *Calderon*, 151 F.3d 918, 923-924 (9th Cir.) (en banc), cert. denied, 524 U.S. 965 (1998)).

b. Judge Wiener filed a concurring opinion. Pet. App. 9a-12a. Although Judge Wiener agreed that petitioner's successive collateral attack was barred under the plain terms of Section 2255(h)(1), he wrote to express his concern that, if petitioner's proffered evidence were presented to a factfinder, it would show that petitioner is mentally retarded. *Id.* at 9a.

ARGUMENT

Congress has eliminated certiorari review of denials of authorization to file a second or successive collateral attack. This Court therefore lacks jurisdiction to take up the questions presented by the petition for a writ of certiorari in this case. Further review would not be warranted in any event: the decision of the court of appeals is correct and does not conflict with any other decision of another court of appeals or this Court. Moreover, as the government explained in the court of appeals, even if a court of appeals may authorize a second or successive collateral attack based on newly discovered facts establishing by clear and convincing evidence that the defendant is ineligible for a death sentence, petitioner has not made that showing here. Nothing in petitioner's proffered evidence clearly demonstrates any error in the finding that petitioner is not retarded—a

finding that the district court has twice made, after extensive adversarial presentation, and the court of appeals has twice affirmed.

1. a. Congress has determined by statute that decisions of the courts of appeals denying authorization to file a second or successive collateral attack are not subject to certiorari review. 28 U.S.C. 2244(b)(3)(E). Section 2244(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Petitioner acknowledges (Pet. 15-16) that Section 2244(b)(3)(E) validly eliminates this Court's jurisdiction over the specified class of cases; petitioner contends, however (Pet. 16-22), that decisions denying authorization to file a second or successive Section 2255 motion are not within that class. That contention is incorrect.

Section 2255 provides that the same procedure that applies to the authorizing of second or successive habeas corpus petitions by state prisoners—the procedure set out in Section 2244—applies to the authorizing of second or successive Section 2255 motions. Section 2255(h) states that a second or successive Section 2255 motion "must be certified *as provided in section 2244* by a panel of the appropriate court of appeals" to meet the standard. 28 U.S.C. 2255(h) (emphasis added). Section 2244, in turn, specifies who shall decide ("a panel of the court of appeals"), what must be decided (whether the petitioner has made "a prima facie showing" that he meets the applicable standard), when the decision must be made (promptly after filing), and that the decision is final and unreviewable (*i.e.,* not "the subject of a petition for rehearing or for a writ of certiorari"). 28 U.S.C. 2244(b)(3)(B)-(E). And although Section 2255 sets out

the substantive requirements that a successive motion must meet to be authorized, those requirements are substantially identical to the substantive requirements in Section 2244. Compare 28 U.S.C. 2244(b)(2) with 28 U.S.C. 2255(h).

Petitioner argues (Pet. 15-20) that although Subparagraphs (b)(3)(A), (B), (C), and (D) all apply to second or successive Section 2255 motions, Subparagraph (b)(3)(E) does not. But "[t]he language of § 2255 * * * makes no effort to specify which provisions of § 2244 it intends to incorporate. In the absence of such a specification, it is logical to assume that Congress intended to refer to all of the subsections of § 2244 dealing with the authorization of second and successive motions, including * * * § 2244(b)(3)(E)." *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997) (Calabresi, J.). Petitioner contends (Pet. 18) that the use of the term "certified" in Section 2255(h) indicates that "there is no adoption or incorporation of the parts of Section 2244 that do not address the procedure *for* certification." But the identity of the decisionmaker plainly *is* a key part of the procedure for certification: Congress intended for certification decisions to be made by a single panel of three appellate judges, for the decisions to be made quickly, and for decisions granting or denying certification to be final. Put another way, if petitioner obtained the relief he seeks—an order by this Court that his successive collateral attack be certified as permissible—his Section 2255 motion would *not* have been "certified as provided in Section 2244," which restricts that certification decision to the court of appeals.

The text and structure of Section 2244 confirm that Congress did not exclude Section 2255 motions from the operation of Subparagraph (b)(3)(E). The 1996 amendments to Section 2244 were in the section of AEDPA

immediately following the amendments to Section 2255 and demonstrably were written with the latter amendments in mind. See, *e.g.*, AEDPA § 106(a), 110 Stat. 1220 (making "conforming amendment" to Section 2244(a) to add a cross-reference to Section 2255).

Furthermore, throughout Section 2244, when Congress intended to refer to a state prisoner's petition for a writ of habeas corpus, it said so specifically. See 28 U.S.C. 2244(b)(1) ("a second or successive habeas corpus application under section 2254"), (b)(2) (same), (c) ("a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court"), (d)(1) (similar). When Congress intended to refer only to a federal prisoner's petition, it said so. See 28 U.S.C. 2244(a) ("an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States"). But in the certification subparagraphs—including not only Subparagraphs (b)(3)(A)-(D), which petitioner concedes apply to both state and federal prisoners' certification requests, but also Subparagraph (b)(3)(E), the applicability of which is at issue here—Congress used only the term "a second or successive application," or "a second or successive application permitted by this section." The absence of any limiting language from these subparagraphs, and only these, is significant—especially given the simultaneous and conforming amendments to Sections 2244 and 2255, see pp. 13-14, *supra*.[5]

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[5] Petitioner's other interpretive arguments fail as well. The canon of *expressio unius est exclusio alterius* (Pet. 19-20) has no application here, because Congress did not omit the relevant language from Section 2255; it included it by express cross-reference to Section 2244. And petitioner cannot contradict that plain text with a statement at a Senate hearing about AEDPA's purported purpose (Pet. 19) by a witness who *opposed* several AEDPA reforms and "le[ft] * * * unaddressed" the

Castro v. *United States*, 540 U.S. 375 (2003), is not to the contrary. In that case, the dispute concerned whether Castro's Section 2255 motion was his second such motion (as the lower courts held) or his first. Castro did not ask the court of appeals for authorization to file a second or successive Section 2255 motion, because he viewed his motion as a *first* motion that does not require authorization, and the court of appeals did not deny such a request. This Court thus found Section 2244(b)(3)(E) inapplicable because there was no "statutorily relevant 'denial'" of a successive application for collateral relief. 540 U.S. at 380. The Court added that even if the court of appeals was read to have not only held that Castro's motion was his second one, but also denied Castro authorization to file it, the jurisdictional bar would not apply because "the 'subject" of Castro's [certiorari] petition [was] not the Court of Appeals' 'denial of an authorization,'" but "the lower courts' refusal to recognize that this [Section] 2255 motion is his first, not his second." *Ibid.*

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tightened rules for successive petitions. *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary*, 104th Cong., 1st Sess. 87 (1995) (statement of Nicholas deB. Katzenbach). In any event, Congress plainly was concerned with bringing finality to federal as well as state postconviction review. See AEDPA § 105, 110 Stat. 1220 (adding time limits and second-or-successive provisions to Section 2255); *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998) (explaining that the stricter limitations AEDPA imposed on the filing of second or successive collateral attacks are "grounded in respect for the finality of criminal judgments").

Finally, the case petitioner cites (Pet. 20) in support of a "narrow" construction of Section 2244(b)(3)(E) stands for the proposition that federal courts narrowly construe enactments that preclude *any* judicial review of executive action—not enactments that only limit appellate review of judicial decisions. See *Utah* v. *Evans*, 536 U.S. 452, 462-463 (2002) (citing *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)).

Here, by contrast, petitioner specifically asked the court of appeals for authorization under Section 2255(h) to file a successive motion, and the court specifically denied the request. Pet. App. 8a. That denial is the "subject" of petitioner's petition for certiorari, which challenges the denial on both statutory and constitutional grounds.[6]

b. Because Section 2244(b)(3)(E) applies to petitions for rehearing as well as petitions for certiorari, the courts of appeals have confronted this question as well. Every court to have done so has concluded that the finality rule of Section 2244(b)(3)(E) is fully applicable to Section 2255 cases. *E.g.*, *Triestman*, 124 F.3d at 367; accord *Leonard* v. *United States*, 383 F.3d 1146, 1148 (10th Cir. 2004); *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997); see also *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998).

Indeed, after the Court in *Castro* raised *sua sponte* the question whether Castro's petition for a writ of certiorari was barred by Section 2244(b)(3)(E), see 537 U.S. 1170 (2003), an amicus suggested the argument petitioner now makes: that the jurisdictional bar does not apply to Section 2255 cases at all. National Ass'n of Criminal Def. Lawyers Br. at 12 n.2, *Castro*, *supra* (No. 02-6683). The government then briefed that issue. U.S. Br. at 13-15, *Castro*, *supra* (No. 02-6683). This Court decided the case on different grounds that apply equally to state and federal postconviction review, thus leaving

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[6] Similarly, because petitioner's motion plainly is second or successive, *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978), is inapposite: as the Court explained in *Castro*, 540 U.S. at 380, *Adamo Wrecking* held only that a bar on reviewing emission standards does not bar a "narrow inquiry" into whether a regulation *is* an emission standard. 434 U.S. at 285.

undisturbed the consensus view of the courts of appeals that the bar on filing rehearing or certiorari petitions applies to requests for certification of successive Section 2255 motions. As already explained, that consensus view is correct.

c. Section 2244(b)(3)(E)'s bar against this Court's review of orders denying leave to file a second or successive Section 2255 motion does not mean that federal postconviction litigants are altogether without recourse to this Court. First, as *Castro* makes clear, this Court retains the ability to review allegations that a motion does not fit the specialized meaning of "second or successive," see, *e.g.*, *Magwood* v. *Patterson*, 130 S. Ct. 2788, 2796-2797 (2010), and may be considered without prior certification by the court of appeals. Second, in cases where Section 2255 truly is an "inadequate or ineffective" remedy, 28 U.S.C. 2255(e), federal defendants may seek habeas corpus relief under 28 U.S.C. 2241, with ultimate review in this Court. Third, there may be avenues of review in this Court other than certiorari. Courts of appeals in Section 2255 proceedings might under exceptional circumstances certify questions to this Court. See *Felker* v. *Turpin*, 518 U.S. 651, 666 (1996) (Stevens, J., concurring) (citing 28 U.S.C. 1254(2)); *id.* at 667 (Souter, J., concurring) (same). And to the extent permitted by 28 U.S.C. 2255(e), a federal defendant may be able to seek habeas relief directly in this Court, as state prisoners may do when they cannot seek certiorari review of a decision denying certification of a second or successive habeas petition. *Felker*, 518 U.S. at 658-662; *In re Davis*, 130 S. Ct. 1 (2009).

2. In any event, the court of appeals correctly rejected petitioner's claim that he should be permitted to file a successive Section 2255 motion even though he concededly cannot show "that no reasonable factfinder

would have found [him] *guilty of the offense*." 28 U.S.C. 2255(h)(1) (emphasis added). That decision is in accord with every appellate decision considering comparable circumstances; petitioner alleges a circuit conflict based on a single Ninth Circuit decision, but that case in fact involved an allegation that, if true, would have established the habeas petitioner's innocence of the capital offense.

a. Under Section 2255(h)(1), in order to obtain authorization to file a successive Section 2255 motion based on newly discovered evidence, an applicant must show that the new evidence would establish that he is not "guilty of the offense." 28 U.S.C. 2255(h)(1); see also 28 U.S.C. 2244(b)(2)(B)(ii) (similar requirement for second or successive habeas petition by state prisoner); 28 U.S.C. 2255(e)(2)(B) (similar requirement for evidentiary hearing on claims not factually developed in state court). Congress's use of the word "offense" plainly excludes challenges to sentences, including death sentences. See *In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998); *Burris* v. *Parke*, 130 F.3d 782, 785 (7th Cir.), cert. denied, 522 U.S. 990 (1997); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir.), cert. denied, 520 U.S. 1151 (1997), overruled on other grounds by *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998); *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1277 (9th Cir.) (per curiam) (*Greenawalt I*), cert. denied, 519 U.S. 1102 (1997), abrogated on other grounds by *Rhines* v. *Weber*, 544 U.S. 269 (2005); *Greenawalt* v. *Stewart*, 105 F.3d 1287, 1288 (9th Cir.) (per curiam), cert. denied, 519 U.S. 1103 (1997); see also *Ward* v. *Hall*, 592 F.3d 1144, 1161 (11th Cir. 2010) (construing Section 2254(e)(2)(B)), petition for cert. pending,

No. 10-288 (filed Aug. 25, 2010); *Burris* v. *Parke*, 116 F.3d 256, 258 (7th Cir. 1997) (same).[7]

To be sure, a challenge to the conviction for the underlying "offense" may affect the defendant's eligibility for the death penalty as well. That was the crucial fact in the Ninth Circuit case on which petitioner relies, *Thompson* v. *Calderon*, 151 F.3d 918 (en banc), cert. denied, 524 U.S. 965 (1998), and for that reason *Thompson* does not support petitioner's argument. In *Thompson*, the habeas petitioner contended that his new evidence would show that he was not guilty of the offense of capital murder, but at most guilty of the lesser offense of homicide, because the new evidence would refute the special circumstance that made his crime a capital one. *Id.* at 920, 923, 924. That special circumstance, the court held, is charged in the indictment as part of the offense of capital murder; "[t]hus, by claiming the infirmity of the lone special circumstance that made him eligible for the death penalty, Thompson is challenging his conviction of the 'underlying offense' of capital murder." *Id.* at 924. The Ninth Circuit has reiterated, in the subsequent case that petitioner also cites, that innocence of the "offense" of capital murder in this context means "actual innocence of either the murder * * * or the special circumstance findings that made [the defendant] eligible for the death penalty." *Babbitt* v. *Woodford*, 177 F.3d 744, 748, cert. denied, 526 U.S. 1107

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[7] Another court has held that the word "offense" in Section 2255(h)(1) does not encompass attacks on sentences of imprisonment, without deciding whether it encompasses attacks on sentences of death. *In re Vial*, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997) (en banc). See also *LaFevers* v. *Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (reserving the question whether Section 2244(b)(2)(B)(ii) extends to capital sentencing challenges).

(1999). The court of appeals here so understood *Thompson* and did not disagree. See Pet. App. 6a n.5.

By contrast, the Ninth Circuit has squarely held that claims purporting to show that no reasonable *penalty-phase* juror would have *imposed* a sentence of death on a death-eligible defendant do not challenge the "offense," and such claims thus are not cognizable under Section 2244(b)(2)(B)(ii). See *Greenawalt I*, 105 F.3d at 1277 (denying leave to file a successive petition "because the constitutional error alleged by Greenawalt is ineffective assistance of counsel at [capital] *sentencing*, and he cannot demonstrate that 'no reasonable factfinder would have found [him] *guilty* of the underlying offense'").

Petitioner's claim of a circuit conflict thus fails: no court of appeals has held that Section 2255(h)(1) encompasses all newly discovered evidence "relating to a death sentence." Pet. 33, 34.

b. Although petitioner claims (Pet. 27 n.9) that he, too, is contending that he is not "guilty" of capital murder, that contention lacks merit. Petitioner is not, for instance, challenging proof of the element of the offense that made it a capital crime, *i.e.*, that death resulted from the kidnapping. See 18 U.S.C. 1201(a) (1994). Nor is he challenging proof of his intent to kill Lisa Rene or of the three statutory aggravating factors. The court below made that clear, because it cited *Thompson* with approval and stated that it "d[id] not mean to suggest that a prisoner is jurisdictionally barred from seeking successive review where he contests a factual predicate of his capital murder conviction, without which he would have been guilty only of non-capital murder." Pet. App. 6a n.5.

Rather, petitioner's argument is that he may not be executed; upholding that claim would not alter the offense, or the statutory aggravating circumstances, of

which he is guilty. See 18 U.S.C. 3596(c). As the court of appeals explained in affirming the denial of petitioner's first Section 2255 motion, nothing in the FDPA or in this Court's capital-sentencing jurisprudence requires the government to *dis*prove the defendant's retardation beyond a reasonable doubt, as if non-retardation were an element or a statutory aggravating factor. To the contrary, "a substantive limitation on [capital] sentencing" imposed by the Eighth Amendment is not an "element[] of the crime of murder" and "need not be enforced by the jury." *Cabana* v. *Bullock*, 474 U.S. 376, 385, 386 (1986), overruled in part on other grounds by *Pope* v. *Illinois*, 481 U.S. 497, 503 n.7 (1987). Indeed, the burden of establishing retardation may permissibly be placed on the defendant, whereas the burden of disproving any element or statutory aggravating factor cannot. See, *e.g.*, 421 F.3d at 311-312 & n.10; *Walker* v. *True*, 399 F.3d 315, 326 (4th Cir. 2005); *State* v. *Grell*, 135 P.3d 696, 706-707 (Ariz. 2006), cert. denied, 550 U.S. 937 (2007); accord *United States* v. *Davis*, 611 F. Supp. 2d 472, 474 (D. Md. 2009) (citing cases); cf. *Dixon* v. *United States*, 548 U.S. 1, 6-8 (2006) (burden of proving duress may permissibly be placed on defendant); *Medina* v. *California*, 505 U.S. 437, 449 (1992) (same, for proof of incompetence to stand trial). Petitioner therefore is incorrect in asserting (Pet. 28) that establishing his "categorical ineligiblity for the death sentence" under the Eighth Amendment would be equivalent to showing that he is not guilty of the capital "offense" of kidnapping resulting in death.

c. Relying on case law pre-dating the enactment of AEDPA, petitioner argues (Pet. 25-29) that the word "offense" in Section 2255(h)(1) should be construed to cover a claim that the movant is "not guilty of the death penalty." But nothing in the word "offense," or any-

where else in the text of Section 2255(h)(1), suggests that Congress codified any pre-AEDPA doctrine that will help petitioner.[8]

Before the enactment of AEDPA, this Court had held that the judge-made doctrines precluding successive, abusive, or procedurally defaulted habeas applications, see *Schlup* v. *Delo*, 513 U.S. 298, 318-319 & n.34 (1995), could be overcome by a showing of a "fundamental miscarriage of justice," which had come to mean "actual innocence." *Id.* at 321. And the Court had also held that an otherwise abusive habeas petition in a capital case could proceed if the habeas petitioner could show his "actual innocence of the death penalty," *Sawyer* v. *Whitley*, 505 U.S. 333, 340-341 (1992), although the situations were "distinguishable" and proof of innocence of the death penalty had to be much more "exacting" than proof of innocence of the crime, *Schlup*, 513 U.S. at 325-326.[9]

As the Seventh Circuit has explained, "[t]he 'actual innocence' exception of the prior law was judge-made, and so its contours were appropriately judge-fashioned

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[8] Indeed, in many respects (including in Section 2255(h)(1)), AEDPA expressly *rejected* prior law by imposing more restrictive limitations. Compare, *e.g.*, *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995) (rejecting clear-and-convincing standard for actual-innocence claims), with 28 U.S.C. 2244(b)(2)(B)(ii), 2255(h)(1) (adopting clear-and-convincing standard for such claims).

[9] The Ninth Circuit's decision in *Thompson* briefly addressed the notion that AEDPA codified the standard for claiming innocence of the death penalty. But although the court in *Thompson* concluded and rejected one textual argument purporting to show that Congress *rejected* the pre-AEDPA decisional law, it did not point to anything suggesting that Congress *adopted* the pre-AEDPA law. 151 F.3d at 923-924. And in any event, as the Ninth Circuit's prior decision in *Greenawalt I* and subsequent decision in *Babbitt* make clear, the basis for the holding in *Thompson* is that Thompson was challenging an element of his conviction for capital murder. See pp. 19-20, *supra*.

and permissibly judge-expanded." *Hope* v. *United States*, 108 F.3d 119, 120 (7th Cir.), cert. denied, 515 U.S. 1132 (1997). The exception in Section 2255(h)(1), on the other hand, "is graven in statutory language that could not be any clearer." *Ibid.*[10] Had Congress wished to continue pre-AEDPA law on successive petitions rather than to change it, it would have used one of the phrases that appeared in this Court's pre-AEDPA cases—"fundamental miscarriage of justice" or "actual innocence"—phrases that are not "self-defining" but take their meaning from this Court's cases, Pet. 30 (quoting *Panetti* v. *Quarterman*, 551 U.S. 930, 943-944 (2007)).[11] Instead Congress made the touchstone "guilt[] of the *offense*," 28 U.S.C. 2255(h)(1) (emphasis added), a term that *is* self-defining and is not "permissibly judge-expanded."[12]

3. In any event, even if clear and convincing evidence of mental retardation hypothetically would satisfy Section 2255(h)(1)'s requirement to make a prima facie showing of actual innocence, that proposition would be of no use to petitioner, because he cannot possibly "establish by clear and convincing evidence that no reasonable factfinder would have found" that he was eligible for the death penalty "in light of the evidence as a

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[10] Petitioner's reliance on a pre-AEDPA "ends of justice" exception to the judge-made rules (Pet. 31-32) thus is unavailing post-AEDPA.

[11] The cases on which petitioner relies give the term "second or successive" such a specialized meaning, in each case to ensure that a claim could be heard the first time it ripens or is exhausted—not to permit repeated relitigation on the merits of the same claim. See *Panetti*, 551 U.S. at 943-946; *Slack* v. *McDaniel*, 529 U.S. 473, 487 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643 (1998). Petitioner's motion, by contrast, plainly *is* second or successive. See pp. 15-16, *supra*.

[12] The import of Section 2255(h)(1)'s reference to "the offense" is all the more clear in context, as Section 2255 in several places refers to collateral challenges to a sentence. 28 U.S.C. 2255(a) and (b).

whole." 28 U.S.C. 2255(h)(1). That is an exceptionally demanding standard: it requires that petitioner's prima facie showing be not just persuasive, but beyond reasonable factual dispute. Petitioner has not met that standard.

As petitioner agreed in the district court, to establish mental retardation, a defendant must do more than show that he has a low I.Q.; he must also show that he has "significant limitations in adaptive functioning." *Morris* v. *Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); see also *Atkins*, 536 U.S. at 308 n.3. In considering petitioner's first postconviction challenge to the district court's finding that petitioner is not mentally retarded, the court of appeals acknowledged that petitioner's I.Q. is low. See 421 F.3d at 312-313. Rather, it is with respect to the element of adaptive deficits that the government has thoroughly refuted petitioner's mental retardation claim, and on that score, petitioner's proffered evidence adds little to his case.

The evidence at trial showed that petitioner demonstrated adaptability by working as a drug dealer; by concocting cover stories after he was arrested; by making excuses to police when they found on his person the key to the motel room in which Lisa Rene was held and raped; and by burning his clothes after her murder. 421 F.3d at 313.[13] The government also presented evidence that, while incarcerated, petitioner engaged in various activities inconsistent with mental retardation, such as writing letters to fellow inmates; complaining when he received incorrect change from the prison commissary; receiving letters and newspapers; reading aloud from newspapers; writing request slips for various services;

[13] Notably, this evidence pertains to petitioner's documented behavior *outside* the prison environment, which petitioner argues is more "rigidly controlled" and hence less probative. Pet. C.A. Reply Br. 8.

preparing written grievances; submitting names and addresses of people for his visitation list; and sneaking into the women's section of the jail. *Id.* at 313-314 n.15. The district court, in rejecting petitioner's mental retardation claim, found that this and other evidence reflected that petitioner "has adapted to the criminal life that he chose," and that he has "the ability to communicate with others, [to] care for himself, [to] have social interaction with others, [to] live within the confines of the 'home' he has been in since he was sixteen, [to] use community resources within this home, [and to] read, write, and perform some rudimentary math." *Id.* at 313. And the court of appeals found that the evidence supporting the district court's ruling was "substantial." 162 F.3d at 353.

Petitioner's most recent submission does not significantly detract from the strength of the above evidence. It consists primarily of the findings of three medical professionals in connection with petitioner's application to the Social Security Administration for disability benefits based on a sinus condition one year before the murder.[14] One of the doctors, C.M. Rittlemeyer, who con-

[14] The Social Security records also contain a letter from petitioner's school district suggesting that he was enrolled in special education classes while in school, contrary to the recollections of petitioner's teachers that he had not been in special education. See Pet. C.A. Decl. of Steven J. Wells Exh. G, at G.17 (Wells Decl.) (stating in full: "The above student's Special Education records were destroyed in 1988. A letter was mailed to parents at the last known address, telling them they could have the records if they wanted them. There was no response to the letter."). Any further proof of petitioner's limited intelligence is cumulative of already-presented evidence and has little bearing on the question whether he suffers from sufficient adaptive deficits to qualify as mentally retarded. Petitioner previously argued that he was not placed in special education because of racial discrimination in the school district; in rejecting petitioner's arguments related to that claim, both the court of appeals and the district court observed that "the

ducted a general physical examination of petitioner, included in his diagnosis: "Mental retardation. Flat feet. Chronic sinus problems and allergies." Gov't C.A. Br. 16. The record does not reflect that Dr. Rittlemeyer did any I.Q. or adaptive skills testing. *Ibid.* Given that he was conducting a physical examination, his diagnosis of mental retardation may well have rested on petitioner's self-reporting.

Dr. Edward Hackett, a psychologist, diagnosed petitioner with mild mental retardation based on an I.Q. of 59, but noted that petitioner "manifested many inconsistencies regarding his street behavior and curent attempts to seek employment." Wells Decl. Exh. G, at G.16. In supplemental information provided to the Social Security Administration, he noted that "[t]here may have been some malingering" because "[t]he IQ scores are not normal considering history." *Id.* at G.14. Petitioner was "quite verbal" and the I.Q. scores were lower on the performance test than the verbal test, whereas "[a] person that displays antisocial personality," as petitioner does, "usually scores higher on performance." *Ibid.* He concluded that petitioner "was * * * a somewhat mild[ly] retarded con man, but very street wise." *Ibid.*; Gov't C.A. Br. 17.

Another psychologist, Dr. Charles Spellman, conducted another psychological examination "in order to better ascertain eligibility for [disability] benefits." Wells Decl. Exh. G, at G.11. He diagnosed petitioner as being mentally retarded based on his I.Q. "estimation" ("69 or lower"), petitioner's self-reporting regarding his level of functioning, and his observations of petitioner,

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government's effort [in the mental-retardation proceedings] did not depend in any significant respect on [petitioner's] non-enrollment in special education courses." 421 F.3d at 314 n.16 (quoting 392 F.3d at 799); see 2003 WL 23109787, at *8.

who had an incentive to exaggerate his mental deficiency in order to obtain disability benefits. *Id.* at G.13; Gov't C.A. Br. 17. Dr. Spellman saw no evidence of malingering, Wells Decl. Exh. G, at G.13, but unlike Dr. Hackett, who performed a Wechsler I.Q. test and suspected malingering, Dr. Spellman did not report performing any such testing.

This evidence, "viewed in light of" the expert and other evidence that the government presented at the penalty phase, 28 U.S.C. 2255(h)(1), would not compel any reasonable factfinder to conclude by clear and convincing evidence that petitioner is mentally retarded. Indeed, one of petitioner's three reports suspected malingering; one did not reflect any I.Q. test; and one was merely a physical examination. And the government's evidence showed that petitioner has demonstrated adaptive skills in a number of ways—ways particularly tailored to the criminal and correctional environments in which petitioner has spent his adolescence and adulthood, including petitioner's attempt to cover up his participation in the murder at issue here. See 421 F.3d at 313 n.15; 2003 WL 23109787, at *12-*14.[15] For those reasons, petitioner could not obtain certification of his

[15] In support of his motion, petitioner also submitted declarations from 11 family members, friends, and acquaintances, five of whom also testified at the penalty phase of his trial and one of whom was interviewed by petitioner's counsel before trial. Pet. C.A. Br. 29 n.11. Petitioner's use of the declarations is time-barred because petitioner could have obtained them by the exercise of due diligence within one year of his conviction. See 28 U.S.C. 2255(f)(4). In the court of appeals, petitioner offered no reason why these declarations would be timely, except to argue that mental retardation or actual innocence should excuse compliance with the statute of limitations. Pet. C.A. Reply Br. 14-15. In any event, given that they come from interested sources, the declarations have debatable probative value.

successive motion even if his renewed claim of mental retardation were cognizable under Section 2255(h)(1).

4. Because the Constitution bars the execution of mentally retarded defendants, petitioner argues briefly (Pet. 35-37) that, if Section 2255(h)(1) precludes him from relitigating the question of his mental retardation based on the proffered evidence, then the provision is to that extent unconstitutional. Petitioner does not contend that Section 2255's limitations on successive post-conviction filings are an unconstitutional suspension of the writ of habeas corpus.[16] Rather, he contends that he is entitled to another hearing on his Eighth Amendment claim by either the Eighth Amendment itself or the Due Process Clause. Both contentions lack merit.

Even before *Atkins*, petitioner had an adequate opportunity to present his mental-retardation theory, both to the jury (which considered the mitigating factor whether petitioner is or *may be* retarded) and to the court. Petitioner appears to contend that he is entitled to unlimited *additional* opportunities to persuade the courts that he is mentally retarded, and that any statute precluding the possibility of relief on a future meritorious *Atkins* claim is unconstitutional. That theory, for which petitioner offers no support, would prove far too much: it reads the Eighth Amendment to require endless opportunities to relitigate any constitutional fact that, if proved, would exempt the defendant from the imposition of the death penalty (for instance, a felony-murder defendant's lack of culpable intent, see *Tison* v. *Arizona*, 481 U.S. 137, 155-158 (1987); 18 U.S.C.

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[16] The amicus makes such an argument, Advocates for Human Rights Br. 16-18, but it is unavailing. See *Felker* v. *Turpin*, 518 U.S. 651, 666 (1996); see also 28 U.S.C. 2255(e) (savings clause permitting federal defendants to file habeas petitions if Section 2255 is an inadequate or ineffective remedy).

3591(a)(2), or the defendant's age at the time of the offense, see *Roper* v. *Simmons*, 543 U.S. 551 (2005); 18 U.S.C. 3591(a)). And petitioner's constitutional theory would not stop there: because even on petitioner's reading, Section 2255(h)(1) precludes relief unless petitioner establishes not only a prima facie case of mental retardation, but a prima facie case that *any* reasonable factfinder would find him mentally retarded, petitioner's theory apparently would hold the statute unconstitutional in those close cases in which reasonable factfinders may disagree.

Nothing in the Eighth Amendment or the Due Process Clause requires such a result. The constitutionally valid limits that Congress has placed on postconviction relief, see note 16, *supra*, extend equally to Eighth Amendment claims. Cf., *e.g.*, *Stewart* v. *LaGrand*, 526 U.S. 115, 119-120 (1999) (per curiam) (claim that method of execution violated Eighth Amendment was procedurally defaulted). And in this case, petitioner's claimed mental retardation has long been a live issue and petitioner has actively litigated it for many years, both on direct review and on his first motion for postconviction relief. Cf. *Ford* v. *Wainwright*, 477 U.S. 399, 424-425 (1986) (Powell, J., concurring in part and concurring in the judgment) (determination of competency to be executed must involve an "opportunity [for defendant] to be heard," but need not be a "full-scale 'sanity trial'").[17]

This Court noted in *Atkins* that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of [capital] sentences" against mentally retarded defendants. 536 U.S. at 317. Well before *Atkins*, in the

[17] Even once "judicial process has been exhausted," petitioner also may pursue clemency as a further "'fail safe.'" *Harbison* v. *Bell*, 129 S. Ct. 1481, 1490 (2009) (citations omitted); see 18 U.S.C. 3599(e).

FDPA and AEDPA, Congress determined both that the federal government would not execute mentally retarded defendants *and* that a defendant would ordinarily be limited to two opportunities to litigate that issue—direct review and a first Section 2255 motion—unless the defendant can meet the standards of Section 2255(h). Because petitioner does not meet those standards, neither the Eighth Amendment nor the Due Process Clause requires that his claim be heard again.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[18] Because petitioner's constitutional claim lacks merit, so does his argument (Pet. 24-25) that Section 2255(h)(1) should be construed, despite its unambiguous text, to allow his successive motion in order to avoid an unconstitutional result.