IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE CARNEIL WEBSTER,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Bruce Carneil Webster, a federal prisoner under sentence of death, moved the Court of Appeals for the Fifth Circuit for authorization to file a successive application under 28 U.S.C. § 2255(h)(1) based on newly discovered evidence (recently released by the Social Security Administration) establishing that he is mentally retarded and therefore constitutionally ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Although the newly discovered evidence, as noted by the concurrence below, "virtually guaranteed that [Petitioner] would be found to be mentally retarded," the Fifth Circuit nonetheless held that it could not even "entertain the § 2255 motion in the first instance" because Petitioner had not satisfied the requirement of 28 U.S.C. § 2255(h)(1) that the new evidence "negate his guilt of the offense of which he was convicted, *i.e.*, capital murder."

The questions presented are:

I. May this Court review a decision by a court of appeals that it lacks jurisdiction to entertain a motion for authorization by a federal prisoner to file a successive application under 28 U.S.C. § 2255(h)(1) because the motion is based on newly discovered evidence of mental retardation establishing that the prisoner is constitutionally ineligible for execution under *Atkins*, rather than evidence that negates his guilt of the offense of which he was convicted.

II. Whether 28 U.S.C. § 2255(h)(1) allows a court of appeals to authorize a successive motion based on newly discovered evidence that shows by clear and convincing evidence that the petitioner is mentally retarded and therefore constitutionally ineligible for the death penalty, whether or not that new evidence also negates his guilt of the offense of which he was convicted.

III. Whether, if 28 U.S.C. § 2255(h)(1) does not allow a court of appeals to authorize a successive motion based on newly discovered evidence that shows by clear and convincing evidence that a petitioner is mentally retarded and therefore constitutionally ineligible for the death penalty, the statute is to that extent unconstitutional under *Atkins* and the Fifth and Eighth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce Carneil Webster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit's opinion is reported at 605 F.3d 256 and reproduced at Pet. App. 1a-12a.

JURISDICTION

The decision of the Fifth Circuit was entered on April 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The appendix reproduces the Fifth and Eighth Amendments to the U.S. Constitution, 18 U.S.C. § 3596(c), 28 U.S.C. § 2244, 28 U.S.C. § 2254, and 28 U.S.C. § 2255.

STATEMENT OF THE CASE

Petitioner sought authorization from the Fifth Circuit to file in the United States District Court for the Northern District of Texas a successive motion to

vacate his death sentence under 28 U.S.C. § 2255.[1] Petitioner challenges his sentence of death based on newly discovered evidence that establishes he is mentally retarded and therefore categorically ineligible for the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

At a federal capital trial more than six years before *Atkins* was decided, Petitioner presented substantial and compelling evidence that he is mentally retarded.[2] That evidence included six scores from individually administered IQ examinations all within the range associated with mental retardation (scores of 48, 51, 55, 59, 65, and 72), the testimony of Petitioner's childhood friends and acquaintances, and three expert witnesses diagnosing Petitioner with mental retardation. In response, two government expert witnesses testified, without ever conducting a single complete IQ test, that Petitioner was faking and that his adaptive skills, as reflected by his ability to keep an orderly prison cell, were evidence of normal functioning. The government also presented the testimony of two witnesses who claimed that Petitioner had never

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1 Petitioner's sentence has been stayed in collateral litigation challenging the constitutionality of the federal lethal injection procedures. *See* Order, *Roane, et al. v. Gonzales et. al.*, Case No. 1:05-cv-2337 (D.D.C. Feb. 16, 2007) (Docket No. 27).

2 In general, a diagnosis of mental retardation requires subaverage intellectual functioning, as well as significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. *Atkins*, 536 U.S. at 318.

been placed in special education classes in school. The trial court found, without explanation, that Petitioner "was not mentally retarded as matter of law," and he was sentenced to death.

Now, Petitioner has newly discovered evidence that establishes his mental retardation and directly refutes the evidence the government presented at trial to contest mental retardation. Newly discovered and released Social Security and school records – from a time prior to the commission of the crime – demonstrate IQ scores (59 and 69) and adaptive functioning well within the range of mental retardation, as well as explicit diagnoses of "mental retardation" (which necessarily evaluated Petitioner's adaptive functioning). The IQ tests and other examinations were performed by unbiased government physicians and psychologists tasked with weeding out fake disability claims, one of whom noted explicitly that there was no evidence that Petitioner was faking his condition. In addition, newly discovered records demonstrate that Petitioner had, in fact, been placed in special education classes.

Petitioner is mentally retarded. His lowest IQ score, 48, puts him at least three and one-third standard deviations below the mean, with an IQ higher than less than 0.1 percent of the population. *See* David Wechsler, *WAIS-III Administration and Scoring Manual* 24 (3d ed. 2003). Furthermore, Petitioner's IQ scores are significantly lower than the scores of prisoners recently found to be mentally retarded by the federal courts. *See, e.g.*, *Rivera v. Quarterman*, 505 F.3d 349, 362 (5th Cir. 2007) (IQ

scores up to 92), *cert. denied*, 129 S. Ct. 176 (2008); *Holladay v. Allen*, 555 F.3d 1346, 1357 (11th Cir. 2009) (IQ scores up to 73); *United States v. Davis*, 611 F. Supp. 2d 472, 478 (D. Md. 2009) (IQ scores up to 76). The government has not identified, and counsel has not been able to find, any case decided since *Atkins* holding that a person with such consistently low IQ scores is *not* mentally retarded.

As the Fifth Circuit's concurrence found: "If the evidence [Petitioner] attempts to introduce here were ever presented to a judge or jury for consideration, it is virtually guaranteed that he would be found to be mentally retarded." Pet. App. 9a. The central question in this case is whether Petitioner will ever have the opportunity to present this newly discovered evidence because the evidence speaks to Petitioner's constitutional ineligibility for the death penalty rather than his factual guilt or innocence of the crime itself. The Fifth Circuit's decision squarely presents the question of whether Congress intended to preclude newly discovered evidence of categorical ineligibility for the death penalty – no matter how conclusive – from ever being raised in a successive motion. The Fifth Circuit's conclusion that Petitioner's newly discovered evidence must negate his guilt of the offense for which he was convicted reads the statutory language too narrowly and would be inconsistent with this Court's principle of interpreting statutes to avoid unconstitutional results.

Indeed, as the concurrence notes, the Fifth Circuit's interpretation of 28 U.S.C. § 2255(h)

produces an "absurdity" and a "Kafkaesque result", and would require the courts to "condone . . . an unconstitutional punishment." Pet. App. 9a, 12a. The courts of appeals are divided on this important issue. This Court's review is not barred by the prohibition on review of motions for authorization brought by state prisoners, and is necessary to resolve an important question of federal and constitutional law.

1. At a trial in the Northern District of Texas more than six years before *Atkins* was decided, Petitioner was tried, convicted, and sentenced to death on a charge of kidnapping in which a death occurred in violation of 18 U.S.C. §§ 1201(a)(1) and (2).

At the sentencing phase, Petitioner attempted to prove that he was mentally retarded and therefore could not be executed under 18 U.S.C. § 3596(c). The evidence presented consisted primarily of testimony from various psychologists or psychiatrists who had administered IQ tests after Petitioner's incarceration. In particular, Petitioner presented evidence of a series of extremely low IQ scores as well as testimony from various doctors that Petitioner had the adaptive functioning of a seven-

year-old and suffered from "mild"[3] mental retardation. In addition, Petitioner presented testimony from his family members and childhood friends regarding Petitioner's difficulties in functioning in daily life (commonly called "adaptive deficits"), including an inability to live on his own and function in the real world, communicate abstract thought, and write legibly.

In response, the government presented two experts to controvert a finding of mental retardation. Both of the government's witnesses examined Petitioner while he was incarcerated. They opined, without conducting their own complete IQ tests, that Petitioner was malingering and exaggerating his symptoms in order to secure a mental retardation defense. The government also introduced testimony that Petitioner had never been placed in special education classes and that he had learned to function well in prison.

Although four jurors decided that Petitioner "is or may be mentally retarded," the trial court, in a two-sentence decision, decided that Petitioner "was not mentally retarded as a matter of law," and Petitioner was sentenced to death. The trial court's

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[3] According to the American Psychiatric Association, "mild mental retardation" refers to individuals with an IQ in the range of 50-55 to approximately 70. This group constitutes about 85% of the population with mental retardation – by far the largest segment of individuals with the disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR* 42-43 (4th ed. 2000). Atkins' IQ scores put him in the range of the "mildly mentally retarded." *Atkins*, 536 U.S. at 308.

decision contained no explanation for its "finding" on the issue of mental retardation; no indication of the standard for mental retardation being applied; and, in fact, no indication whether *any* standard at all was being applied. On direct appeal, the Fifth Circuit affirmed the district court, rejecting Petitioner's arguments that the trial court erred in making its mental retardation finding. *See United States v. Webster*, 162 F.3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999).

2. Petitioner then filed his initial Motion to Vacate Conviction and Sentence under 28 U.S.C. § 2255 ("2255 Motion") on September 29, 2000. Among other claims, he argued that he was ineligible for execution under 18 U.S.C. § 3596(c) because he is mentally retarded.

While his 2255 Motion was pending, Petitioner filed a Motion for Leave to Conduct Discovery on April 30, 2001. This motion requested discovery on several issues related to his mental retardation claim. Request for Discovery No. 8 specifically asked that the government "be required to produce . . . any reports prepared by a mental health professional in the Government's possession which, in any manner, questions or rebuts the testimony by the government's witnesses at trial (*i.e.*, Dr. Coons and Dr. Parker) on the issue of petitioner's mental retardation."[4] On June 18, 2002, the Northern District of Texas entered an order denying all requests for discovery and requiring

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[4] Trial counsel had earlier requested Petitioner's Social Security records, but the records were not released.

Petitioner to file an amended motion to vacate under 28 U.S.C. § 2255 within 60 days. The court concluded that because two of Petitioner's claims of mental retardation had been affirmed on direct appeal, additional discovery would not be permitted on those claims. The court further concluded that on the other two claims, Petitioner failed to show how additional discovery would contribute to his claims.[5]

The district court ultimately denied Petitioner's Amended 2255 Motion on September 30, 2003, affirming its previous finding that Petitioner is not mentally retarded. In rejecting his claim, the district court recognized that trial experts for the government and defense agreed that Petitioner's IQ scores fell consistently in the range of subaverage intellectual functioning associated with mental retardation, but that the experts "converged" on the issue of Petitioner's adaptive skills. The court denied all of Petitioner's claims as well as his request for an evidentiary hearing.

3. Petitioner applied for certificates of appealability from the district court on each of the 16 grounds raised in his Amended 2255 Motion, including the court's denial of his request for additional discovery on his mental retardation claim. The district court granted certificates of appealability only on (1) whether sufficient evidence

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[5] Had the court granted the Request for Discovery No. 8, among others, the government would have been required to turn over the Social Security records which are a significant part of the new evidence Petitioner now seeks to present in his successive motion.

supported the district court's finding that Petitioner was not mentally retarded, and (2) whether the government is required to prove a capital defendant is not mentally retarded. On appeal, the Fifth Circuit again affirmed the trial court's finding on mental retardation. *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005), *cert. denied*, 549 U.S. 828 (2006).

4. On October 21, 2009, Petitioner moved the Fifth Circuit for authorization to file a successive motion to vacate his death sentence under 28 U.S.C. § 2255(h)(1). The motion was based on the fact that, although substantial evidence of Petitioner's mental retardation had been presented at trial, newly discovered evidence now clearly and convincingly establishes that Petitioner is mentally retarded – under the definition of mental retardation widely accepted by the courts today and widely accepted by the medical field both now and at the time of trial. The newly discovered evidence directly contradicts and undercuts the government's case at trial that Petitioner was faking his IQ tests and that his adaptive functioning was normal.

The newly discovered evidence presented to the Fifth Circuit includes Social Security records, which, though requested long before the trial, were not released by the government (the Social Security Administration) until recently (February 2009). The records reflected examinations performed by government physicians and psychologists when Petitioner was 20, a year *before* the commission of the crime. Of the six individually administered IQ

tests admitted into evidence at trial, only one had been administered before commission of the crime.

In 1993, more than a year before his indictment for the offense of conviction, Petitioner had applied for Social Security benefits, claiming a disabling condition of sinus problems and headaches. In order to determine whether he was eligible for Social Security benefits based on this claim, the Social Security Administration had Petitioner evaluated by three separate medical professionals. Each doctor independently diagnosed Petitioner as having an extremely low IQ and/or having mental retardation. First, Dr. Rittelmeyer diagnosed Petitioner as suffering from "[m]ental retardation." Pet. App. 9a. Then, Dr. Spellman described Petitioner as "a slow fellow who did not know much and did not know how to communicate well." Pet. App. 9a-10a. Explaining that he had found "no evidence of exaggeration or malingering," Dr. Spellman found that Petitioner's IQ was 69 or lower and concluded that his significant cognitive difficulties were attributable not to mental illness but to "mental retardation." Pet. App. 10a. Finally, Dr. Hackett performed an IQ test and concluded that Petitioner's IQ was 59. Dr. Hackett described Petitioner as "mildly retarded," "antisocial," and unable to "function well in the work place." Pet. App. 10a.

Unlike the limited, post-incarceration examinations performed by the government's trial witnesses, the diagnoses in the Social Security records were based on administration of applicable examinations when Petitioner was 20 years old, well

before he committed the crime at issue in this case. In addition, because the newly discovered diagnoses were made before Petitioner was incarcerated and expressly conclude that there is no evidence of malingering, they refute the government's suggestion that Petitioner was faking later IQ tests in order to secure a mental retardation defense.

The newly-released Social Security records also contain previously unavailable evidence that Petitioner in fact was enrolled in special education classes. A letter from the Special Education Supervisor for the Watson Chapel Schools, Lou Jackson, explains that there were records pertaining to Petitioner's placement in special education classes, but that these records had been destroyed in 1988. This new evidence directly contradicts the testimony of two Watson Chapel Schools representatives offered by the government at trial, each of whom had suggested that Petitioner had not been placed in special education classes and therefore did not meet the definition of mentally retarded.

Finally, Petitioner also sought to present new testimony discussing the manifestation of his mental retardation prior to age 18. This testimony revealed evidence that Petitioner was unable to care for himself, including his inability to tie his shoes and dress himself. Additional new evidence demonstrates Petitioner's inability to understand simple language concepts and basic tasks. There is also new evidence regarding Petitioner's performance in school, which goes to his adaptive deficit in functional academics. Importantly, the

new evidence illustrates that Petitioner's adaptive deficits existed before incarceration, in contrast to the government's evidence on adaptive deficits which was based on Petitioner's ability to function in prison.[6]

5. a. The Fifth Circuit denied Petitioner's motion for authorization, holding that it did not have jurisdiction to entertain the application under 28 U.S.C. § 2255(h). Pet. App. 8a n.8. Reading the language of section 2255(h)(1) narrowly, the court concluded that "a petitioner cannot bring a successive claim under § 2255(h)(1) where he does not assert that the newly discovered evidence would negate his guilt of the offense of which he was convicted, *i.e.*, capital murder." Pet. App. 4a. The court concluded that such a result is "compelled by the plain language of § 2255(h)(1), which does not encompass challenges to a sentence." Pet. App. 4a. The court noted that while a reading of "offense" that would "cover not only a claim that a prisoner is not guilty of the offense of conviction but also a claim that he is merely 'not guilty of the death penalty' . . . accords with prior habeas corpus law interpreting 'actual innocence' to include 'innocence of the death penalty[,]' . . . there is no reason to believe that Congress intended the language 'guilty of the

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[6] Experts in the field discredit statements about an individual's ability to function in prison because the structured nature of the environment does not provide a true test of an individual's abilities. *See, e.g.*, J. Gregory Olley and Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II*, 20 (2d ed. 2008).

offense' to mean 'eligible for a death sentence.'" Pet. App. 4a-5a.

b. Judge Wiener concurred in the opinion but wrote separately to emphasize the "absurdity of the Kafkaesque result: Because [Petitioner] seeks to demonstrate only that he is constitutionally ineligible for the death penalty – and not that he is factually innocent of the crime – we must sanction his execution." Pet. App. 9a. Surveying the evidence presented in the motion, Judge Wiener concluded that "it is virtually guaranteed" that Petitioner would be found mentally retarded if the newly discovered evidence could be considered on the merits, but noted that "we must turn a blind eye to this evidence, as it speaks to [Petitioner's] constitutional eligibility for the death penalty and not his factual innocence of the crime." Pet. App. 9a, 11a. Judge Wiener further stated that although he concurred in the majority's opinion "as a correct statement of the law, I continue to harbor a deep and unsettling conviction that, albeit under Congress's instruction which ties our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment." Pet. App. 11a-12a.

REASONS FOR GRANTING THE PETITION

In *Atkins*, this Court determined, conclusively and categorically, that a sentence of death cannot be constitutionally carried out against the mentally retarded. The Fifth Circuit, however, interpreted 28 U.S.C. § 2255(h)(1) as requiring it "to condone just

such an unconstitutional punishment" despite newly discovered, clear and convincing proof that Petitioner is mentally retarded. That determination merits review by this Court.

As a threshold matter, this Court *can* consider the merits of the petition. First, the bar imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") to this Court's review of denials of motions for authorization brought by *state* prisoners pursuant to 28 U.S.C. § 2254 does not apply to Petitioner, who is a *federal* prisoner challenging his sentence under section 2255. In any event, Petitioner seeks review not of a "denial of authorization" based on the merits of the *evidence* presented in the motion, but instead of the Fifth Circuit's holding that it lacked jurisdiction even to consider evidence of categorical ineligibility of the death penalty. It is this Court's duty to say what the law is, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and this Court should do so here on this important statutory and constitutional question of the meaning of 28 U.S.C. § 2255(h)(1).

On the central question, the Fifth Circuit's holding rests on an interpretation of AEDPA that too narrowly construes the statutory text and would in Petitioner's case lead to the unconstitutional execution of a mentally retarded person. The courts of appeals are in conflict on this narrow but vitally important issue, which is likely to recur whenever newly discovered evidence establishing any categorical exclusion from the death penalty is raised by a prisoner.

I. THIS COURT HAS JURISDICTION TO CONSIDER THE MERITS OF THIS PETITION.

A. Certiorari Review Is Available from Decisions of the Courts of Appeals, Absent an Express Bar.

"Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). Here, Petitioner seeks review of the Fifth Circuit's order denying authorization to file a successive motion under 28 U.S.C. § 2255(h)(1). The denial of authorization by the court of appeals constitutes a "case" for purposes of the availability of certiorari review. *See Hohn v. United States*, 524 U.S. 236, 241 (1998) (noting that a proceeding seeking relief for a "wrongful detention in violation of the Constitution" constitutes a case). Accordingly, absent an express congressional intent to bar this Court's review, this Court has certiorari jurisdiction to consider the merits of this petition.

B. This Court's Review of the Fifth Circuit's Decision Is Not Barred by 28 U.S.C. § 2244(b)(3)(E).

Petitioner anticipates that the government will argue 28 U.S.C. § 2244(b)(3)(E) bars this Court's review of his petition. While section 2244(b)(3)(E) bars this Court's review of a circuit court's grant or denial of an authorization to file a second or

successive application made by *state* prisoners under 28 U.S.C. § 2254, its terms do not, on their face, bar this Court's review of a grant or denial of an authorization to file a second or successive application made by *federal* prisoners, like Petitioner, under 28 U.S.C. § 2255.

This Court has never squarely addressed whether the restriction in section 2244(b)(3)(E) applies to federal prisoners. The question is important because there is uncertainty about whether Congress intended to allow greater review of federal petitions than state petitions, and the question will persist until this Court addresses it. Applying the canons of statutory construction, the Court should conclude it has the authority to review denials of authorization sought by federal prisoners.

Section 2244 addresses second or successive habeas petitions. With the exception of subsection (a), section 2244 by its express terms applies only to applications brought by state prisoners under section 2254. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 [which applies to state prisoners] . . . ."); 28 U.S.C. § 2244(b)(2) (same); 28 U.S.C. § 2244(c) ("In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court . . . ."); 28 U.S.C. § 2244(d)(1) (noting the limitations period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court").

Section 2244(a), on the other hand, expressly references individuals who are detained "pursuant to

a judgment of a court of the United States," and states that a circuit or district court judge need not entertain an application for a second or successive application "except as provided in section 2255." 28 U.S.C. § 2244(a). On its face, section 2244(a) thus states that a federal prisoner seeking to bring a second or successive motion must satisfy the requirements of section 2255, not section 2254. Indeed, section 2255(h) sets forth a separate standard for federal prisoners seeking to bring a second or successive motion, namely, that there exists either (i) newly discovered evidence that would render the movant not guilty of the offense; or (ii) a new rule of constitutional law. *See* 28 U.S.C. § 2255(h). While section 2255 sets forth the standard to be met in order to obtain authorization to file a successive motion, section 2255 does not set forth the procedure by which an applicant is to seek authorization. Instead, section 2255 states that the "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h).

Subsections 2244(b)(3)(A)-(C) set forth the certification procedure by which "a second or successive application permitted by this section is filed in the district court." 28 U.S.C. § 2244(b)(3)(A). That procedure includes the requirement that the applicant first move in the appropriate court of appeals for an order authorizing the district court to consider the application, *see* 28 U.S.C. § 2244(b)(3)(A); the requirement that a three-judge panel of the court of appeals determine the motion, *see* 28 U.S.C. § 2244(b)(3)(B); and the requirement that the court of appeals consider whether the

applicant has made a *prima facie* showing that the application satisfies the requirements of the subsection, *see* 28 U.S.C. § 2244(b)(3)(C).

Congress thus clearly intended federal prisoners to follow the same procedure as state prisoners in seeking the required certification. But, Congress did *not* expressly incorporate the bar to this Court's *review* of such certifications found in section 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," and clearly bars review of certification decisions regarding state prisoners. As noted above, however, the plain language of section 2255(h), which adopts for federal prisoners the section 2244 state prisoner certification procedures, provides only that a "second or successive [federal prisoner] motion *must be certified* as provided in section 2244;" there is no adoption or incorporation of the parts of section 2244 that do not address the procedure *for* certification. *See* 28 U.S.C. § 2255(h) (emphasis added). The *standards* for federal prisoner certification are not adopted from section 2244 (they are set forth in section 2255(h)), and neither are the provisions regarding whether a certification once made may be *reviewed*. Only the procedures for how a motion "must be certified" in the first instance are incorporated. In short, section 2255 – the section exclusively applicable to federal prisoners – incorporates parts of section 2244, but not subsection 2244(b)(3)(E), the subsection which bars further

review. With no explicit bar to this Court's review, the usual provisions of 28 U.S.C. § 1254(1) govern.

This plain language reading is not inconsistent with the purpose of AEDPA "to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Though the legislative history surrounding AEDPA is sparse, it appears from the debates that Congress was most often focused on balancing the need for finality in judgments and federalism with the need for full constitutional review by federal judges who are likely to be further removed from the community than local state judges. *See, e.g.*, *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary*, 104th Cong. 87-88 (1995) (prepared statement of Nicholas deB. Katzenbach, former Attorney General of the U.S., on behalf of the Emergency Committee to Save Habeas Corpus). This Court's review on writ of certiorari of a circuit court's denial of certification to file a second or successive section 2255 motion does not implicate the federalism or comity concerns implicated in federal court review of state court judgments.

Further, under the well-known interpretative canon, *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of the other"), Congress's explicit decision to bar this Court's review of the court of appeals' denial of authorization to file a second or successive application by state prisoners under 28 U.S.C. § 2254 demonstrates that it did not intend to bar this Court's review of the court of appeals' denial of

authorization to file a second or successive application by federal prisoners under 28 U.S.C. § 2255. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted). Indeed, as this Court has recognized in an analogous situation, "a Congress concerned enough to bar [the Court's] jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Hohn*, 524 U.S. at 250 (contrasting requirements for certificates of appealability and motions for second or successive applications for habeas corpus relief).

Finally, this Court "read[s] limitations on [its] jurisdiction to review narrowly," and generally declines to "read into a statute an unexpressed congressional intent to bar jurisdiction." *See Utah v. Evans*, 536 U.S. 452, 463 (2002); *cf. Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power. . . .").

C. This Petition Seeks Review of the Fifth Circuit's Interpretation of Section 2255 and Its Conclusion that It Lacked Jurisdiction to Entertain the Motion for Authorization, Rather Than Its "Denial of Authorization."

In any event, section 2244(b)(3)(E) does not bar this Court's certiorari jurisdiction over the Petitioner's claim because the subject of this petition is not the Fifth Circuit's *application* of section 2255(h)(1), but whether the Fifth Circuit's *interpretation* of that statute itself is correct. As the Fifth Circuit made clear, it did not evaluate the evidence presented by Petitioner to determine whether, for example, it was "newly discovered" or whether it was "substantive" because it believed it lacked jurisdiction to do so as a result of its too-narrow construction of section 2255(h)(1).[7] Pet. App. 8a n.8.

There is a difference, as this Court has recognized, when the "subject" of a certiorari petition is the denial of authorization and when the "subject" is the lower courts' improper *interpretation* of a statutory provision that controls the authorization decision. *Castro v. United States*, 540 U.S. 375, 380 (2003). Even if a federal statute bars judicial review of a decision on a particular issue, judicial review

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[7] "Our decision that the instant motion is beyond the reach of § 2255 is jurisdictional in nature, going to the ability of the district court and this court to entertain the § 2255(h) motion in the first instance." Pet. App. 8a n.8.

may nonetheless sometimes be required to the extent that review is necessary to clarify a disagreement about the proper interpretation of a legal term within the controlling statute. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978).

Thus, regardless of whether the motion for authorization is brought by a state or a federal prisoner, section 2244(b)(3)(E) does not bar certiorari review of the court of appeals' interpretation of provisions establishing its own gatekeeper "jurisdiction." This Court can and should review the Fifth Circuit's conclusion that, under section 2255(h)(1), it lacked jurisdiction even to consider the evidence presented by Petitioner. Therefore, the "subject" of this certiorari petition is the Fifth Circuit's improper interpretation of the term "guilty of the offense," not the application of the statute to the particular facts of Petitioner's case.

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS WHETHER, BY ENACTING AEDPA, CONGRESS INTENDED TO PRECLUDE A SUCCESSIVE MOTION BASED ON NEWLY DISCOVERED EVIDENCE THAT A PRISONER IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY – A MOTION THAT WOULD NOT HAVE BEEN BARRED PRIOR TO AEDPA.

The question before the Fifth Circuit was whether Petitioner had made a prima facie showing

of "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). The Fifth Circuit's narrow interpretation of the language "guilty of the offense" is inconsistent with prior habeas law and would lead to an unconstitutional and literally fatal result here.

The question whether Congress intended the phrase "[not] guilty of the offense" in 28 U.S.C. § 2255(h)(1) to eliminate the pre-AEDPA concept of "innocence of the death penalty" is cleanly presented by this case. This was the *only* question addressed by the Fifth Circuit. And as the concurrence makes clear, because the new evidence would "virtually guarantee[]" a finding that Petitioner is mentally retarded, rarely if ever will the facts present that question as starkly as it is raised here.

This Court should review this case to address this critical issue which will arise when a prisoner under sentence of death discovers new evidence of categorical ineligibility (such as mental retardation or juvenile status) for the death penalty. Importantly, there is confusion in the lower courts in related contexts under sections 2244 and 2255. As discussed below, the courts of appeals are split as to whether the phrase "not guilty of the offense" in 28 U.S.C. § 2255(h)(1) was intended to alter the pre-AEDPA jurisprudence of this Court. Moreover, prior to the Fifth Circuit's decision, no court had ever interpreted the language of section 2255(h)(1) to preclude a prisoner from raising a successive motion

alleging newly discovered evidence which made him *categorically* ineligible for the death penalty.

Finally, if this Court were to conclude that Congress really did intend to preclude such a claim, then the Court should address the issue whether section 2255(h)(1) is to that extent unconstitutional because, as Judge Wiener noted in his concurrence below, such a statutory bar would result in an unconstitutional punishment here.

A. The Fifth Circuit's Narrow Construction Will Lead to an Unconstitutional Result.

The Fifth Circuit's narrow construction of section 2255(h)(1) will lead to an unconstitutional result, namely, the execution of a mentally retarded individual in contravention of the Eighth Amendment. Rather than construing the language as the Fifth Circuit did, however, this Court can and should interpret section 2255(h)(1) to avoid that result by concluding that Congress intended to allow federal prisoners to bring a second or successive motion if it presents newly discovered evidence that clearly and convincingly demonstrates a categorical ineligibility for the death penalty.

It is a fundamental principle of this Court's jurisprudence that an act of Congress should not be construed as unconstitutional if any other possible construction remains. *See Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884) ("Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of

the words used, brings the statute into harmony with the provisions of the constitution."); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Thus, if a federal statute may be read two ways, the Court should construe the statute in the manner that avoids rendering it unconstitutional.

In order to interpret section 2255(h)(1) in a way that avoids an unconstitutional result in this case, the Court should interpret the language to allow a federal prisoner to present newly discovered evidence that he is categorically ineligible for the death penalty. As shown below, and contrary to the Fifth Circuit's holding, such an interpretation is a fairly possible reading of section 2255(h)(1), and would avoid the unconstitutional execution that will result under the Fifth Circuit's reading of the statute.

B. In Enacting Section 2255, Congress Did Not Intend to Alter This Court's Rule That a Prisoner May Raise Newly Discovered Evidence of His Ineligibility For the Death Penalty in a Successive Motion.

Prior to the enactment of AEDPA, this Court had articulated an "actual innocence exception" to the bar arising from the doctrine of "abuse of the

writ" against bringing claims in a successive habeas application. *See Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). As the Fifth Circuit acknowledged, this "actual innocence" exception included the concept of "innocence of the death penalty" where a prisoner could show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. Pet. App. 4a-5a; *Sawyer v. Whitley,* 505 U.S. 333, 336 (1992). The question here, as the Fifth Circuit recognized, is whether Congress intended to alter this concept in enacting AEDPA; or whether it intended the phrase "[not] guilty of the offense" to include the concept of "actual innocence," but not "innocence of the death penalty." Pet. App. 4a-5a.

Using the canons of statutory construction,[8] the Ninth Circuit has concluded that Congress' use of the phrase "not guilty of the *underlying* offense" (the standard that a state prisoner must satisfy to bring a successive habeas application) in 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added) does not indicate an intention to alter the pre-AEDPA jurisprudence. *Thompson v. Calderon*, 151 F.3d 918, 924 (9th Cir.) (en banc), *cert. denied*, 524 U.S. 965 (1998). As that court noted, section 2244(b)(2)(B)(ii) applies to all successive state-prisoner petitions raising a new claim, regardless of whether the petitioner was under sentence of death:

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[8] There is no evidence in the legislative history that, in enacting AEDPA, Congress intended to alter the *Sawyer* principle.

> However, unlike *Sawyer,* the standard in § 2244(b) applies to all habeas petitions, not just capital habeas petitions. For that reason, it would not have made sense for Congress to adopt, without any changes, the *Sawyer* standard referring to eligibility "for the death penalty," since the statute would have to apply to cases where the petitioner did not receive the death penalty. Thus, the need to cover non-capital habeas petitions best explains the slight difference in wording between the *Sawyer* "actual innocence" standard and § 2244(b)(2)(B)(ii).

Id. at 923-24.[9] Like section 2244(b)(2)(B)(ii), section 2255(h)(1), applies to all federal prisoners attempting to file a successive motion, not just those under sentence of death.

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[9] As noted above, *Thompson* dealt directly with the phrase "guilty of the *underlying* offense" as it appears in section 2244(b)(2)(B)(ii) (emphasis added). To the extent there is any material difference between that phrase and "guilty of the offense" in section 2255(h)(1), the latter is the broader phrasing, and that difference cuts in Petitioner's favor here. Petitioner is not challenging his conviction of murder (in a sense, murder is the "underlying" offense to "capital murder" because "capital murder" is a murder for which a death sentence may be imposed). But he is asserting that he cannot be "guilty" of (*i.e.*, susceptible to punishment for) "capital" murder, and to that extent is indeed saying he cannot be "guilty of the offense" of capital murder insofar as that would permit his execution.

Further, Petitioner fits into the *Sawyer* paradigm. Petitioner here was convicted of "capital murder," rather than "merely homicide." *Id.* at 924. "Capital murder" is a crime which carries with it the possibility of a sentence of death. If a petitioner presents new evidence of his mental retardation demonstrating his categorical ineligibility for the death sentence, then the offense no longer carries with it the possibility of a sentence of death. Such a petitioner has, in substance, challenged the basis for "*capital* murder."

Indeed, this Court recognized that the very reasons that the mentally retarded are ineligible for the death penalty relate not just to sentencing but also to their ability to participate in their defense of the crime of which they are accused. As the Court noted, the "reduced capacity of mentally retarded offenders" hinders them from providing an effective defense. *Atkins*, 536 U.S. at 320. In the aggregate, the mentally retarded "face a special risk of wrongful execution" because they are more likely to give false confessions and less able to give meaningful assistance to their counsel. *Id.* at 321. Their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," *id.* at 318, enhances the prospect that a capital sentence "will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). They are typically poor witnesses, they have more difficulty presenting evidence of mitigating factors when presented with

aggravating factors, and their demeanor may create an "unwarranted impression of lack of remorse for their crimes." *Id.* at 321. The Court explained that Atkins himself received a capital sentence because the jury viewed his trial testimony as less "coherent and credible" than his co-defendant's. *Id.* at 307.

Thus, for the above reasons this Court laid out in *Atkins* and those the Ninth Circuit set forth in *Thompson*, evidence of mental retardation does address whether a federal death row prisoner is "not guilty of the offense" of capital murder. And here, although Petitioner is not attempting to challenge the entirety of his "murder" conviction, he is challenging the "capital" (i.e., eligible for the death penalty) part of that conviction.

C. Allowing a Federal Prisoner to Raise Newly Discovered Evidence of Mental Retardation Pursuant to 28 U.S.C. § 2255(h)(1) Is Consistent with this Court's General Principles in Construing AEDPA.

In interpreting AEDPA's provisions, this Court has noted its willingness to look to the "implications for habeas practice." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). No doubt recognizing the significance of reading AEDPA too narrowly, this Court has expressly avoided interpreting the statute in a way that would "produce troublesome results," "create procedural anomalies," and "close [the Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent."

Castro v. United States, 540 U.S. at 380-81; *see also Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (eschewing a literalist interpretation of section 2244(b) in favor of a functional competency rule that avoided "troublesome results" and that did not "close [federal courts] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent"); *Martinez-Villareal*, 523 U.S. at 644 (rejecting literal reading of section 2244(b) to avoid "perverse" results). These principles also counsel in favor of a reading of section 2255(h)(1) that would permit certification of Petitioner's claim of categorical ineligibility for the death penalty here.

Such an approach also comports with this Court's "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)); *see also Sanders v. United States*, 373 U.S. 1, 18-19 (1963) (creating a presumption in favor of entertaining successive claims for federal prisoners even though the statute appeared to support an opposing inference); *Kuhlmann*, 477 US. at 449, 451-52 (applying "the ends of justice" exception to successive claims, even though Congress had eliminated the exception from section 2244(b) in 1966).

In addition, this Court has repeatedly recognized that AEDPA's language is not "self-defining" but rather "takes its full meaning from [the Court's] case law, including decisions predating the

enactment of the [AEDPA]." *Panetti*, 551 U.S. at 943-44. As the Court recently stated, AEDPA seeks to eliminate delays in the federal habeas review process "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law." *Holland v. Florida,* 130 S. Ct. at 2549, 2562 (2010); *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."). "When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland*, 130 S. Ct. at 2562 (citing *Slack*, 529 U.S. at 483).

Among the fundamental pre-AEDPA principles the Court has always recognized is an "ends of justice" exception to the abusive and successive petitions rules. *See McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (recognizing an "ends of justice" gateway for "abusive"[10] claims); *Kuhlmann*, 477 U.S. at 454 (plurality opinion) (same for successive claims). That is, even when a petitioner either did or could have raised a claim before, this Court recognized an exception allowing the Court to address the merits of the claim when it is necessary

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[10] In the habeas context, "abuse of the writ" may be applied to bar previously-available claims which a petitioner failed to raise in a prior habeas petition. *McCleskey*, 499 U.S. at 490. Because the evidence that would be presented in Petitioner's successive motion is newly-discovered, and was previously unavailable, due, in part, to the district court's denial of Petitioner's request for discovery, the abuse of the writ doctrine does not apply to Petitioner's claims.

to serve the ends of justice. *See McCleskey*, 499 U.S. at 494.

All these principles counsel against the narrow reading applied to section 2255(h)(1) by the Fifth Circuit here, which would require the "absurd[]," "Kafkaesque," and "illogical[]" result of "condon[ing] . . . an unconstitutional punishment." Pet. App. 9a, 12a (Wiener, J., concurring). And not just any such punishment, but a fatal one.

D. The Circuits Are Split as to Whether Challenges to the Imposition of the Death Sentence May be Raised After AEDPA.

Whether Congress intended to allow prisoners to challenge not only their conviction, but also their death sentence (as under *Sawyer*), is a question that has divided the circuit courts and will continue to cause confusion until this Court resolves it. The Seventh Circuit has held, in a non-capital case, that the "actual innocence" exception did not survive the AEDPA amendments to 28 U.S.C. § 2255. *See Hope v. United States*, 108 F.3d 119, 119-120 (7th Cir. 1997) (concluding that "a successive motion under 28 U.S.C. § 2255 . . . may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence"). The Eleventh Circuit has reached a similar conclusion, also in a non-capital case. *See In re Dean*, 341 F.3d 1247, 1248-49 (11th Cir. 2003) (rejecting a federal prisoner's claim in a non-capital case that the "guilty of the offense" language of section 2255(h) allowed the prisoner to present

newly discovered evidence – a copy of an order reversing two previous state convictions – to prove that the prisoner's sentence was improperly enhanced on the basis of his prior criminal history). The Seventh and Eleventh Circuits have also concluded that, even in capital cases, state prisoners seeking to bring a successive motion under section 2244 must present newly discovered evidence related to "whether or not the applicant is 'guilty of the underlying offense' – not to claims related to sentence." *In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998); *see also Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997) (same); *Burris v. Parke*, 130 F.3d 782, 785 (7th Cir. 1997) (same), *cert. denied*, 522 U.S. 990 (1997); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (same), *cert. denied*, 520 U.S. 1151 (1997), *overruled on other grounds by Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

Other circuits have either expressly concluded that AEDPA allows a prisoner to present newly discovered evidence relating to a death sentence or have at least left open the possibility. In particular, the Ninth Circuit has concluded that § 2244(b)(2)(B)(ii) permits challenges brought by state prisoners to a death sentence. *See Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999), *cert. denied*, 526 U.S. 1107 (1999); *Thompson,* 151 F.3d at 923. The Fourth and the Tenth Circuits, on the other hand, have left open the question "whether, under the AEDPA, an individual subject to a sentence of death may assert . . . that he is 'innocent' of the death penalty." *In re Vial*, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997); *cf. LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting that the

court need not decide whether § 2244(b)(2)(B)(ii) applies to challenges to a death sentence made by a state prisoner under 28 U.S.C. § 2244).

In this case, the Fifth Circuit concluded that the plain language of section 2255(h)(1) demonstrates that Congress did not intend to incorporate the "old, broad interpretation of actual innocence." Pet. App. 7a. That conclusion is not the only permissible reading of the "plain language," as noted above, and none of the cases upon which the Fifth Circuit relied for its decision involved a similar situation. Those cases holding that a federal prisoner cannot challenge his sentence based on newly discovered evidence under 28 U.S.C. § 2255(h)(1) were not decided in the capital context. *See Hope*, 108 F.3d at 120; *In re Dean*, 341 F.3d at 1248-49. Those cases concluding that newly discovered evidence relating to a death sentence cannot provide a basis for a successive motion have all been in the context of state prisoners, for whom the applicable statute refers to the "underlying offense." *See In re Jones*, 137 F.3d at 1273; *Burris*, 116 F.3d at 258; *Burris*, 130 F.3d at 785; *In re Medina*, 109 F.3d at 1565. And none of the courts have considered whether newly discovered evidence that the prisoner is *categorically* excluded from the death penalty on constitutional grounds would allow the prisoner to bring a successive motion under 28 U.S.C. § 2255(h)(1).

III. IF THE FIFTH CIRCUIT CORRECTLY CONSTRUED SECTION 2255(h)(1) AS PRECLUDING PETITIONER'S CLAIM, THE STATUTE IS, TO THAT EXTENT, UNCONSTITUTIONAL.

If the Fifth Circuit's reading of section 2255(h)(1) is correct, the result will be the execution of a mentally retarded individual without due process in contravention of the Eighth and Fifth Amendments. Under the Fifth Circuit's reading of the statute, even though Petitioner has newly discovered, clear and convincing evidence of his mental retardation – so compelling that the concurrence concluded it was "virtually guaranteed" that Petitioner would be found mentally retarded if the merits could be considered – a court must ignore such evidence and condone "an unconstitutional punishment." Pet. App. 9a, 12a.

There can be no question that Petitioner has a liberty interest in avoiding an unconstitutional execution. This Court has stated that "the condemned prisoner . . . has not lost the protection of the Constitution altogether;" therefore, "if the Constitution renders the fact or timing of [the prisoner's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). This Court has also recognized that a prisoner's constitutional eligibility for the death penalty is an important "life" interest, which must be determined "with the high regard for truth that befits a decision affecting the

life or death of a human being." *Id.* Under the Fifth Circuit's reading, Section 2255(h) creates an obvious risk of deprivation of protecting this "life" interest, because it eliminates any safety valve, even a very narrow one, for a post-conviction court to avoid executions which are "virtually guaranteed" to be unconstitutional. As the Fifth Circuit concurrence said, "under Congress's instruction which ties our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment." Pet. App. 11a-12a.

As shown above, prior law (pre-AEDPA) allowed a prisoner in Petitioner's circumstance to show by newly discovered evidence that he was "actually innocent" of the death penalty. *Sawyer*, 505 U.S. at 336. This Court may not yet have decided that the Constitution prevents the execution of someone who is "actually innocent," *Herrera v. Collins*, 506 U.S. 390, 417 (1993), but it has decided that the Constitution categorically prevents the execution of one who is mentally retarded. *Atkins,* 536 U.S. at 321. If AEDPA really does prevent the courts from hearing such a claim and requires them to condone the execution of one who is mentally retarded, then to that extent it permits the "infliction" of a "cruel and unusual punishment" and itself violates the Eighth Amendment; it also deprives the Petitioner of life without due process of law in violation of the Fifth Amendment. This Court need not reach that question because section

2255(h)(1) need not be so read, but if it is so read, then this Court should so hold.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] Alternatively, the Court should remand the case to the Fifth Circuit to consider in the first instance whether section 2255(h)(1) is unconstitutional because that court's holding implicates the constitutional question under *Atkins*.

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