NO. 13-1433

IN THE
Supreme Court of the United States

KEVAN BRUMFIELD ,
Petitioner,

V.

BURL CAIN, WARDEN
LOUISIANA STATE PENITENTIARY,
Respondent.

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

BRIEF AMICI CURIAE OF CHIEF JUSTICE PASCAL F. CALOGERO, JR., THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (LACDL), & THE PROMISE OF JUSTICE INITIATIVE (PJI) IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

Chief Justice Pascal F. Calogero, Jr. of the Louisiana Supreme Court, retired, was elected to the Louisiana Supreme Court in 1972, and sworn in as Supreme Court Chief Justice in 1990. In December of 1994, Chief Justice Calogero was appointed by U. S. Supreme Court Chief Justice William H. Rehnquist to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States, and, in 1995, he commenced serving on the National Center for State Courts Time on Appeal Advisory Committee. In 1997, he was elected to the Board of Directors of the Conference of Chief Justices. Chief Justice Calogero retired in 2008.

The *Louisiana Association of Criminal Defense Lawyers* (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL has been an instrumental partner in the bi-partisan effort to reform indigent

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[1] Pursuant to this Court's Rule 37, *Amicus* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

defense services in Louisiana. LACDL has been involved in the effort to reform indigent defense services which resulted in the creation of the Louisiana Indigent Defender Board (LIDB), its transformation into the Louisiana Indigent Defense Assistance Board (LIDAB), and the current Louisiana Public Defender Board (LPDB), on which a member of LACDL serves *ex officio*. See La. R.S. 15:146 (B) (6)(a). The mission of LACDL is to promote a fair, accurate, and humane criminal justice system through education, advocacy, and the development of effective and professional defense lawyers.

The *Promise of Justice Initiative* (PJI) is a private, non-profit organization that advocates for humane, fair, and equal treatment of individuals in the criminal justice system. PJI is located in New Orleans Louisiana. PJI was created to advocate for the constitutional commitment to decency and justice. Board members of PJI include former Chief Justice of the Louisiana Supreme Court, Chief Justice Calogero, responsible for the creation of the Louisiana Indigent Defender Board, and author of the decision in *State v. Peart*, 621 So. 780 (1993) and, now retired Honorable Judge Calvin Johnson, elected in 1990 to the Criminal District Court in Orleans Parish, the first African-American Chief Judge of that court, responsible for the ruling in the district court in *State v. Peart*, and ultimately a significant participant in the effort to transform the indigent defense system after Hurricane Katrina.

SUMMARY OF ARGUMENT

Mr. Brumfield's post-conviction case came in the *lacunae* between the system that existed prior to the closure of the federal resource center, and the system that exists today. It is unquestionable, that if tried today, or even any period after 2004, or even if had proceeded into state conviction after 2004, or even if he had been just been assigned state post-conviction counsel from a state funded office rather than reliant on pro bono counsel, he would have had access to state funded resources to prepare and present a claim of intellectual disability.

This gap in services arose during Louisiana's long struggle to fulfill its obligations to fully fund indigent defense. Amicus LACDL has been at the heart of that struggle for thirty years. Nowhere has this struggle had more consequential ramifications than in the context of Louisiana's administration of capital punishment.

While petitioner was in state post-conviction, this Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). This Court held the execution of individuals with mental retardation to be cruel and unusual punishment, directing the states to "develop [an] appropriate way[] to enforce the constitutional restriction upon its execution of sentences" of death against intellectually disabled defendants. *Id.* at 321.

The decision in *Atkins* came in the midst of significant crisis in the funding of capital cases in Louisiana, occurring shortly after the Louisiana Legislature created a statutory requirement to provide counsel in state post-conviction, but before that obligation was fully funded. The crisis ultimately resulted in Acts 2007, No. 307, creating what is now called the Louisiana Public Defender Board (LPDB).[2]

This *Amicus Brief* provides factual background on the eighteen other defendants in Louisiana who were prosecuted prior to this Court's decision in *Atkins*, and whose claims of intellectual disability were then addressed on direct appeal or post-conviction.[3] As demonstrated below, each defendant was ultimately provided funding to

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[2] At the time that Mr. Brumfield's case proceeded through state post-conviction, the Louisiana Indigent Defense Assistance Board (LIDAB) was responsible for funding capital cases on direct appeal and in state post-conviction. As explained later, the mandate was not funded at the outset, and a number of individuals such as Mr. Brumfield had to rely on *pro bono* counsel. Mr. Brumfield was the only individual with an *Atkins* claim who did not receive funds to develop evidence supporting exemption from capital punishment due to intellectual disability.

[3] The *Amicus Brief* does not address cases that were tried after *Atkins v. Virginia*, where defendants raised the issue prior to trial, and the claim was rejected by a jury.

develop and present their *Atkins* claim in the state courts, or, as in a few cases, the evidence supporting intellectual disability was developed by the Loyola Death Penalty Resource Center, whose funding (for all expenses, including experts) was provided by the Defender Services Office of the Administrative Office of the United States Courts.

The funding that was provided to each *Atkins* claimant was secured through various state-funded capital defender offices. The funds provided compensation for the staff attorneys and for experts in the field of intellectual disability, including psychologists and investigators to specifically determine the adaptive functioning of each individual client.

LIDAB contracted with a number of organizations to provide this representation, including the Capital Appeals Project (CAP), the Louisiana Capital Assistance Center (LCAC), the Capital Post-Conviction Project of Louisiana (CPCPL), and the Baton Rouge Capital Conflicts Office (BRCCO). In April of 2003, LIDAB created a special *Atkins* fund to provide experts for cases that were either on direct appeal, or in state post-conviction and represented by CPCPL.[4] At the

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[4] The one-time allocation of funds to handle remand cases was ultimately not sufficient. After the depletion of this fund,

time this case proceeded, however, the fund was not available for individuals like Petitioner who were represented by *pro bono* counsel in state post-conviction.

In each of the described cases, it is shown that the *Atkins* claimants were provided an opportunity to present and litigate their claims *via* these offices. In Louisiana's chaotic effort to enforce the protections of *Atkins*, Petitioner Brumfield appears to be the only condemned prisoner with who did not receive state resources to develop his claim.

Additionally, this amicus brief explains the judicially- and legislatively-imposed changes in law for capital post-conviction petitioners beginning in 1999, at the close of the federally-funded death penalty resource center. As shown, those changes, including access to state public defender expert funding, provided other condemned prisoners fair and adequate opportunities to develop evidence that categorically exempted them from capital punishment.

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resources were secured through the state funded capital defender offices.

ARGUMENT

I. The Louisiana Supreme Court Adopted Basic Procedures For Handling *Atkins* in Cases on Appeal and In Post-Conviction in Louisiana Which Were Applied to Every Defendant Except Petitioner.

The handling of *Atkins* cases on appeal and in post-conviction in Louisiana has been governed by court rule. While Louisiana's legislature ultimately responded to *Atkins* by implementing a statutory provision, La. C.Cr.P. art. 905.5.1, the Court held that the Article only applies at the trial level.[5]

In response to this Court's decision in *Atkins*, the Louisiana Supreme Court adopted a procedure for handling claims of intellectual disability in cases that had been tried prior to the *Atkins* decision. The state Supreme Court held that, while

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[5] *See State v. Dunn*, 974 So. 2d 658, 662 (La. 2008), discussed *infra* ("**[W]e find that, by its terms, Article 905.5.1 does not apply to the present situation.** Because the legislature has not established a procedure to be used for Atkins hearings conducted post-trial and/or post-sentencing, the state of the law for cases in a post-verdict posture is the same as it was at the time we issued our decision in *Williams*.") (emphasis added).

the defendant does not have an "automatic right to a hearing on the issue of mental retardation," he is entitled to a hearing if there is "sufficient evidence to raise a reasonable doubt" as to the issue. *State v. Williams*, 831 So. 2d 835, 858 n.33 (La. 2002) (citation omitted). The Court made clear that this did not mean that the defendant must provide proof to prevail on the claim, but only that he must "com[e] forward with some evidence to put his mental condition at issue." *Id.*

Borrowing from Louisiana's competency to stand trial provisions, La. C.Cr.P. art. 641, et seq., *Williams* held that the "procedure will allow for court-appointed experts to examine the defendant," and cautioned that only experts "with the appropriate expertise to diagnose mental retardation" must examine the defendant, and the State and the defendant must also be given the right to independent mental examination of the defendant by experts of their choice. *Id.* at 859.

The evidentiary standard at the hearing on the issue was "the preponderance of the evidence standard." *Id.* at 859. The definition of mental retardation adopted by the court required i) evidence of significantly sub-average general intellectual functioning; ii) deficits in adaptive behavior; and iii) manifestation during the developmental period. It was consistent with the

clinical definitions quoted and adopted by the Court in *Atkins*. *See Williams*, 831 So. 2d at 852–54.[6]

II. Resolution of Other Cases Pending at the Time of *Atkins*

At the time *Atkins* was issued, there were 87 people on Louisiana's death row.[7] After *Atkins*, eighteen Louisiana death row inmates (besides Petitioner Brumfield) whose cases were on appeal or in post-conviction have brought *Atkins* claims. In every case except for the Petitioner's, the claimant appears to have had access to expert assistance and received an opportunity to be heard on the *Atkins* claim:

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[6] *Williams* cited the AAMR 10th edition's definition and specifically noted that the standard error of measurement of the individual testing instruments must be taken into account when reviewing *Atkins* claims. *Id.* at 853 n.26. Likewise, *Williams* cites to the DSM IV, *id.* at 853 n.25, which states clearly at pp. 41–42, "it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75."

[7] *See* DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, DEATH ROW U.S.A. 26 (2002), *available at* www.naacpldf.org/files/publications/DRUSA_Summer_2002.pdf. The number listed in the document is 96 as of July 2002. Nine individuals listed in the file were in brackets, however, reflecting that they had previously had their convictions or sentence reversed.

1. Corey Williams' case was pending on direct appeal when this Court rendered the *Atkins* decision. *See Williams*, 831 So. 2d 835. The evidence introduced at his trial by his own expert was that he was not mentally retarded, despite a low IQ score, because the expert described the defendant as "street smart." *Id.* at 856. In the first post-*Atkins* appellate decision addressing intellectual disability determinations, the Louisiana Supreme Court remanded for an evidentiary hearing. *Id.* at 861. State public defender funding was ultimately available to counsel to retain appropriate experts to conduct an adaptive functioning evaluation, and administer testing. Following this assessment, an intellectual disability expert generated a report opining that the defendant was mentally retarded. The district court then appointed its own experts to assess the defendant's intellectual disability. After a four-day hearing, the district court granted relief, holding that Williams was a person with intellectual disabilities. *See State v. Williams*, 1st Judicial District Case No. 193,258-3 (Feb. 20, 2004) (unpub. order). Williams was represented on appeal by lawyers from the state-funded Capital Appeals Project (CAP) and in the trial court by the state-funded Louisiana Capital Assistance Center, with access to state funds to prepare and present his *Atkins* claim.

2. James Dunn's case was pending on direct appeal when this Court rendered the *Atkins* decision. *See State v. Dunn*, 831 So. 2d 862 (La. 2002). The evidence at trial indicated that Dunn achieved an IQ score of 71. Though an expert opined that he was mentally retarded at his pre-*Atkins* trial, the Court noted that the expert did not "adequately focus on the developmental period of Dunn's life—a critical time period for determining whether one is mentally retarded." *Id.* at 884. The Louisiana Supreme Court remanded for an evidentiary hearing. *Id.* Dunn was represented in part by CPCPL[8] on direct appeal and by the BRCCO on remand. Thus, state public defender funding was readily available to retain appropriate experts to conduct an adaptive functioning evaluation and administer testing. Following this assessment, an intellectual disability expert generated a report opining that the defendant was mentally retarded. The district court appointed its own experts to assess the defendant's intellectual disability. After a

[8] CPCPL was created in 2001 to provide representation in post-conviction and on appeal in cases where, due to a conflict of interest, CAP was unable to represent the defendant. CAP represented Mr. Dunn's co-defendant, Anthony Scott. As such, CPCPL enrolled on behalf of Mr. Dunn prior to oral argument on direct appeal, and litigated the claim of mental retardation in the Louisiana Supreme Court.

multi-day hearing at which experts testified, the trial court denied relief. The Louisiana Supreme Court affirmed the ruling, observing: "In this instance, it is clear defendant suffers from low intellectual functioning, but, based upon all the evidence before us, we do not find defendant has met his burden to establish the trial court erred in finding he is not mentally retarded." *State v. Dunn*, 41 So. 3d 454, 473 (La. 2010).

3. Joseph Carmouche's case was pending on direct appeal at the time this Court issued the *Atkins* decision. *See State v. Carmouche*, 872 So. 2d 1020 (La. 2002). The evidence at his trial indicated that he had an IQ in the 70–80 range. After his counsel sought rehearing based upon *Atkins*, the Louisiana Supreme Court remanded the case for an *Atkins* hearing.[9] Carmouche was represented by two state-funded offices, primarily CAP[10] on direct

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[9] *See State v. Carmouche*, 872 So. 2d 1020, 1049 (La. 2002) ("On remand of this case, the district court is to consider pleadings from relator and from the state and determine whether relator has 'provided objective factors that . . . put at issue the fact of mental retardation.'") (*quoting Williams*, 831 So. 2d at 857).

[10] CAP was created in 2001, and enrolled on Mr. Carmouche's behalf after the opinion had been issued for the purpose of filing rehearing and seeking certiorari.

appeal and LCAC on remand. Thus, counsel had the necessary funding to retain appropriate experts to conduct an investigation to identify evidence of adaptive deficits. Counsel retained an expert who examined the defendant and generated a report opining that the defendant was a person with intellectual disabilities. At the scheduled hearing, the State ultimately conceded that the defendant was a person with intellectual disabilities; he now has a life sentence. *See State v. Carmouche*, 15th Judicial District Case Nos. 54,122; 54,123; 54,124 (Oct. 11, 2004) (unpub. order).

4. Anthony Scott was sentenced to death by a jury prior to this Court's opinion in *Atkins*. He raised the issue of intellectual disability for the first time on direct appeal. *See State v. Scott*, 921 So. 2d 904, 959 (La. 2006). The Court noted that "[t]he record contains several IQ tests of the defendant over his lifespan ranging near the borderline range of intellectual functioning." *Id.* The State argued that a remand was unnecessary, because the record indicated that the "defendant at one time carried a school classification as learning disabled, which excludes by its definition the possibility that defendant is also mentally retarded." *Id.* Over the State's objection, the Louisiana Supreme Court ordered a remand for an *Atkins* hearing.

Id. at 960. Scott was represented by CAP on direct appeal. LCAC represented Scott on remand with access to funding to prepare and present his *Atkins* claim. Thus, counsel had the necessary funding to retain appropriate experts to conduct an investigation to identify evidence of adaptive deficits. Counsel retained an expert who examined the defendant and generated a report opining that the defendant was a person with intellectual disabilities. The district court appointed its own experts to assess the defendant's intellectual disability. Following this assessment, an order granting *Atkins* relief was entered in 2012. *See State v. Scott*, 23rd Judicial District Case No. 98-36-E (June 26, 2012) (unpub. order).

5. Eddie Mitchell's case was in state post-conviction at the time of *Atkins*. His conviction had been upheld years earlier. *See State v. Mitchell*, 674 So. 2d 250 (La. 1996). Mitchell was represented by attorneys by a state-funded defender office, the Louisiana Capital Assistance Center, with access to funds to prepare and present his *Atkins* claim. Funded counsel retained the psychiatrist who had previously performed the initial competency hearing in the case. The psychiatrist consulted with a psychologist who performed IQ testing. While Mr. Mitchell had been diagnosed with a low IQ score prior to

trial, counsel used state funds to conduct an investigation into adaptive deficits and to determine the age of onset. After a hearing, the state post-conviction court granted *Atkins* relief. *See State v. Mitchell*, 14th Judicial District Court Case No. 92-CR-006308 (7/26/2002) (unpub. order). This ruling was upheld on writs to the Louisiana Supreme Court. *See State v. Mitchell*, 860 So. 2d 1126 (La. 2003).

6. Tyronne Lindsey was tried and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Lindsey*, 543 So. 2d 886 (La. 1989). Lindsey was initially represented by the Loyola Death Penalty Resource Center, and thus had federal funding to develop his claim of intellectual disability. Unable to secure relief in state courts prior to *Atkins*, Lindsey filed a federal habeas corpus petition. After *Atkins*, and after securing funding to conduct an investigation of adaptive functioning, the parties agreed to *Atkins* relief. The parties then filed a joint out-of-time motion for a new penalty trial in the state district court, which was granted; Lindsey now has a life sentence. *See State ex rel. Lindsey v. Cain*, 24th Judicial District Case No. 80-0220-J (Apr. 5, 2004) (unpub. order).

7. Thomas Deboue was convicted and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Deboue*, 552 So. 2d 355 (La. 1989). In state post-conviction prior to *Atkins,* Deboue's counsel, the Loyola Death Penalty Resource Center, retained experts, conducted an evaluation of adaptive functioning, and argued that his intellectual disability exempted him from capital punishment. The state post-conviction court denied relief, rejecting the contention that it was cruel and unusual punishment to execute an individual with mental retardation. Based entirely on the evidence developed prior to *Atkins* by the Resource Center,[11] a federal district court granted *Atkins* relief in federal habeas corpus proceedings. *See Deboue v. Cain*, E.D. La. 01-464 (3/10/2005), Doc. 35. The Court observed that "all of the evidence relevant to petitioner's mental retardation was collected and analyzed at a time which substantially pre-dates the issuance of the *Atkins* opinion. The undisputed fact is that petitioner fits the definition and profile of a mentally retarded person." *Id.* at 7.

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[11] The funding of the intellectual deficit investigation was supplemented by court-ordered funding. See *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287 (La. 1992).

8. Allen Robertson was sentenced to death in 1995. His conviction and death sentence were upheld. *See State v. Robertson*, 712 So. 2d 8 (La. 1998). Robertson was represented by pro bono counsel in state post-conviction proceedings, who moved the district court for funds to develop an *Atkins* claim. In support, the motion cited *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992). Following the denial of expert funding by the district court, the Louisiana Supreme Court granted writs and consolidated his case with that of Jimmy Ray Williams. *See State ex rel. Robertson v. Cain*, 872 So. 2d 1073 (La. 2004); *State ex rel. Williams v. Cain*, 872 So. 2d 1073 (La. 2004). After the court's opinion in *State ex rel. Williams v. State*, 888 So. 2d 792 (La. 2004), Robertson then received state public defender funding to more fully develop an *Atkins* claim. His amended post conviction petition alleging an *Atkins* claim was denied by the trial court. The Louisiana Supreme Court granted writs and remanded for an *Atkins* hearing. *See Robertson v. Cain*, 17 So. 3d 960 (La. 2009). Robertson is now represented by CPCPL; his claim is still pending in state court.

9. Rogers Lacaze was sentenced to death in 1995 just four and a half months after his arrest on first degree murder charges. His conviction and death sentence were upheld

prior to this Court's opinion in *Atkins*. *See State v. Lacaze*, 824 So. 2d 1063 (La. 2002). The Louisiana Supreme Court rejected his claim that the execution of individuals with intellectual disability was cruel and unusual punishment, noting however that trial counsel had not discovered until after trial that the defendant had an IQ score within the limits of intellectual disability. Lacaze is represented by CAP. Thus, public defender funding was available to counsel to develop and litigate an *Atkins* claim in post-conviction, which remains pending in state court.

10. Frederick Gradley was convicted and sentenced to death, and his conviction and sentence were affirmed prior to this Court's opinion in *Atkins*. *See State v. Gradley*, 745 So. 2d 1160 (La. 1998). The Louisiana Supreme Court observed in upholding his sentence:

> Three psychologists testified about defendant's mental status. One opined that defendant was mildly mentally retarded with an IQ in the mid-sixties range. . . . Two other psychologists testified that defendant's IQ scores were in the borderline to low average range of 75 to 80. . . . Police officers that had dealt with defendant testified that he had never appeared to be

> mentally retarded in their dealings with him.

Id. at 1171. His case is funded by CPCPL; he received funding to litigate his *Atkins* claim in post-conviction, which remains pending in state court.

11. Jeremiah Manning was convicted and sentenced to death on May 7, 2002, just prior to this Court's decision in *Atkins*. *See State v. Manning*, 885 So. 2d 1044 (La. 2004). On direct appeal, the Louisiana Supreme Court rejected the defendant's request for a remand. *Id.* The Court noted that a psychologist "indicated defendant had been diagnosed as 'mildly retarded or at least slow learner level.'" *Id.* at 1107. In rebuttal, the State's psychiatrist "at the penalty phase, testified defendant's IQ was between 70 and 80" and "also stated he did not consider defendant mentally retarded, but rather that he functioned in the 'just below average' range." *Id.* The Court noted that

> In an appendix to his brief defendant has attached school records that were not submitted to the trial court. Appx., pp. 129–36. Because these reports were not submitted to the trial court, we will not consider them in our

> assessment of defendant's claim that the records support an *Atkins* remand.

Manning, 885 So. 2d at 1107 n.47. The Court affirmed his conviction and death sentence but noted that "in the event this judgment becomes final on direct review," the Clerk should "immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which . . . to enroll counsel to represent defendant in any state post-conviction proceedings . . . ." *Id.* at 1114. His case remains in post-conviction where he is represented by CPCPL and now has access to funding to develop and litigate an *Atkins* claim.

12. Antoine Tate was convicted and sentenced to death in February 2000. The Louisiana Supreme Court upheld his conviction and sentence after this Court's decision in *Atkins*. *See State v. Tate*, 851 So. 2d 921 (La. 2003). The Louisiana Supreme Court noted that the defense psychologist testified at trial that the defendant had borderline intellectual functioning and was not mentally retarded. *Id.* at 942. The Court affirmed his conviction and death sentence but noted that "in the event this judgment becomes final on direct review," the Clerk should "immediately notify the Louisiana Indigent Defense Assistance Board and provide

the Board with reasonable time in which . . . to enroll counsel to represent defendant in any state post-conviction proceedings . . . ." *Id.* at 943. His case remains in post-conviction where he now has access to funding to develop and litigate an *Atkins* claim.

13. Willie Tart was convicted and sentenced to death prior to *Atkins*. *See State v. Tart*, 672 So. 2d 116 (La. 1996). In its proportionality review, the Louisiana Supreme Court noted that Tart failed a number of grades, and was "classified as being learning disabled but not mentally retarded." *Id.* at 134. The Court observed "[a]lthough no I.Q. was determined at this time, the state asserts in brief that earlier school testing determined Tart's I.Q. as 82. The defense does not contest this result." *Id.* Subsequently, with the assistance of state public defender funding to develop and litigate an *Atkins* claim, Tart was permitted to seek *Atkins* relief in state post-conviction. *See State ex rel. Tart v. State*, 3 So. 3d 456 (La. 2009) ("Accordingly, our denial of writs in *State ex rel. Tart v. Cain*, 02-2132 (La. 11/26/03), 860 So. 2d 1126, in which relator sought relief on the basis of the intervening decision in *Atkins v. Virginia*, 536 U.S. 304 . . . without presenting the claim first to the district court does not preclude further proceedings designed to produce a definitive

answer to the question of whether relator is mentally retarded and so exempt from capital punishment. . . . [T]he district court is ordered to make a substantive ruling on whether relator qualifies as mentally retarded under *Atkins* and is hence ineligible for execution. . . . Although the district court has already taken evidence on the *Atkins* issue, it may conduct further evidentiary proceedings as it deems necessary to address the claim fully on the merits.") (internal citations omitted). Tart is represented by CPCPL and has access to state public defender funding to litigate his *Atkins* claim in post-conviction, which remains pending in state court.

14. Cedric Edwards was convicted and sentenced to death prior to *Atkins*. *See State v. Edwards*, 750 So. 2d 893 (La. 1999). On direct appeal, during the proportionality analysis of the Court's opinion, the Court observed: "Defendant has a learning disorder but managed to complete the 10th grade. His full scale IQ is 88, in the low average range, as determined by defense psychologist Dr. Mark Vigen." *Id.* at 912–13. Following direct appeal, Edwards was represented by CPCPL, and thus had state public defender funding to develop and litigate an *Atkins* claim. In state post-conviction, the defendant asserted that he was intellectually disabled and exempt from capital

punishment. He was able to retain experts to conduct an investigation into adaptive functioning and testing. The Louisiana Supreme Court granted his writ application and remanded the case for a full hearing. *See State v. Edwards*, 841 So. 2d 768, 768–69 (La. 2003) ("For the first time in this Court, relator has raised the question of whether he is exempt from capital punishment by reason of mental retardation."). Funded counsel conducted an investigation to identify evidence of adaptive deficits, and retained experts who examined the defendant. Edwards' over-all post-conviction petition claims remains pending. However, based upon the opinions of his retained experts, the *Atkins* claim was withdrawn.

15. Michael Cooks was convicted and sentenced to death prior to *Atkins*. *See State v. Cooks*, 720 So. 2d 637 (La. 1998). The Court observed that the Uniform Capital Sentence Report and the Capital Sentence Investigation Report noted that Cooks "graduated high school in special education. Testing revealed an I.Q. of 78 . . . ." *Id.* at 651. When Mr. Cooks' conviction and death sentence became final, the district court issued an execution warrant. On writs, the Louisiana Supreme Court stayed the execution and ordered the appointment of counsel. *See State ex rel. Cooks v. State*, 1999

La. LEXIS 3547 (La. Dec. 22, 1999) ("Relator's execution set for January 5, 2000, is stayed. This Court previously directed the district court to refer this case to the Louisiana Indigent Defense Assistance Board (LIDAB) for purposes of enrolling counsel to represent relator in post-conviction proceedings. *State v. Cooks*, 99-2541 (La. 8/25/99) 746 So. 2d 1292. The district court is directed to conduct immediately a hearing on the costs of enrolling counsel to represent relator and the source of funding for such representation, with the LIDAB present as an interested party with authority to subpoena witnesses. The district court shall take further steps as necessary to protect relator's interests, including the appointment of Neal Walker [an attorney employed by CAP] solely for purposes of representing relator at the hearing."). Ultimately CPCPL assumed the representation. Using state public defender funding, Cooks developed an *Atkins* claim. As a result of the evidence developed by post-conviction counsel, the court appointed a panel of experts who generated reports that Cooks was mentally retarded. His *Atkins* claim remains pending in state court.

16. Adam Comeaux was in post-conviction at the time this Court issued its holding in *Atkins*. *See State v. Comeaux*, 699

So. 2d 16 (La. 1997). Both parties stipulated to *Atkins* relief in 2003, after Mr. Comeaux's conviction and death sentence had already been affirmed.[12] The record in his case contained evidence that his IQ score was between 55 and 68. *See State v. Comeaux*, 699 So. 2d 16, 27–28 (La. 1997) (unpub. app.). Throughout this process, Comeaux had access to state public funding for experts.

17. Richard Hobley was tried and sentenced to death prior to this Court's opinion in *Atkins*. *See State v. Hobley*, 752 So. 2d 771 (La. 1999). Evidence of intellectual disability was raised on direct appeal chronicling pre-trial state testing showing Hobley had a 55 IQ. After the Louisiana Supreme Court reversed the death penalty on an unrelated claim, the State agreed not to seek the death penalty on retrial because of Hobley's intellectual disability. Hobley was represented by lawyers from the Loyola Death Penalty Resource Center on direct appeal, and was assisted by the CPCPL on remand post-reversal.

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[12] The Louisiana Supreme Court granted Mr. Comeaux penalty phase relief on direct appeal on an unrelated claim. *See State v. Comeaux*, 514 So. 2d 84 (La. 1987). Mr. Comeaux was again sentenced to death after his second penalty phase.

18. Herbert Welcome's conviction and death sentence were upheld in 1983. Evidence of his intellectual disability was presented at trial. *See State v. Welcome*, 458 So. 2d 1235, 1247 (La. 1983) (noting that a "psychiatrist, a witness for the defense, testified at trial that defendant had a mental age of eight years."). On rehearing addressing proportionality review, Justice Blanche, concurring, observed: "Herbert Welcome was mentally retarded. He was described by one psychiatrist as having a mental age of 8 years. The sanity commission found him to be mildly to moderately retarded." *Id.* at 1258. After the *Atkins* decision, the *Atkins* fund (identified *supra*) was used to provide counsel for the defendant. Counsel sought clemency based upon his intellectual disability and based upon *Ford v. Wainwright*. After a clemency hearing, where evidence of his intellectual disability and mental illness was not contested, Welcome's death sentence was commuted to life without the possibility of parole in 2003.

III. The Impact of the Indigent Defense Crisis on Capital Appeals and Post-Conviction

Petitioner's crime occurred the same year the Louisiana Supreme Court issued a sweeping

condemnation of Louisiana's indigent defense system, recognizing that "the provision of indigent defense services . . . is in many respects so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees . . . ." *State v. Peart*, 621 So. 2d 780, 291 (La. 1993); *see also State v. Wigley*, 624 So. 2d 425, 429 (La. 1993) (noting that "budget exigencies" had created "oppressive and abusive extension of attorneys' professional obligations" to indigent defendants).

Mr. Brumfield's conviction became final when his *Petition for Certiorari* was denied March 22, 1999, at the onset of a critical gap period, during which time Louisiana recognized the need for funding in post-conviction assistance but before that funding became readily available.

From 1988–1999, before it closed from lack of funding, the federally-funded Loyola Death Penalty Resource Center represented death-sentenced inmates after their direct appeals were affirmed. From 1999 until 2001, representation of indigent condemned prisoners was *ad hoc,* reliant on civil law firms to provide services *pro bono*. The quality of representation varied significantly.

In 1999, shortly after Brumfield's conviction became final, the Louisiana Legislature mandated that the new Louisiana Indigent Defense

Assistance Board (LIDAB) provide counsel on direct appeal and in post-conviction cases where an indigent has been sentenced to death:

> In a capital case in which the trial counsel was provided to an indigent defendant and in which the jury imposed the death penalty, the court, after imposition of the sentence of death, shall appoint the Indigent Defense Assistance Board, which shall promptly cause to have enrolled counsel to represent the defendant on direct appeal and in any state post-conviction proceedings, if appropriate.

La. R.S. 15:149.1 (Lexis 2000).[13]

The mandate came without full funding. As noted in the Louisiana Bar Journal in 2002:

> Attached to that bill was a fiscal note estimating that, in the first five years, the program would cost $1.3 million annually. Calculations were based on the number of persons on death row at the time and the number of new cases

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[13] The statute was amended and replaced in 2007 by La. R.S. 15:169.

> projected. The Legislature never funded the program, forcing LIDAB to find money within its existing $7.5 million budget to comply with the legislative mandate.[14]

In 2001, LIDAB initiated a contract with CAP to handle all direct appeals arising from convictions and with CPCPL to handle post-conviction cases. For inmates represented by those offices, funding for experts and lawyers was available. For the few who were represented by pro bono counsel, the process for securing funding and assistance remained troubled.

On December 1, 2004, in *State ex rel. Williams v. State*, the Louisiana Supreme Court identified the problem:

> This post-conviction proceeding concerns funding issues for an indigent death row inmate represented by *pro bono* counsel. Defendant argues the systematic provision of funds to some death row inmates seeking post-conviction relief

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[14] Ed Greenlee, *Feature: Justice In Louisiana: Indigent Defense: The Louisiana Indigent Defense Assistance Board*, 50 LA. B.J. 97, 101 (Aug. 2002).

> violates equal protection guarantees. Defendant's equal protection claim appears to have two facets. First he suggests that those represented by the Capital Post-Conviction Project of Louisiana (CPCPL) get more funding than he does and this fact disadvantages him. Second, he claims that the fact that he has to litigate his funding requests while those who have representation from CPCPL do not have to do so disadvantages him.

State ex rel. Williams v. State, 888 So. 2d 792, 792–93 (La. 2004). [15]

After outlining the facts contained in the record and analyzing the applicable statutes, the court determined that LIDAB was not fulfilling its obligations found in La. R.S. 15:151.2(E)(2) (repealed 2007). That statute provided in pertinent part, that LIDAB "shall also adopt rules regarding the provision of reasonably necessary services associated with the [post-conviction litigation],

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[15] The funding crisis reached a nadir during this period when even trial-level resources were insufficient. The Louisiana Supreme Court authorized district courts to stay prosecutions pending the delivery of funds. *State v. Citizen*, 898 So. 2d 325, 328 (La. 2005) (detailing the lack of funding between 2001 and 2004).

including investigative, expert, and other services." *Id.* The court stated, "[i]n reviewing the record, the arguments of both the State and the defendant, and the legislation and its history, we note there may be statutory violations in the manner in which the funding is allocated by LIDAB to indigent capital defendants in post-conviction proceedings." *State ex rel. Williams*, 888 So. 2d at 797.

The court then determined that the record needed expanding, noting: "**We are particularly interested in the question concerning LIDAB's adoption of a resolution to prohibit the provision of funds for expert witnesses to civil law firms handling capital post-conviction cases on a *pro bono* basis** . . . ." *Id.* (emphasis added). The case was thus remanded to the trial court for further hearings.

Following this decision, LIDAB implemented a rule that set forth guidelines for providing expert and investigative resources to all death row inmates, as mandated by 15:151.2(E)(2). Thus, no further evidence was taken by the trial court. That rule allowed *pro bono* counsel representing death-sentenced inmates to have full access to state public defender funding by application to the agency.

Eventually, after nearly a decade of effort (and a hurricane of historic proportions), reformers, due to the work of LACDL together with the

Louisiana Public Defender Association, the District Attorneys Association and other organizations, in 2007 obtained a major overhaul of the system by the enactment The Public Defender Act of 2007 (Act 307).

Mr. Brumfield's post-conviction case came in the *lacunae* between the system that existed prior to the closure of the federal resource center, and the system that exists today. He is the only one of those condemned individuals with an *Atkins* claim who did not receive state public defense funding. Comparison between the handling of petitioner Brumfield's case and others shortly thereafter is illustrative. As discussed above, *State v. Corey Williams* and *State v. Joseph Carmouche* both arose shortly after the creation of the Capital Appeals Project. Both were ultimately remanded to the district court for hearings at which they were able to use their state public defender expert funds, allowing the opportunity to present evidence of mental retardation—even though in *Williams* the defense psychologist had testified at trial that the defendant was not mentally retarded, and in *Carmouche*, an IQ score of between 70 and 80 was introduced into the trial record.[16]

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[16] *State v. Carmouche*, 872 So. 2d 1020, 1043 (La. 2002) ("Dr. Larry J. Benoit evaluated the defendant's IQ and determined that it was in the borderline range of 70–80. The defendant

The *Carmouche* case is particularly salient as the defendant was initially represented by appointed counsel on direct appeal, but transferred to CAP when it was created. The Louisiana Supreme Court issued a decision on his case on May 14, 2002. CAP took over the case on rehearing, and requested the case be stayed pending the decision in *Atkins*. After this Court decided *Atkins*, CAP supplemented the application for rehearing, and the Louisiana Supreme Court granted the rehearing request and remanded the case to the district court for a hearing.

> Application for rehearing granted; case remanded. For the first time in this Court, relator has raised the question of whether he is exempt from capital punishment by reason of mental retardation. Because the issue is a matter for the district court in the first instance, and because "not everyone faced with a death penalty sentence will automatically be entitled to a post-Atkins hearing," it is not appropriate for this Court to address

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did not assert insanity as a defense, but his mental state did comprise part of the defense case in mitigation, in which Dr. Benoit testified that the defendant's intelligence range was close to mild mental retardation.").

> the merits at this time or to order an evidentiary hearing on the claim. On remand of this case, the district court is to consider pleadings from relator and from the state and determine whether relator has "provided objective factors that . . . put at issue the fact of mental retardation." If relator carries his burden in that regard, and if the court finds reasonable grounds to believe that relator is mentally retarded, it shall hold a hearing at which the court will take testimony and other evidence and determine whether relator is mentally retarded and so may not be executed.

State v. Carmouche, 872 So. 2d at 1049, *on reh'g* Sept. 24, 2003 (internal citations omitted).

CAP counsel, with access to state public defender funds, was then able to fully develop an *Atkins* claim by retaining the appropriate experts to conduct an evaluation of adaptive functioning and testing. Following the proffer of the evidence in pleadings, the State agreed to relief. Thus, there was no hearing as remanded to determine whether Carmouche could cross the *Williams* threshold of putting at issue mental retardation, because he demonstrated intellectual disability using the state public defender funding for experts.

Also similar to this discussion is the case of Allen Robertson. Like Brumfield, his case was in post-conviction at the time *Atkins* was issued and he was being represented by pro bono counsel. After counsel's request for expert funding for an *Atkins* investigation was denied by the district court, the Louisiana Supreme Court granted writs (*State ex rel. Robertson v. Cain*, 872 So. 2d 1073 (La. 2004)) and consolidated his case with *State ex rel. Williams v. Cain*, 872 So. 2d 1073 (La. 2004). After the court's opinion in *Williams*, 888 So. 2d 792 (La. 2004), [17] Robertson easily secured public defender funding to develop his claim. *See supra* Part II(8). And, as stated above, Robertson's *Atkins* claim has been subjected to an evidentiary hearing, which is presently ongoing.

To be clear, Brumfield's state post conviction litigation was final on October 29, 2004. *See Brumfield v. State*, 885 So. 2d 580 (La. 2004) (denying review). He filed his federal habeas corpus petition on November 4, 2004 (the final date for filing a timely petition). The *Williams/Robertson* decision was handed down on December 1, 2004. Thus, unlike Robertson,

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[17] Following the Louisiana Supreme Court's decision, Williams received access to state public defender funding to develop his post-conviction claims. After he proffered proof, the state agreed to a settlement in his case.

Brumfield could not take advantage of the equitable change in the state public defender expert funds. Kevan Brumfield is the only person in the post-*Atkins* era in Louisiana who was not provided the tools in which to develop and present an *Atkins* claim. All others were given access to funding from state sources for appropriate expert evaluations to fairly present their claims of constitutional violations.

CONCLUSION

Amicus respectfully suggest that the judgment below should be reversed.

Respectfully submitted,

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