No. __-____

IN THE

Supreme Court of the United States

COREY JOHNSON,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay

Execution Date: January 14, 2021 at 6:00 P.M. E.T.

EMERGENCY APPLICATION OF COREY JOHNSON FOR A STAY OF EXECUTION

Shay Dvoretzky*
Donald P. Salzman
David E. Carney
Wallis M. Hampton
Jonathan Marcus
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, NW
Washington, DC 20005
Ph: (202) 371-7246
Fax: (202) 661-8295
Email: david.carney@skadden.com

Counsel for Corey Johnson

**Counsel of record for Mr. Johnson, and Member of the Bar of the Supreme Court*

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the Fourth Circuit:

INTRODUCTION

Corey Johnson seeks a stay of execution from this Court. Just an hour ago, the United States Court of Appeals for the Fourth Circuit sitting en banc denied his stay request by a vote of 8-7, with written dissent, on the two issues presented here.

Corey Johnson is intellectually disabled.[1] His childhood IQ scores, as low as 65, place him in the lowest first or second percentile of the population. He remained in the second grade for three years, then repeated third and fourth grades. As an adolescent he could not spell his own name nor recite the months of the year. He could not navigate school halls as a teen nor manage any but the most familiar streets as an adult. He was never able to live on his own. Three prominent experts conclude that Mr. Johnson meets all three diagnostic criteria for intellectual disability.[2]

This evidence, or any affirmative case establishing Mr. Johnson's intellectual disability, has never been considered by a court or jury. In 1993, his was the first federal trial of a man with what was then called mental retardation. Trial counsel did not hire a specialist in this field, but instead asked a psychologist to conduct a

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[1] The modern convention is to refer to individuals as "intellectually disabled" rather than "mentally retarded." This motion, however, uses the term "mentally retarded" when citing statutes and case law or quoting documents that use it.

[2] These are IQ scores within the range of intellectually disability, usually below 75; adaptive deficits in one of three domains of life skills (Mr. Johnson has deficits in all three); and onset before the age of 18. *See* American Association on Intellectual and Developmental Disabilities Definition Manual ("AAIDD-11") (APP.696); Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") (APP.717, 719); *see also Moore v. Texas*, 137 S. Ct. 1039, 1042, 1045 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 710 (2014), 1048 (recognizing these standards).

general mitigation investigation. He administered an IQ test to Mr. Johnson, obtained a score of 77, and on that basis alone determined—and told the jury—that Mr. Johnson could not be mentally retarded. (APP.621-.622.) Post-conviction counsel later argued that the 77 was in fact in the 72-74 range or lower based on diagnostic standards and thus within the range of the disability, but presented no other information or evidence in support of the diagnosis. (APP.801-804.)

Current standards and evidence establish that Mr. Johnson conclusively meets the diagnostic and legal criteria for intellectual disability and is thus ineligible for execution. He cannot, however, get into court to prove it. This is so despite the fact that the Anti-Drug Abuse Act, 21 U.S.C. § 848(l)(now repealed), under which he was convicted and the Federal Death Penalty Act, 18 U.S.C. § 3596(c), which replaced it, both prohibit the implementation of a death sentence if the prisoner is found to be intellectually disabled. When the government scheduled his execution date, Mr. Johnson argued that he met the § 3596(c) / § 848(*l*) implementation exemption and filed a motion pursuant to its terms, but was told his attempt at litigation was successive under 28 U.S.C. § 2255(h).

This was incorrect. As the dissent below noted, Congress "inten[ded] to allow an inquiry at the time of execution. . . . If Johnson's death sentence is carried out today, **the United States will execute an intellectually disabled person."** (APP.814 (Wynn, J., dissenting)) (emphasis in original).

When the government set his execution date, Mr. Johnson had already been in court for months having filed a motion for reconsideration of sentence pursuant to

the First Step Act. Congress passed the First Step Act of 2018 to redress grave racial disparities occasioned by sentencing disparities for offenses involving crack as compared to powder cocaine. Individuals previously convicted were given the right to seek resentencing, with no procedural hurdles, so long as Sections 2 or 3 of the Fair Sentencing Act of 2010 modified the penalties for statutes under which they had been convicted. On August 19, 2020, Mr. Johnson (an African-American) sought a sentence reduction under the First Step Act. He had the right to seek resentencing because Section 2 of the Act modified the penalties of his statute of conviction (21 U.S.C. § 848). As the dissent below noted, the district erred in rejecting this claim because Mr. Johnson "is legally entitled to reconsideration of his sentence." (APP.813 (Wynn, J., dissenting).)

The District Court for the Eastern District of Virginia found that Mr. Johnson was not entitled to any reconsideration under the statute because his § 848 offenses were not "covered offenses." The district court also concluded that even if Mr. Johnson were entitled to reconsideration of his sentence, it was not the court's "role" to reconsider the decision of Mr. Johnson's 1993 sentencing jury, even though the First Step Act's purpose was precisely that: to require courts to engage in serious reconsideration of sentences based on contemporary legal standards. (APP.255.) In Mr. Johnson's case, this sentence determination would have required examination of evidence he has proffered of his intellectual disability and his pristine prison record. Just hours after he had noticed his appeal to the Fourth Circuit, the Justice Department announced it was setting Mr. Johnson's execution date for January 14.

If this Court does not grant a stay, Corey Johnson will become the first intellectually disabled federal prisoner to be executed without the benefit of an actual evidentiary hearing. This would happen despite undisputed evidence demonstrating his ineligibility for execution and two statutes—both § 3596 and the First Step Act—expressly allowing for an inquiry at this time.

This Court should grant a stay of execution to protect its ability to consider the fundamentally important issues that Mr. Johnson might need to raise in a petition for writ of certiorari.

STATEMENT OF FACTS

I. In 1993, Mr. Johnson was convicted of various crack-related offenses.

In April 1992, Mr. Johnson and six co-defendants were charged in a 33-count indictment with offenses arising from a drug conspiracy pursuant to the Anti-Drug Abuse Act (the "ADAA"). In February 1993, Mr. Johnson was convicted of all 27 counts in the government's superseding indictment, including seven murders in the course of a continuing criminal enterprise (a "CCE") under 21 U.S.C. § 848(e)(1)(A).

During sentencing, Mr. Johnson's counsel presented the jury with mitigation evidence from psychologist Dewey Cornell, who testified about Mr. Johnson's documented educational failures; diagnoses he had received as an adolescent of diffuse organic brain damage; and several IQ test scores and standardized test scores that placed him in the bottom one to two percent of children his age. (APP.572-573).

Despite this evidence, which included an IQ score of 69, Dr. Cornell testified that Mr. Johnson did not meet the criteria for a diagnosis of intellectual disability because Mr. Johnson had scored 77 on an IQ test Dr. Cornell had administered; this

was "just above the level of mental retardation . . . two points above that." (*Id.* at APP.621-622.) Because Dr. Cornell believed Mr. Johnson's IQ score of 77 precluded a diagnosis of intellectual disability, he believed that ended the inquiry and did not address Mr. Johnson's adaptive functioning pursuant to the diagnostic standards. Accordingly, neither the judge nor the jurors were asked to determine whether Mr. Johnson was intellectually disabled. Based on the jury's recommendation, the court sentenced Mr. Johnson to death for the § 848(e) offenses.

II. In Mr. Johnson's original habeas proceeding, no evidence of intellectual disability was presented beyond a challenge to the 77 IQ score.

In June 1998, Mr. Johnson's new attorneys filed a motion for collateral relief pursuant to § 2255, arguing for the first time that Mr. Johnson was ineligible for a death sentence because he was intellectually disabled. Counsel argued that Dr. Cornell should have adjusted Mr. Johnson's IQ score to account for the Flynn Effect––a testing phenomenon that causes IQ scores to inflate over time and requires scores to be corrected accordingly. Had he done so, they contended, Mr. Johnson's IQ score on which Dr. Cornell relied would have fallen within the standard error of measurement diagnostic of intellectual disability, and Dr. Cornell would have had to conduct a full intellectual disability analysis that considered all relevant factors. But they did not introduce any expert testimony—or other evidence—establishing Mr. Johnson's intellectual disability. (APP.801-804.)

Because post-conviction counsel offered no new evidence regarding Mr. Johnson's intellectual disability, the district court found that "the record before the

Court demonstrates that Johnson is not mentally retarded," and that Mr. Johnson's trial counsel was not ineffective for failing to raise the Flynn Effect because counsel had reasonably relied on Dr. Cornell's assessment. (APP.137-141.) The district court granted the government's motion for summary judgment and denied Mr. Johnson relief. (*See* APP.58.) The court concluded that Dr. Cornell's testimony "belies the suggestion that [his] analysis did not account for possible variations in his testing instrument." (*Id.* at APP.138-139.) But Dr. Cornell never mentioned the Flynn Effect at trial, and the evidence in the § 2255 proceedings does not show that Dr. Cornell had accounted for it. The court also dismissed the fact that Mr. Johnson had a childhood IQ score under 75 as reported by Dr. Cornell himself. (*Id.* at APP.139-140.)

Mr. Johnson then appealed to the Fourth Circuit. That court agreed that the IQ score of 77 that Dr. Cornell had assigned Mr. Johnson placed him outside the diagnostic range for mental retardation and ended the inquiry. *United States v. Roane*, 378 F.3d 382, 408-09 (4th Cir. 2004). After the Fourth Circuit denied Mr. Johnson's petition for rehearing, he raised the intellectual disability issue, and others, in a petition for certiorari. This Court denied the petition. *Johnson v. United States*, 546 U.S. 810 (2005) (mem.).

In late 2005, counsel filed a motion to recall the mandate and for rehearing in light of new Fourth Circuit decisions remanding cases to trial courts to consider evidence of Flynn Effect adjustments to IQ scores above 75, exactly what Mr. Johnson had asked the district court to do in his own § 2255 motion. The Fourth Circuit denied the motion to recall without explanation. (APP.223.)

III. The district court denied Mr. Johnson's new motions for relief.

A. The court concluded that Mr. Johnson could not bring a second § 2255 motion raising the § 3596 / § 848 exemption without the Fourth Circuit's authorization.

The government set an execution date for Mr. Johnson in 2006, but the execution was stayed due to litigation challenging the government's planned method of execution. (As explained in Section V *infra*, the government did not issue a new execution protocol until 2019.) New counsel later began representing Mr. Johnson. During their investigation, they located two additional scores from IQ tests he had taken as a child, both of which supported a finding that Mr. Johnson was intellectually disabled. (APP.517.) Counsel also retained three nationally renowned experts in intellectual disability to conduct full evaluations of Mr. Johnson—including a full examination according to legal and medical standards of adaptive functioning—and they each independently concluded that Mr. Johnson is intellectually disabled.

On November 20, 2020, just hours after Mr. Johnson appealed the district court's denial of his First Step Act relief request, the Bureau of Prisons set Mr. Johnson's execution date for January 14, 2021. On December 14, 2020, Mr. Johnson filed his § 2255 Motion in the U.S. District Court for the Eastern District of Virginia, seeking an evidentiary hearing to establish that the government could not execute him under § 3596(c) of the Federal Death Penalty Act (the "FDPA") because he was

intellectually disabled.[3] The government argued that § 848(*l*) of the Anti-Drug Abuse Act applied instead. The district court found that the statutes were identical, so which of the two provisions governed did not matter. (APP.272.) On January 2, 2021, the district court concluded that the § 2255 Motion was an unauthorized successive motion, dismissed the motion, and declined to issue a certificate of appealability. (APP.285.)

B. The court decided that Mr. Johnson could not seek resentencing under the First Step Act.

On August 19, 2020, Mr. Johnson brought a motion under the First Step Act, seeking to have his death sentences under 21 U.S.C. § 848(e) for murder in the course of a continuing criminal enterprise reduced to life in prison. He did so after other federal courts in Virginia and elsewhere had determined that § 848(e) offenses were "covered offenses," and some prisoners had received reduced sentences during resentencing. He also proffered evidence showing that a sentencer would have ample reason to consider a sentence less than death. This included expert testimony regarding his intellectual disability, lay declarations of Mr. Johnson's abuse, neglect, and abandonment throughout childhood and a pristine prison record.

The district court denied relief. It held that Mr. Johnson's violations of § 848 were not "covered offenses." Even if they were, the court continued, it was not its role "to overturn the will of the community" as expressed by the 1993 jury. (APP.255.)

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[3] As the District Court for the Eastern District of Virginia found, § 848(*l*) and § 3596(c) of the FDPA are identical. (APP.272.) The government appears to have dropped a previous contention that the FDPA does not apply. That is not in any event a question that need be resolved here. The prohibition at issue exists no matter which statute contains it. Mr. Johnson generally refers to § 3596 for simplicity alone.

IV. The Fourth Circuit denied a stay of execution pending resolution of Mr. Johnson's appeals.

Mr. Johnson appealed the district court's orders denying him relief under the FDPA and the First Step Act. (APP.255.) He filed his opening brief on the First Step Act issues on December 28, 2020, and on January 7, 2021, sought a stay of execution pending the Fourth Circuit's resolution of that appeal. (APP.286.) On January 8, 2021, Mr. Johnson filed an Informal Preliminary Brief, With Request for Certificate of Appealability, and a corresponding Emergency Motion of Corey Johnson for Stay of Execution Pending Consideration and Disposition of Appeal on the FDPA issues. (APP.735.) After expedited briefing, the Fourth Circuit denied both stays on January 12. (APP.340.) Judge Motz dissented with respect to Mr. Johnson's motion to stay pursuant to the First Step Act, concluding that he raised a "timely and serious challenge . . . that should be resolved prior to his execution." (APP.346.) And while the panel unanimously denied Mr. Johnson's motion to stay pursuant to the federal statutory prohibition on executing the intellectually disabled, Judge Motz nevertheless found that his claim raised "grave concerns about the propriety of now executing him" because "[n]o federal court has ever assessed this evidence or considered whether it forecloses a lawful imposition of the death penalty." (*Id.* at APP.345) (Motz, J., concurring). Mr. Johnson filed a petition for rehearing en banc on January 13, which was denied today. (APP.810.) Mr. Johnson then asked the Fourth Circuit to stay execution pending his appeal to this Court. (APP.815.)

ARGUMENT

I. This Court has jurisdiction to stay an execution pending resolution of a forthcoming petition for writ of certiorari.

The Court has jurisdiction to stay Mr. Johnson's execution under the All Writs Act, 28 U.S.C. § 1651. The All Writs Act empowers this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law."

The Court can take appropriate action to preserve its "potential jurisdiction." *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) ("The exercise of this power 'is in the nature of appellate jurisdiction' where directed to an inferior court and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." (citation omitted)). This includes the power to "hold an order in abeyance" even if the court of appeals has not issued judgment. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (staying removal of petitioner after court of appeals declined to enter stay until Supreme Court resolved the petitioner's appeal).[4] Thus, if a court of appeals fails to preserve the potential jurisdiction of this Court and to protect a party from the consequences of failing to enter a stay, that party may seek relief in this Court under the All Writs Act. *See, e.g.*, *Maxwell v. Bishop*, 385 U.S. 650 (1967) (per curiam) (granting common-law petition for writ of certiorari where shortness of time available before a scheduled execution made ordinary appeal procedure unavailable); *Barefoot v. Estelle*, 463 U.S.

[4] Alternatively, the Court can treat this motion as a petition for writ of certiorari and stay Mr. Johnson's execution on that basis. *Nken v. Mukasey*, 555 U.S. 1042, 1042 (2008) (granting application for stay and treating it as petition for writ of certiorari).

880, 889, 895 (1983) ("Approving the execution of a defendant before his [Petition] is decided on the merits would clearly be improper . . . ."); *see also Delo v. Stokes*, 495 U.S. 320, 323 (1990) (Kennedy, J., concurring).

The Fourth Circuit denied Mr. Johnson's motion to stay his execution but has not ruled on the merits of his appeals. This Court will have jurisdiction in the event Mr. Johnson needs to file a petition for writ of certiorari (the "Petition") regarding the Fourth Circuit's ultimate judgment. Accordingly, this Court has jurisdiction to stay Mr. Johnson's execution.

The general standard for granting a stay is well-established. The factors are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (citation omitted). There also must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision." *Barefoot*, 463 U.S. at 895 (citations omitted). And "'in a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). All these factors support a stay.

II. There is a reasonable probability that the Court will grant certiorari.

The "reasonable probability" standard is not a "more likely than not" standard. *Smith v. Cain*, 565 U.S. 73, 75 (2012) (citation omitted) (discussing "reasonable probability" of a different outcome in the context of *Brady* materiality). Rather, Mr. Johnson need demonstrate only a reasonably good chance that this Court will grant certiorari on at least one of the issues that he would present in his Petition.

There is a compelling national interest in ensuring that the government does not execute intellectually disabled prisoners. As the recent dissent in *Bourgeois* noted, the question of whether to apply current diagnostic standards to federal prisoners scheduled for execution "presents a serious question that is likely to recur." *Bourgeois v. Watson*, 141 S. Ct. 507, 509 (2020) (Sotomayor, J., dissenting). Those diagnostic standards potentially change dramatically over the course of a capital proceeding—as they have here. Federal capital law, under both the FDPA and the ADAA, provides an independent and heightened protection to prevent the execution of intellectually disabled prisoners.

Mr. Johnson recognizes that this Court denied Alfred Bourgeois's petition for a writ of certiorari. *Bourgeois*, 141 S. Ct. at 507. Mr. Johnson's case, however, is in a different posture from a different era and presents a far more compelling reason for this Court to resolve the important questions presented.

Mr. Bourgeois presented all of his intellectual disability evidence during a five-day evidentiary hearing in 2011, at which he called over 20 witness, including 4 expert witnesses, and after which the district court issued a 107-page opinion thoroughly

evaluating the factual record. *See United States v. Bourgeois*, C.A. No. C-07-223, 2011 WL 1930684, at *20 (S.D. Tex. May 19, 2011). Mr. Johnson's counsel, pre-*Atkins*, did not proffer evidence beyond the Flynn Effect, and focused solely on Dr. Cornell's IQ score of 77.

Mr. Bourgeois had no childhood IQ scores. He based his intellectual disability claim largely on IQ tests administered after he had been charged with capital murder. *Id.* at *25. By contrast, Mr. Johnson's claim is based on childhood IQ scores, at a time when he would have had no reason to malinger. His scores consistently point to a finding of intellectual disability.

The evidence related to Mr. Bourgeois' day-to-day functioning came largely from witnesses describing their memories of his abilities as a child years earlier. *Id.* at *36-37. Mr. Johnson's claim, however, is based on a comprehensive collection of contemporaneous records documenting his impairments during childhood. Allowing the government to execute Mr. Johnson based on woefully outdated diagnostic work from the early 1990s would lead to the "intolerable result" of executing a person with intellectual disability. *Webster v. Daniels*, 784 F.3d 1123, 1139 (7th. Cir. 2015).

This Court also should grant certiorari to bring uniformity to lower courts' application of the First Step Act. Many courts have held that § 848 offenses are covered offenses under this statute, and some of those courts have granted significant sentence reductions, including to time served. *See, e.g.*, *United States v. Brown*, No. 3:08-cr-00011-1, 2020 WL 3106320, at *4 (W.D. Va. June 11, 2020); *United States v. Dean*, No 97-276(3), 2020 WL 2526476, at *3 (D. Minn. May 18, 2020); *United States*

v. Jimenez, No. 92-CR-550-01, 2020 WL 2087748, at *2 (S.D.N.Y. Apr. 30, 2020); Mem. Order, *United States v. Kelly*, No. 94-CR-163-4 (E.D. Va. June 5, 2020), ECF No. 1133. Other courts have concluded the opposite and denied the requests altogether. *See United States v. Smith*, No. 04-80857, 2020 WL 3790370, at *10-12 (E.D. Mich. July 7, 2020); *United States v. Chambers*, No. 87-80933, 2021 WL 75248, at *3 (E.D. Mich. Jan. 8, 2021); *United States v. Davis*, No. 5:93CR30025-003, 2020 WL 1131147, at *2 (W.D. Va. Mar. 9, 2020).

This Court's guidance will reduce the risk of inconsistent results in actual resentencing decisions. And because the First Step Act allows prisoners to seek resentencing only once, *see* Pub. L. No. 115-391, 132 Stat. 5194 (2018), review will also safeguard the statutory rights of prisoners who might otherwise be permanently deprived of relief by an erroneous application of the Act.

Review is also necessary to correct the government's inconsistent positions on this issue. It conceded in other cases involving § 848 offenses that an offense is a "covered offense" under the First Step Act where the statute under which the movant was convicted makes reference to, or has as a predicate, a statute amended by the Fair Sentencing Act. *See, e.g.*, United States' Mot. to Remand at 8, *United States v. Maupin*, No. 19-6817 (4th Cir. Aug. 29, 2019), ECF No. 26; *Davis*, 2020 WL 1131147, at *2 ("The government acknowledges that the defendant is eligible for a sentence reduction under the 2018 FSA for all three counts, including Count Two due to § 848's requirement of a § 841(b)(1)(A) violation."). The government has since reversed its

position in one of these § 848 cases (*Davis*) and argued to the contrary in Mr. Johnson's case.

In light of the inconsistent interpretations of the First Step Act by the lower courts and the government, Mr. Johnson respectfully suggests that this Court should provide clear guidance about how to determine what is a "covered offense." Refraining from doing so runs the risk of district courts denying prisoners the relief afforded them under the First Step Act.

III. There is a fair prospect that the Court will reverse the judgment below.

Mr. Johnson also must demonstrate a "fair prospect" that if review is granted, the Court will reverse the judgment under review. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (quoting *Conkright*, 556 U.S. at 1402 (Ginsburg, J., in chambers)); *see also Phillip Morris USA, Inc. v. Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers) (granting stay where it was "significantly possible that the judgment below will be reversed"); *Barefoot*, 463 U.S. at 895 (there must be "a significant possibility of reversal of the lower court's decision" (citations omitted)).

For the reasons stated below, the Court is likely to rule in favor of Mr. Johnson on at least one of his statutory arguments.

A. The Federal Death Penalty Act prohibits the government from executing an intellectually disabled prisoner.

The government's position founders on a fundamental misunderstanding of intellectual disability principles. It reasons that because any intellectual disability is fixed at age 18, a prisoner cannot seek to litigate his intellectual disability at the

time of execution. But this ignores the uncontroverted fact that the standards for a diagnosis of intellectual disability are continually refined as science advances. By requiring intellectual disability to be evaluated at the time of execution, Congress in the FDPA accounted for this possibility—just as it had done in § 848(*l*) of the ADAA. The government does not—and cannot—explain why Congress would want courts to determine a prisoner's intellectual disability based on obsolete standards—especially those from the early 1990s—and allow such a prisoner to be executed when modern accurate standards prohibit it.

1. The statute prohibits the execution of a prisoner who is intellectually disabled under prevailing medical and diagnostic standards at the time of execution.

The plain language, structure, and legislative history of 18 U.S.C. § 3596 mandate that a death sentence cannot be "carried out" where available evidence, when assessed under current legal and diagnostic standards, clearly demonstrates that the federal prisoner is intellectually disabled.

The FDPA's plain language provides that a death sentence "shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c). As this Court reiterated last year, a statute is to be interpreted "in accord with the ordinary public meaning of its terms" because "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020). Moreover, the Dictionary Act, 1 U.S.C. § 1, "ascribes significance to [the] verb tense" of a federal statute and "instructs that the present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438, 448 (2010). Congress' use

of the present-tense phrase "is mentally retarded" reflects Congress' intent to prohibit the execution of prisoners who are intellectually disabled under standards applicable at the time of execution.

The district court found that although the FDPA does not allow the death penalty to be "carried out" on someone who "is mentally retarded," it "does not follow that a determination on a defendant's intellectual disability must occur shortly before execution." (APP.280.) It reasoned that such a reading of the statute would "make[] little sense, given that the prohibition applies to a permanent condition that—by definition—must have manifested before the defendant committed the capital crime." *Id.* But this logic misses the mark. "[W]hile a prisoner's intellectual disability may not change, the medical standards used to assess that disability constantly evolve as the scientific community's understanding grows." *Bourgeois*, 141 S. Ct. at 508-09 (Sotomayor, J., dissenting). Indeed, this Court's own decisions make clear that the applicable legal and diagnostic standards related to this critical inquiry are anything but "permanent." *See Moore v. Texas*, 137 S. Ct. 1039, 1049– 53 (2017) ("*Moore I*"); *Hall v. Florida*, 572 U.S. 701, 710-14, 721-23 (2014).

The word "implementation" in the title of § 3596 reinforces this conclusion. Under § 3596, "implementation" of a death sentence involves only conduct that immediately precedes the execution. *See, e.g.*, *United States v. Mitchell*, 971 F.3d 993, 996–97 (9th Cir. 2020) (per curiam) (holding that "implementation" means only those measures that "effectuate the death" (citation omitted)). Section 3596(a) states that a person sentenced to death must be "committed to the custody of the Attorney

General" while any appeal is pending. Then, "[w]hen the sentence is to be implemented," the Attorney General must "release" the prisoner to a United States marshal, "who shall supervise implementation of the sentence." This language demonstrates that "implementation" does not include the trial, the sentencing process, or even motions to vacate a death sentence when the execution is not imminent. Instead, § 3596(c) presupposes that the execution is about to be "carried out," and its prohibition on executing the intellectually disabled must be viewed through the lens of current legal and diagnostic standards.[5]

The larger structure of the FDPA reinforces § 3596(c)'s plain language. The FDPA's preceding sections govern "[i]mposition of a sentence of death," 18 U.S.C. § 3594, and "[r]eview of a sentence of death," 18 U.S.C. § 3595. This structure underscores that courts must evaluate the intellectual disability issue when a death sentence is to be implemented, notwithstanding the prior "[i]mposition" and "[r]eview" of a valid death sentence.[6]

Section 3596 also provides that a death sentence "shall not be carried out" upon "a person who . . . lacks the mental capacity to understand the death penalty," 18 U.S.C. § 3596(c), or upon "a woman while she is pregnant," 18 U.S.C. § 3596(b). Pregnancy

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[5] The government made this very same point before this Court three days ago when addressing a different provision of the same statute, 18 U.S.C. § 3596(a). The government wrote that the acts described in § 3596 "occur[] long after the sentence was imposed" and the governing law is that which exists "at the time the sentence is being implemented, not when it was imposed." *United States v. Higgs,* No. 20-927, Petition for a Writ of Certiorari Before Judgment at 19.

[6] The FDPA took provisions from the ADAA, including § 848(*l*), and arranged them in chronological order. The prohibition on executing the intellectually disabled appears alongside other directives that come into play at the time of execution. § 3596 (a) – (c).

and mental incompetence are both conditions that must be assessed at the time a death sentence is implemented, not imposed. They have nothing to do with what "must have manifested before the defendant committed the capital crime." (APP.280.) By placing the intellectual disability prohibition in the "implementation" section together with pregnancy and mental incompetence, Congress intended to allow for an intellectual disability determination under legal and diagnostic standards applicable at the time of execution, not the standards from the time the sentence was imposed or reviewed. As this Court has repeatedly recognized, "statutory words are often known by the company they keep." *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018); *see also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (statutory terms must be interpreted "in their context and with a view to their place in the overall statutory scheme").

Indeed, during the floor debate on the proposed intellectual disability provision, Senator Orrin Hatch warned that this very language would permit prisoners to raise their intellectual disability "at any time." (APP.727) (comments by Sen. Hatch) (emphasis added).) Despite Senator Hatch's concerns, Congress kept this provision.

2. Mr. Johnson is intellectually disabled under prevailing standards.

Corey Johnson is intellectually disabled under the current diagnostic standards of the American Psychiatric Association ("APA") and the American Association on Intellectual and Developmental Disabilities ("AAIDD"). This Court has called the corresponding manuals "the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore I*, 137 S.

Ct. at 1053 (citation omitted); *see also Moore v. Texas*, 139 S. Ct. 666, 668 (2019) ("*Moore II*").

Three nationally-recognized experts in intellectual disability—Drs. Gregory Olley, Daniel Reschly, and Gary Siperstein—agree that Mr. Johnson meets all three criteria for intellectual disability: significant deficits in intellectual functioning ("prong one"), significant deficits in adaptive functioning ("prong two"), and onset before the age of eighteen ("prong three"). Their opinions are based on a broad universe of information, much of which comes from test results and observations recorded during Mr. Johnson's childhood.

Intellectual Functioning. A valid, reliable IQ score falling two or more standard deviations below the norm for the general population demonstrates a deficit in intellectual functioning. Under current diagnostic standards, the presumptive range for intellectual disability is an IQ score of 75 or below. (*See* APP.719.)

Mr. Johnson has four valid and reliable IQ scores on gold-standard IQ tests within the presumptive range for intellectual disability. He took these IQ tests in 1977 (age 8), 1981 (age 12), 1985 (age 16), and 1992 (age 23). He received full-scale scores of 73, 78, 69, and 77 respectively. Current diagnostic standards require full-scale IQ scores to be corrected for the Flynn Effect.[7] (APP.719.) When corrected, Mr.

[7] According to the Flynn Effect, IQ test scores across populations increase slowly over time—approximately .3 points per year or 3 points over ten years. Thus, as applied in this case, Mr. Johnson's 1992 IQ score of 77 would be adjusted to about 73. Federal courts have "acknowledged the appropriateness of considering Flynn-adjusted scores." *See United States v. Davis*, 611 F. Supp. 2d 472, 487 (D. Md. 2009) (recognizing that acceptance of the Flynn Effect is "widespread" and noting that experts deem its consideration "essential"); *United States v. Shields*, No. 04-20254, 2009 WL 10714661, at *12 (W.D. Tenn. May 11, 2009) (finding that "the Flynn Effect must be considered").

Johnson's IQ scores are properly reduced to approximately 72, 75, 65, and 73—all within the presumptive range for intellectual disability. Even uncorrected, two of Mr. Johnson's scores are within the presumptive range. Mr. Johnson thus satisfies prong one.

Adaptive Functioning. The concept of adaptive functioning refers to "how well a person meets community standards of personal independence and social responsibility." (APP.719); *see also Moore I*, 137 S. Ct. at 1045; *Hall*, 572 U.S. at 710. To satisfy this prong, a person need only have significant limitations in a single domain of adaptive behavior. (APP.720); *Moore I*, 137 S. Ct. at 1050. Mr. Johnson has significant deficits in all three domains—conceptual, social, and practical.

First, since childhood, Mr. Johnson has grappled with significant deficits in the *conceptual* domain, which involves, among other things, competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, and problem solving. (APP.719.) Mr. Johnson wanted to learn as a child. He worked hard in school, but simply could not succeed. (APP.808.) ("He is truly motivated to do well and to succeed and has not yet given up on himself. . . . Corey's progress in his class has been very, very, very slow almost to the point where one might feel that he is not learning.").) Mr. Johnson's school records show his early and constant academic struggles—reflective of deficits in the conceptual domain. He repeated several grades, including second grade three times, and fell further and further behind. (APP.459.) At age eight, he still had "no concept of number facts, no reading

skills, [could not] retain sight vocabulary words," and "had difficulty saying the alphabet." (APP.660; APP.665.)

Mr. Johnson's academic struggles continued into his teens despite his well-documented desire to learn. When he was 13, one school evaluator noted that Mr. Johnson was barely able to write his own name and "was unable to read single syllable short vowel words in isolation." (APP.668-669.) One year later, he scored in the bottom one percent on an achievement test administered by Dr. Kenneth Barish (a psychologist who evaluated Mr. Johnson in a residential placement). (APP.672.) Dr. Barish considered Mr. Johnson's deficit "so profound that [he has] used it over the past 30 years as a teaching example in [his] classes." (APP.634.)

Mr. Johnson's childhood records also demonstrate that he suffered from significant deficits in language and communication from early on. Dr. Olley concluded that "Corey Johnson has never demonstrated the conceptual aspects of communication appropriate for his age, and, instead, his language and communication abilities are significantly impaired." (APP.473.)

Second, Mr. Johnson has significant impairments in the *social* domain, which involves, among other things, empathy, interpersonal skills, friendships, and social judgment. (APP.719.) As a youth, Mr. Johnson was often taken advantage of by his family and school peers. (APP.478.) Mr. Johnson had "difficulty in understanding social cues and norms," and was, over the course of his life, the quintessential follower, easily influenced by and victimized by peers, who took his money, tricked and manipulated him. (APP.476-80.) Mr. Johnson's aunt, Minnie Hodges, reported

that "[p]eople found it easy to take advantage of him all throughout his childhood . . . . He wouldn't understand others but didn't want to look bad, so other children easily tricked and manipulated him." (APP.481.) He continued to struggle with social interactions as he aged. (*Id.* at APP.477.)

Third, contemporaneous records created during his childhood and anecdotes described by people who knew him during his childhood reflect Mr. Johnson's deficits in the *practical* domain, which involves self-management across life settings. (APP.719.) Mr. Johnson could not take care of himself. He wet and soiled his bed until he was about 12 years old. (APP.483.) He needed constant reminders to keep himself clean. *Id.* When he was living in Trenton as a young adult, visitors described his home as "dirty and strewn with trash, dishware, and clothes." *Id.*

Even during his teen years, Mr. Johnson was not trusted to travel alone, and relied on others to get around. (APP.483.) He also never developed the skills needed to live on his own. A caseworker at the group home that Mr. Johnson lived in during his late teens told Dr. Olley that Mr. Johnson is "the kind of kid who I don't think could make it on his own—pay his rent, etc. Some people should stay in a protected setting all their lives." (APP.486; *see also* APP.659.)

Dr. Olley administered the ABAS-II, a standardized tool developed to assess adaptive functioning, to three adults who knew Mr. Johnson well when he was a child. (APP.465.) Much like IQ scores, a composite score of 75 or below meets the standard for the adaptive prong of an intellectual disability diagnosis. Mr. Johnson's

composite score for each of the three raters was less than 75 (60, 64, 74). (*Id.* at APP.486.)

Onset Before the Age of 18. Mr. Johnson's significant limitations in intellectual and adaptive functioning arose before he turned 18. Drs. Reschly, Olley, and Siperstein reviewed the substantial evidence and concurred that his disability began in childhood. (APP.450; APP.393; APP.521.)

In the years since Mr. Johnson's trial and § 2255 proceeding, there have been significant developments in the scientific understanding of intellectual disability. When assessed under prevailing standards—as this Court has repeatedly stated is required—Mr. Johnson's intellectual disability is virtually undisputable. *See Hall*, 572 U.S. at 721 (instructing that an intellectual disability determination must be "informed by the medical community's [current] diagnostic framework"); *Moore II*, 139 S. Ct. at 673 (Alito, J., dissenting) (explaining that, in *Moore I*, "both the majority and the dissent agreed that the [lower court] should have assessed Moore's claim of intellectual disability under contemporary standards rather than applying . . . outdated evidentiary factors").

But this question has remained frozen because of Dr. Cornell's deeply flawed 1993 analysis, which flunks current diagnostic standards in several ways. First, Dr. Cornell failed to adjust the score of the IQ test he administered to account for the Flynn Effect. The Flynn Effect was not widely accepted or used in 1993. The APA formally recognized the Flynn Effect in 2013, when it mandated the effect's consideration in conjunction with IQ tests used in intellectual functioning determinations. (*See*

APP.719 ("Factors that may affect test scores include . . . the 'Flynn effect' (i.e., overly high scores due to out-of-date test norms).")).[8] The first time the Flynn Effect was adopted in a federal death penalty case was April 2009. *See United States v. Davis*, 611 F. Supp. 2d 472 (D. Md. 2009). Had Dr. Cornell adjusted for the Flynn Effect, Mr. Johnson's IQ score of 77 would have fallen within the presumptive range for intellectual disability. (APP.801-804.) Dr Cornell's failure to do so has haunted this case for years.

Second, because Dr. Cornell believed that Mr. Johnson's IQ score of 77 precluded an intellectual disability diagnosis, he dismissed other evidence supporting such a diagnosis, including an IQ score from Mr. Johnson's childhood that would, even without adjusting for the Flynn Effect, place Mr. Johnson within the requisite range. He also never considered Mr. Johnson's wealth of adaptive deficits. This is all contrary to currently prevailing diagnostic standards.[9] *See Hall*, 572 U.S. at 723 (holding that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits") (emphasis added); *Moore I*, 137 S. Ct. at 1050 ("[W]e require that courts continue the

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[8] This marked the first time that both leading psychiatric associations mandated adjustments for the Flynn Effect. The AAIDD did so in 2007, still after Mr. Johnson's original § 2255 proceeding.

[9] The DSM-5 and the AAIDD-11 caution against using rigid rules regarding IQ scores, instead placing more emphasis on the adaptive functioning prong. (*See* APP.719; APP.698); s*ee also In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019) (explaining that DSM-5's new diagnostic guidelines in 2013 "included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment"), *cert. denied*, 140 S. Ct. 2521 (2020) (mem.). In addition, the development and use of retrospective standardized assessments (like the ABAS-II) as important diagnostic tools did not materialize until after Mr. Johnson's sentencing and first § 2255 proceeding.

inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.") (emphasis added); *see also United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) (holding that prong two adaptive deficit analysis is necessary "if *any* IQ test, evaluated in the context of a 95% interval, reflects a range falling to 70 or below") (emphasis added).

If a court were to review Mr. Johnson's claims under modern standards, there would be little doubt that it would find him intellectually disabled. Yet the government intends to execute him today without allowing him that review.

3. Mr. Johnson did not need the court of appeals' authorization to file a second § 2255 motion pursuant to § 3596(c) or § 848(*l*).

It is "settled law" that "not every numerically second petition [or motion] is a 'second or successive' petition [or motion] within the meaning of the AEDPA." *United States v. Hairston*, 754 F.3d 258, 262 (4th Cir. 2014) (citation omitted). Indeed, this Court "has declined to interpret 'second or successive' as referring to all § [2255] applications filed second or successively in time." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). Rather, courts should look to the individual circumstances of each case and "resist[] an interpretation of the statute that would . . . 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'" *Id.* at 945-46 (quoting *Castro v. United States*, 540 U.S. 375, 380-81 (2003)).

Accordingly, courts should treat a second-in-time petition as non-successive when "the grounds for challenging the movant's sentence did not exist at the time he

filed his first motion to vacate." *Hairston*, 754 F.3d at 261. Mr. Johnson's December 2020 motion presented such a claim. Here, the basis for Mr. Johnson's claim has changed for two reasons. First, the statute prohibits *implementing* the death penalty with respect to an intellectually disabled person, and Mr. Johnson's sentence is now being implemented. Second, legal and diagnostic standards have evolved, and as Mr. Johnson has shown, he is intellectually disabled under those current standards. Thus, the basis for his claim today is not the same as it was at the time of his first § 2255 motion, and his current motion is not successive. That statute requires courts to determine intellectual disability under the currently prevailing legal and diagnostic standards when execution is imminent.[10] The lower courts, nonetheless, closed the door on Mr. Johnson's claim.

The district court held that "the Present § 2255 Petition constitutes a second or successive § 2255 petition within the meaning of 28 U.S.C. § 2255(h)" because intellectual disability "manifests early in life and would not change as a defendant's execution nears," and "[f]or this reason, courts may consider challenges that a defendant's intellectual disability precludes a death sentence at all phases of the trial and sentence." (APP.274-277.) The court also reasoned that "defendant's intellectual disability ripened years ago, and the courts rejected it years ago." (*Id.* at APP.278.) Again, this reasoning ignores the fact that, although a defendant's mental condition may manifest since childhood, the diagnostic standards used to diagnose that

[10] In contrast to federal movants, § 2254 petitioners have other potential forums to raise second-in-time claims like these. *See, e.g.*, *Ex Parte Blue,* 230 S.W.3d 151, 154 (Tex. Crim. App. 2007) (allowing successive *Atkins* claims in state court and providing criteria for consideration). Federal death row prisoners have only one forum and one opportunity to litigate post-conviction claims. The provision in the federal statute provides some measure of comparable protection for federal prisoners who are intellectually disabled at the time of execution.

condition are constantly evolving. *See Hall*, 572 U.S. at 721; *Moore I*, 137 S. Ct. at 1049; *Bourgeois*, 141 S. Ct. at 508-09 (Sotomayor, J., dissenting). It also ignores the difference between the facts underlying a claim and the "basis" for the claim. Mr. Johnson's intellectual disability may have "ripened" years ago, but that does not mean that his *claim* under § 3596 of the FDPA—based on new and dispositive standards—did. And, as explained above, it ignores the plain text, structure, and history of the federal law.

The district court also stated that a "fresh intellectual disability claim does not arise every time the medical community updates its literature." (APP.282.) But that is not the situation presented here. The legal and diagnostic standards have shifted dramatically in the last 20+ years. And § 3596 does not suggest that a new intellectual disability assessment is appropriate "every time" diagnostic standards evolve. Rather, assuming standards have evolved, a renewed determination may be warranted after the execution date is set (i.e., during the "implementation" of the death sentence). This Court should clarify that in cases such as this—particularly with facts like this case—federal prisoners facing implementation of their death sentence have a statutory right to bring a new § 2255 motion under the FDPA, which is not "second or successive" within the meaning of § 2255(h).[11]

B. The First Step Act permits Mr. Johnson to seek resentencing of his death sentence.

1. Mr. Johnson is eligible under Section 404 of the First Step Act because his statute of conviction is 21 U.S.C. § 848 and

[11] There will not be many federal applicants needing or able to take advantage of this provision. Corey Johnson's was the first federal capital trial of an intellectually disabled man and was conducted years before federal legal standards and medical criteria developed.

the penalties of § 848 were modified by the Fair Sentencing Act.

On August 3, 2010, Congress enacted, and the President signed into law, the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), to address the longstanding and widespread recognition that the 1986 Anti-Drug Abuse Act's penalty scheme for crack offenses was based on false assumptions, unjustifiably punished crack offenders far more harshly than other similarly-situated drug offenders, and had a disproportionate impact on African Americans. *See Dorsey v. United States*, 567 U.S. 260, 268-69 (2012); *Kimbrough v. United States*, 552 U.S. 85, 96-98 (2007). Sections 2 and 3 of the Fair Sentencing Act modified the statutory penalties for violations of Title 21 involving crack by increasing the weight ranges to which § 841(b)'s statutory penalties apply. Because felony violations of § 841 are predicates for violations of § 848, Congress' amendment of § 841 necessarily amended § 848.

The Fair Sentencing Act, however, was not made retroactive. *See Dorsey v. United States*, 567 U.S. 260, 282 (2012). In 2018, Congress passed the First Step Act to allow prisoners to seek resentencing of certain offenses committed before the Fair Sentencing Act was passed. When a claim is brought by a defendant for First Step Act relief, the Act requires the court to engage in a two-part process. First, the court must determine whether the defendant has committed a "covered offense," a determination that should reach the same result regardless of the specific facts of the case or the conduct of the defendant before the court at that time. *United States v. Gravatt*, 953 F.3d 258, 262 (4th Cir. 2020). An offense must be deemed "covered" or

not, based on the statute of conviction itself, not on individual circumstances or the facts on the ground. *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020); *Gravatt*, 953 F.3d at 262; *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020).

Second, and only *after* the court has determined an offense is "covered," the Act requires that the defendant's sentence be reconsidered, at which point the sentencer, while not required to impose a different sentence from the one originally given, *is* required to consider the entire range of factors that go into a sentencing determination, ensuring that the sentence imposed is sufficient, but no more than necessary, to provide just and adequate punishment, and considers post-conviction evidence judged under contemporary legal standards. *See, e.g., United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020). A court must not conflate the determination of whether a particular defendant's sentence should be reduced with its initial determination of whether the defendant has committed "covered offenses." *See, e.g. Gravatt*, 953 F.3d at 264; *United States v. Woodson*, at 817.

(a) Violations committed pursuant to 21 U.S.C. § 848 are "covered offenses."

Mr. Johnson's entitlement to reconsideration of his CCE offenses turns on the determination of whether his statute of conviction was modified by the Fair Sentencing Act. Mr. Johnson was convicted of offenses pursuant to both subsections (a) and (e) of 21 U.S.C. § 848. The statute of conviction for each of these subsections is 21 U.S.C. § 848. This is so because all of the crimes punished by the statute rest on an initial determination that the accused has engaged in a continuing criminal enterprise, specifically defined by § 848(c). Subsections (a), (b), and (e) each lay out

additional elements that, if found, carry specific penalties. None of the violations under these subsections can exist independent of subsection (c). Indeed, the government conceded in previous litigation that a violation of Title 21 is a covered offense under the First Step Act where the statute under which the movant was convicted makes reference to, or has as a predicate, a statute amended by sections 2 and 3 of the Fair Sentencing Act. These concessions include 21 U.S.C. § 848(b) and (e). *See* Section II, *supra.*

Moreover, the Fourth Circuit has already laid the groundwork for determining how to decide what constitutes a "covered offense" for purposes of the First Step Act. That court has held that "[t]he most natural reading of the First Step Act's definition of 'covered offense' is that 'the statutory penalties for which were modified by [certain sections of the Fair Sentencing Act]' refers to 'a Federal criminal statute' rather than 'a *violation* of a Federal criminal statute.'" *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019) (citing Pub. L. No. 115-391, at § 404(a), 132 Stat. at 5222) (alterations and emphasis in original); *see also United States v. Boulding*, No. 19-1590, 2020 WL 2832110 (6th Cir. June 1, 2020); *United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020) (holding that "the statute of conviction alone determines eligibility for First Step Act relief"). In *Wirsing*, the Fourth Circuit emphasized that Congress gave no indication when passing the First Step Act that it "intended a complicated and eligibility-limiting determination at the 'covered offense' stage of the analysis." *Wirsing*, 943 F.3d at 186; *see also Brown*, 2020 WL 3106320, at *4.

In *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020), the Fourth Circuit undertook a comprehensive analysis of what the First Step Act means when it uses as a focal point a modification of penalties by the Fair Sentencing Act to the statute of conviction. In *Woodson,* the Fourth Circuit rejected the government's argument that the specific penalties the defendant was subject to must have been explicitly amended by Section 2 or 3 of the Fair Sentencing Act in order for his violations to constitute a "covered offense." The court explained that, for example, the defendant's convictions under both subsections 841(b)(1)(B)(iii) and 841(b)(1)(C) had been "modified" by the Fair Sentencing Act even though neither Section 2 nor 3 of the Fair Sentencing Act referred to them directly. This is because Section 2 of the Act changed the applicable drug weights triggering a sentence within 841(b)(1)(C), which had the effect of changing the penalty. Thus, Congress had no need to amend the text of these provisions in order to effect the penalties connected to them. *Woodson*, 962 F.3d at 816. This, the court noted, "accords with the ordinary meaning of the term 'modified,' which 'includes any change, however slight. [citations omitted]." *Woodson*, 962 F.3d at 816. The court explained:

> the relevant change for purposes of a "covered offense" under the First Step Act is a change to the statutory penalties for a defendant's statute of conviction, not a change to a defendant's particular sentencing range as a result of the Fair Sentencing Act's modifications. *See Wirsing*, 943 F.3d at 185-86. Section 2 of the Fair Sentencing Act shifted the entire sentencing scale for crack cocaine trafficking offenses.

The court concluded that "even defendants whose offenses remain within the same subsection after Section 2's amendments are eligible for relief," even if Section

2 of the Fair Sentencing Act did nothing to lower the maximum statutory sentence or any mandatory minimum. *Woodson*, 962 F.3d at 817.

The analysis in *United States v. Brown*, No. 3:08-cr-00011-1, 2020 WL 3106320 (W.D. Va. June 11, 2020), is persuasive and adopts a methodology consistent with that used by the Fourth Circuit in both *Wirsing* and *Woodson*. Employing the plain reading that court has accorded to the definition of "statute of conviction," *Wirsing,* 943 F.3d at 186, the district court in *Brown* noted the "most straightforward solution" was to consider § 848 in its entirety as the statute of conviction. *Brown*, 2020 WL 3106320, at *4; *see also Dean*, 2020 WL 2526476, at *3 (holding § 848 is the statute of conviction and convictions under § 848(a) are eligible under the First Step Act, as a result). This natural reading of the term "statute of conviction" acknowledges that, had it chosen to, Congress could have limited the Act's coverage only to those crimes committed under § 841, or to non-violent offenses, or to non-CCE offenses, or directed the courts to consider only "offenses" for which the penalty had been modified. Congress did not choose any of these routes, and the courts applying the Act must assume Congress meant what it said. *See, e.g., Gravatt*, 953 F.3d at 264 (noting that if Congress had intended for the Act not to apply in a certain manner, "it could have included that language. But it did not. We decline to expand the limitations crafted by Congress.").

Brown reached the same result via a more specific route, as well. It determined that, given the brevity of 21 U.S.C. § 848 and its focus on one type of conduct – continuing criminal enterprise—§ 848 must be considered a unitary whole, punishing

acts that involve CCEs. As such, § 848(c) stands as the centerpiece of the statute, because it defines what constitutes a CCE. *Brown*, 2020 WL 3106320, at *4. Subsections 848(a), (b), and (e) then define various penalties to be imposed, depending on additional factors described within each of those subsections, but which all fall under the "umbrella" created by § 848(c). *Id.*

Brown then determined that, because some of the penalties for violations of § 848 have been modified, the statute of conviction as a whole has been modified, and violations under any provision of it are, therefore, covered offenses. In this regard, the *Brown* court noted (as the government had conceded) that § 848(b) was modified by the Fair Sentencing Act. 2020 WL 3106320, at *2. The court also noted that a sister court had previously found that the penalty imposed under § 848(e)(1)(A) was modified by the Fair Sentencing Act. *Id.* at *4 (citing *Davis*, 2020 WL 1131147, at *2). The court thus concluded that 21 U.S.C. § 848 is a covered offense *in toto* "because at least one of the penalties . . . was modified by Section 2 or 3 of the Fair Sentencing Act." *Brown*, 2020 WL 3106320, at *4. Thus, any violation of § 848—that is, any continuing criminal enterprise as defined by § 848(c) and penalized under any provision of § 848—constitutes a covered offense.

As noted in Section II, *supra*, many other courts have also determined that § 848 is a covered offense. These decisions comport with both precedent, reason and the public policy behind the First Step Act – that the determination of what constitutes a "covered offense" be uncomplicated, broad and categorical–and only thereafter may

the sentencer apply discretion in deciding whether or not to reduce the sentence for those covered offenses.

Relying on a 1997 case, *United States v. NJB*, 104 F.3d 630 (4th Cir. 1997), the government urged, and the district court agreed, that § 848(e) is a standalone offense and should be considered Mr. Johnson's "statute of conviction." But *NJB* involved the narrow and very different question whether the Government had given a juvenile defendant proper notice that the offense he had committed (not the statute he had violated) was a crime of violence. That the district court and the government misplaced reliance on *NJB* is confirmed by the author of that opinion, who dissented from the denial of Mr. Johnson's motion for a stay of execution, concluding that Mr. Johnson's "statute of conviction" was indeed § 848, viewed as a unified whole. (APP.347 (Motz, J., dissenting).)

(b) In the alternative, subsection 848(e) of 21 U.S.C. 848 is a covered offense because, even if deemed a stand-alone statute, its penalties have been modified by operation of the Fair Sentencing Act.

Because the penalties for violation of 21 U.S.C. § 848(e) have themselves been modified by virtue of the Fair Sentencing Act, even if it is considered a stand-alone statute, offenses committed pursuant to it must still be deemed "covered offenses." Section 848(e)(1)(A) provides:

> (e) Death Penalty
>
> (1) In addition to the other penalties set forth in this section __
>
> (A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of

> this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death[.]

The quantities of crack cocaine that now constitute a violation of § 841(b)(1)(A) were explicitly changed by Section 2 of the Fair Sentencing Act. Thus, someone who could have been convicted for crack distribution offenses under § 841 prior to passage of the Fair Sentencing Act would no longer be chargeable under § 848(e)(1)(A). While, by its terms, the First Step Act does not invalidate these, or any other, convictions under § 841 or § 848, someone being charged today would have to be charged differently from the way he or she was before passage of the Fair Sentencing Act. Thus, the First Step Act modified penalties applicable to § 848(e)(1)(A) and, therefore, convictions under the § 848(e) "statute" must be deemed "covered offenses."

2. When a prisoner is eligible for reconsideration of sentence under the First Step Act, the sentencer must consider post-conviction evidence under current legal standards to determine whether the death penalty is still appropriate.

When considering resentencing, the sentencer must engage in a robust analysis of whether a sentence reduction is appropriate under current legal standards, and only after considering the entire range of factors that go into a sentencing determination, including post-conviction prison adjustment. While not required to impose a different sentence from the one originally given, the court (or jury) must ensure that the sentence imposed is sufficient, but no more than necessary, to provide just and adequate punishment. *See, e.g.*, *Chambers*, 956 F.3d at 674.

Chambers is consistent with holdings of this Court in other contexts. *See, e.g.*, *Pepper v. United States*, 562 U.S. 476, 491 (2011) (holding that in the resentencing context, post-sentencing evidence "may be highly relevant to several of [those] factors."). Given the overwhelming evidence of Mr. Johnson's intellectual disability and his pristine prison record extending beyond two decades, a legally appropriate sentence reconsideration would have to yield a sentence less than death. This robust analysis is something the district court refused to do, insisting instead it was not its role to disrupt the sentence imposed by Mr. Johnson's 1993 sentencing jury. (APP.255.) In fact, that is precisely the district court's role.

While a court can decide not to reduce any defendant's sentence under the First Step Act, it cannot defer, as the district court did here, to the "will of the community" as reflected under a different sentencing regime. The "will of the community" is reflected in part through legislation, including the First Step and Fair Sentencing Acts, which represent a declaration of the community's public policy goals. Mr. Johnson will be able to show a nearly unblemished and non-violent history for the last 27 years. (APP.293.) Here, the public policy requires reconsideration of sentence for an eligible offense, which the district court violated by reflexively deferring to the "will" of the original jury. *See* Pub. L. No. 115-391, § 404(c) (2018) (requiring the district court to "complete review on the merits" and consider the sentencing factors enumerated in 18 U.S.C. § 3553(a); *see, e.g., Chambers*, 956 F.3d at 674-75. ("There are generally no limitations on the types of character and background information a court may consider for sentencing purposes.").

IV. Mr. Johnson will be irreparably injured without a stay.

Because the government intends to execute Mr. Johnson tonight, he unquestionably faces irreparable injury. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (recognizing that irreparable injury "is necessarily present in capital cases").

V. A stay will not substantially injure the United States, and the balance of the equities supports a stay.

Staying Mr. Johnson's execution will not substantially injure the United States. The government initially set an execution date for Mr. Johnson in 2006, but could not carry out the execution then because of flaws in its execution protocol. Having announced a need to revise its execution protocol, the government spent 2011 to July 2019 without any execution protocol at all. (*See* APP.227.) It then waited another 16 months to reschedule Mr. Johnson's execution—and did so only *after* Mr. Johnson had already brought his First Step Act litigation. (*See* APP.256.) Compounding matters, it scheduled the execution with less than eight weeks' notice, before multiple major holidays, and during a pandemic.

This case is extraordinary. Overwhelming and unrefuted evidence—which "no federal court has ever . . . considered," (APP.345)—demonstrates Mr. Johnson's intellectual disability and the fallacies of Dr. Cornell's decades-old assessment; racial inequities, now addressed by the First Step Act, tainted his sentencing proceeding; and federal statutes give him robust rights to correct those injustices. Although the government normally has a "strong interest" in "proceeding with its judgment," *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004) (citation omitted), no such interest exists here.

Having shown no urgency for years now, the government cannot justify why executing Mr. Johnson must happen immediately and despite the troubling claims he has raised. And the government has no interest whatsoever in executing a prisoner in violation of federal law.

The equities also favor a stay. This is not a case where a death row prisoner is bringing a last-minute motion for stay of execution as a tactical step. *See Gomez v. U.S. Dist. Ct.*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the balancing of the parties' interests should include considering whether a stay application is last-minute or otherwise manipulative of the habeas process). Mr. Johnson has timely and diligently pursued his challenges under both the FDPA and the First Step Act.

First, the execution claim in Mr. Johnson's current § 2255 motion could be raised only "[w]hen the sentence is to be implemented." 18 U.S.C. § 3596(a), (c). Mr. Johnson has secured additional evidence and expert testimony demonstrating his intellectual inability. Once the government scheduled Mr. Johnson's execution for January 14, 2021, Mr. Johnson promptly filed, on December 14, 2020, a § 2255 motion in the district court challenging the implementation of his sentence under the FDPA.

Likewise, Mr. Johnson has not been dilatory in his pursuit of resentencing under the First Step Act. He sought this relief in August 2020, just months after courts determined in non-capital cases that 21 U.S.C. § 848 was a covered offense, and after the district court determined that any sentencing reconsideration had to consider post-conviction conduct. *Davis*, 2020 WL 1131147, at *2; *Jimenez*, 2020 WL

2087748, at *2; Mem. Order at 5, *United States v. Kelly*, No. 94-CR-163-4 (E.D. Va. June 5, 2020), ECF No. 1133.

Seven judges below believed Mr. Johnson was entitled to a stay on these claims. As the dissent noted, both were timely: "If anything, these emergency motions became necessary only because the Government scheduled his execution while his First Step Act claim was being litigated." (APP.814 (Wynn, J., dissenting).)

VI. Executing Mr. Johnson now serves no legitimate public interest.

When Congress passed the ADAA and the FDPA, it concluded that the public has an interest in ensuring that the United States does not execute intellectually disabled people. *See* 21 U.S.C. § 848(*l*) (repealed); 18 U.S.C. § 3596(c). Likewise, the First Step Act reflects the public interest in allowing people such as Mr. Johnson who were subject to a discriminatory sentencing regime to seek resentencing. This Court should not permit the government to execute Mr. Johnson before he can exercise his fundamental rights under these statutes.

CONCLUSION

Mr. Johnson respectfully requests that this Application for a Stay of Execution be granted.

Dated: January 14, 2021

Respectfully submitted,

/s/ Shay Dvoretzky

Shay Dvoretzky*
Donald P. Salzman
David E. Carney
Wallis M. Hampton
Jonathan Marcus
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, NW
Washington, DC 20005
Ph: (202) 371-7246
Fax: (202) 661-8295
Email: david.carney@skadden.com

Counsel for Corey Johnson

**Counsel of record for Mr. Johnson, and Member of the Bar of the Supreme Court*

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b), I certify that the document contains 40 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d)

/s/ Shay Dvoretzky
Shay Dvoretzky