No. 13-1433

IN THE
Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONER

NICHOLAS J. TRENTICOSTA
SUSAN HERRERO
ATTORNEYS AT LAW
7100 St. Charles Ave.
New Orleans, LA 70118
nicktr@bellsouth.net

MICHAEL B. DESANCTIS
Counsel of Record
AMIR H. ALI
ADAM G. UNIKOWSKY
R. TRENT MCCOTTER
LEAH J. TULIN
DAVID A. WISHNICK*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mdesanctis@jenner.com

*Admitted in Illinois only;
supervised by principals of the firm

QUESTIONS PRESENTED

I. Whether a state court that considers the evidence presented at a petitioner's penalty phase proceeding as determinative of the petitioner's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

II. Whether a state court that denies funding to an indigent petitioner who has no other means of obtaining evidence of his intellectual disability has denied petitioner his "opportunity to be heard," contrary to *Atkins* and *Ford v. Wainwright*, 477 U.S. 399 (1986), and his constitutional right to be provided with the "basic tools" for an adequate defense, contrary to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

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INTRODUCTION

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that it is unconstitutional for the state to execute a person who is intellectually disabled.[1] Petitioner, Kevan Brumfield, was found to be intellectually disabled after a seven-day evidentiary hearing in federal district court – the only court to afford him an *Atkins* hearing. Nevertheless, he remains on Louisiana's death row.

Because Brumfield's 1995 trial pre-dated *Atkins*, no witness testified then that he satisfied the clinical criteria of intellectual disability, or that he did not. No witness was ever asked. Nevertheless, the penalty phase record revealed that Brumfield had scored an IQ of 75, that he has at best a fourth-grade reading level, that he spent much of his schooling in special education classes, that he needed someone to "help him function" both at school and at home, and that his "basic problem" was that he "could not process information." These are core indicia of intellectual disability.

Even after *Atkins*, however, the state postconviction court refused to afford Brumfield a hearing to demonstrate the appropriate clinical evidence of his intellectual disability. The court instead determined that Brumfield's pre-*Atkins* penalty phase record was itself sufficient to resolve his claim.

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[1] With the exception of quotations from the record or prior case law, this brief uses the term "intellectual disability" to describe the "identical phenomenon" historically referred to as "mental retardation." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

The state court's determination that Brumfield's pre-*Atkins* penalty phase record was dispositive of his intellectual disability was unreasonable and therefore not entitled to deference under 28 U.S.C. § 2254(d)(2). Independently, the state court's refusal to provide Brumfield with funding to develop the clinical evidence that was essential to demonstrate his intellectual disability, and thus his ineligibility for the death penalty, violated clearly established federal law and was not entitled to deference under 28 U.S.C. § 2254(d)(1).

For both reasons, the district court was justified in affording Brumfield a hearing under § 2254(d), and the Fifth Circuit's contrary decision should be reversed.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a) is reported at 744 F.3d 918. The district court's opinion (Pet. App. 17a) is reported at 854 F. Supp. 2d 366. Its order adopting the Magistrate Judge's Report and Recommendation (Pet. App. 99a) is unreported. The Magistrate Judge's Report and Recommendation (Pet. App. 101a) is unreported. The Louisiana Supreme Court's opinion rejecting Brumfield's application for supervisory and/or remedial writs (Pet. App. 168a) is reported at 885 So. 2d 580. The state trial court's oral denial of Brumfield's claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) (Pet. App. 170a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on February 28, 2014, and denied a timely petition for

rehearing on that same date. The petition for writ of certiorari was timely filed on May 29, 2014, and granted on December 5, 2014.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT

I. Capital Trial.

On January 7, 1993, off-duty Corporal Betty Smothers was killed during the course of an armed robbery while she was escorting a grocery store manager making a night deposit at a bank in Baton Rouge, Louisiana. Three men were involved in the robbery. Two were active shooters. The third drove the getaway car. There was no eyewitness testimony or physical evidence that linked Kevan Brumfield to the crime scene. Brumfield initially denied any involvement in the crime. After being interrogated, he confessed to having been the driver and, after further interrogation, to being one of the shooters.

Brumfield's primary defense at trial was that he was not present at the time of the murder and that he had been manipulated into giving a false confession after being interrogated for twenty hours, during which he was allowed neither food nor sleep, and was force-fed the interrogators' desired account of the events. The jury rejected that defense and found Brumfield guilty of first-degree murder.

II. Penalty Phase Proceedings.

At the sentencing hearing, the State's case for death focused largely on Brumfield's prior bad acts and the threat of his future dangerousness. The prosecution told the jury that "as long as he lives, others are in jeopardy and in danger." JA 152a. This danger would

exist, the State argued, even if Brumfield were to spend the rest of his life in prison:

> [T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with. . . . [H]e has no regard for anyone else, he has no regard for authority, he has no problem with brutalizing and killing police officers or battering them.

JA 152a-53a.

Brumfield's mitigation case focused primarily on his abusive childhood and the mental and emotional difficulties that he has had all his life. He did *not* put on a case that he was clinically intellectually disabled. No expert evaluated him for that purpose, and no witness was ever asked whether Brumfield is intellectually disabled.

Defense counsel called several of Brumfield's family members to testify about his difficult childhood. Counsel also presented the testimony of Brumfield's fourth grade teacher, and two experts: Dr. Cecile Guin and Dr. John Bolter. Dr. Guin was a social worker who described her role as developing "a profile of the person who's been found guilty of the crime so that everything about his life is known." JA 73a. She explained that, over the years, Brumfield had six different stepfathers or other temporary father figures. JA 82a. One, whom Dr. Guin described as "exceedingly abusive," would torture Brumfield and his siblings in profoundly disturbing ways. JA 83a. She told, for example, about

how he would decide which of the children in the household to beat by making each of them hold a finger in a glass of water. Whichever child's finger made the most ripples would get the beating. More often than not, the child whose finger trembled most was Kevan. JA 84a-85a.

Dr. Guin further testified that Brumfield's many problems manifested themselves literally from birth. She explained that Brumfield weighed only 3.5 pounds at birth. JA 96a. That, she said, is an indication "that something has gone wrong during the pregnancy." JA 76a. She explained that Brumfield "was born with slower responses than normal babies," and that "there is definitely a[n] indication that when he was born they knew that something was wrong at that point." JA 76a.

Dr. Guin explained that by the third grade, Brumfield's teachers "knew that there were problems," and they referred him for a special education evaluation at that time. JA 81a. Through a series of clerical errors in the East Baton Rouge School System, however, he remained in regular classes through the middle of the fifth grade. JA 87a, 98a. As Dr. Guin narrated, "the teachers know something's wrong with him, but can't get the help for him that's needed." JA 98a.

Dr. Guin testified that Brumfield appeared to have "learning problems" that were continuously misdiagnosed as a behavioral problem. JA 90a, 92a. Throughout that time, Brumfield manifested serious problems at school. She testified that he "simply couldn't" stay in his chair, JA 82a, and frequently acted out uncontrollably. JA 88a. "He could not function

with a lot of chaos" and thus did poorly even at recess. JA 86a, 88a. She explained that Brumfield was "teased at school all the time as a result of being different." JA 100a-01a. He had "impaired impulse control" and, whether at school or at home, needed someone to "help him function." JA 92a, 101a.

Dr. Guin described Brumfield as having "intellectual problems." JA 100a. She explained that Brumfield's teachers "questioned his intellectual functions" and "recognized the fact that he probably had a learning disability related to some type of slowness in motor development." JA 89a. Dr. Guin concluded that "Kevan's basic problem is that he – he could not process information." JA 98a. "When he received information, his mind did something a little differently with it than my mind would and your mind would." JA 98a.

Because of these issues, Brumfield spent much of his time in special education programs after the fifth grade. JA 87a-93a. He was transferred among fourteen or fifteen different schools by the time he was fourteen years old, and was committed to six out-of-home institutions beginning at age twelve. JA 94a, 101a.

Dr. Bolter, the only other expert to testify at the penalty phase, was qualified to testify to "the effects of brain injury or insult to somebody's central nervous system on their behavior." JA 124. He testified that Brumfield has "a basic deficit somewhere in the brain," and exhibits a "rapid rate of forgetting." JA 128a-30a. According to Dr. Bolter, Brumfield also appeared to have severe attention deficit disorder and to have developed "an antisocial personality" as he became an

adult. JA 127a-28a. Dr. Bolter further confirmed that Brumfield's very low birth weight put him at "risk of some form of potential neurological trauma," and that "this individual was in trouble many many many many years ago." JA 130a-31a.

He testified that he had administered a Wechsler IQ test to Brumfield and that Brumfield's score from that test was 75. JA 133a. He described this as "borderline general intelligence" and "on the low end of intelligence." JA 128a. He also described Brumfield's "academic skills" as "very poor." JA 128a. According to Dr. Bolter: "He's reading at about the fourth grade level, and that's simple word recognition. That's not even comprehension; that's just identifying [the words]." JA 128a. He testified that Brumfield's math and spelling were at about a sixth-grade level. JA 128a.

The entire penalty phase proceeding – from opening statements through jury deliberations – was completed in one day, at the end of which the jury recommended that Brumfield be sentenced to death.

III. State Postconviction Petition.

On March 25, 2000, Brumfield filed a petition for postconviction relief in state court alleging a number of grounds for relief from his conviction and sentence. JA 172a.

While that petition was pending, this Court decided *Atkins*, which held that intellectually disabled persons are ineligible for execution, "leav[ing] to the State[s]" the task of adopting an appropriate standard for intellectual disability. 536 U.S. at 317 (quotation marks omitted). Shortly thereafter, the Supreme Court of

Louisiana adopted the clinical definition of intellectual disability endorsed in *Atkins*. *See State v. Williams*, 831 So. 2d 835 (La. 2002). The court concluded that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *Id.* at 852-54.[2] The court further explained that a defendant would be entitled to an evidentiary hearing on his claim of intellectual disability where he "provides objective factors that will put at issue the fact of mental retardation." *Id.* at 857; *see also id.* at 858 n.33 (defendant must "com[e] forward with some evidence to put his mental condition at issue").

Following *Atkins* and *Williams*, Brumfield promptly amended his state petition to assert that he is intellectually disabled and that his execution would thus violate the Eighth Amendment. JA 193a-205a. Brumfield proffered the following objective facts indicating his intellectual disability:

- He had an IQ score of 75;
- He had a fourth-grade reading level;
- He was born with a very low birth weight (3.5 pounds);

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[2] As this Court did in *Atkins*, the Louisiana Supreme Court looked to definitions of the American Association of Mental Retardation and the American Psychiatric Association.

- Medical records from the time of his birth indicated "that he was born with slower responses than normal babies";
- He suffered from seizures as a child;
- He was placed in psychiatric hospitals and prescribed numerous psychiatric drugs;
- His learning and behavioral disabilities were noticed by his teachers as early as the third grade;
- He spent most of his schooling in special education classes; and
- At the age of 10, he was identified as having some form of learning disability.

JA 203a-04a.

Brumfield requested the opportunity to present further evidence of his intellectual disability at an evidentiary hearing. JA 205a. He also urged the court *not* to assume that it could resolve his intellectual disability based simply on the testimony provided at his penalty phase hearing. He warned that "while there was some intelligence related testimony, there is a complete absence of testimony or evidence dealing directly with the issue of mental retardation." JA 243a.

In conjunction with his *Atkins* claim, Brumfield asserted his entitlement to funding to investigate and retain the expert assistance needed to prove his intellectual disability. He specifically argued that until his request for funding was resolved, it would be "premature for this court to address [his] claims." JA

207a. This was the sixth time Brumfield had asserted his right to funding during the pendency of his postconviction proceedings. *See* JA 173a-74a, 176a, 181a-82a & nn.1-2, 184a-85a & nn.1-2, 187a-88a & nn.1-2.

On October 23, 2003, the state court held a "motions hearing," wherein it orally dismissed Brumfield's petition in its entirety. JA 240a; Pet. App. 169a-72a. According to the court, Brumfield had not "demonstrated impairment based on the record in adaptive skills" because the testimony at his penalty phase discussed his being "anti-social personality or sociopath" and "as someone with no conscience." Pet. App. 171a. The court thus decided that Brumfield "hadn't carried his burden placing the claim of mental retardation at issue." Pet. App. 171a-72a. The court's explanation, in full, was as follows:

> I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue – there was a lot of testimony by all on those in Dr. Jordan's report.
>
> Dr. Bolter in particular found he had an IQ of over – or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant

> hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Pet. App. 171a-72a.

The court then, for the first time, addressed Brumfield's entitlement to funding, stating that, to the extent that entitlement might have provided an independent basis for postconviction relief, it was denied. Pet. App. 181a.

Brumfield subsequently filed an application for supervisory writs with the Louisiana Supreme Court, which denied the application without an opinion. JA 245a.

IV. Brumfield's Evidentiary Hearing In Federal District Court.

On November 4, 2004, Brumfield filed a petition for a writ of habeas corpus in federal district court. Brumfield argued, among other things, that the state court's dismissal of his *Atkins* claim without a hearing and without funding violated 28 U.S.C. § 2254. The district court appointed counsel and, for the first time, Brumfield was provided funds to investigate his intellectual disability. Pet. App. 5a. Brumfield thereafter amended his habeas petition to include a wealth of evidence establishing his intellectual disability.

The district court agreed that the state court's decision was unreasonable under AEDPA. It concluded that the state court's denial of Brumfield's

Atkins claim without a hearing was based on the unreasonable determination that his pre-*Atkins* penalty phase transcript was determinative of his intellectual disability, in violation of 28 U.S.C. § 2254(d)(2). Pet. App. 36a-48a. The court also concluded that the state court's denial of funding for Brumfield to pursue his *Atkins* claim was contrary to this Court's decisions in *Atkins*, and *Ford v. Wainwright*, 477 U.S. 399 (1986). Pet. App. 30a-36a, 48a.

Consistent with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the court went on to consider the evidence that Brumfield had adduced regarding his intellectual disability. Based on testimony elicited from several experts over the course of a seven-day trial, as well as hundreds of pages of expert reports and exhibits, the court found that Brumfield is intellectually disabled. Pet. App. 98a.

The evidence supporting the district court's finding of intellectual disability was substantial and largely unrebutted. With respect to Louisiana's first prong, every expert who testified agreed that Brumfield's intellectual functioning was consistent with intellectual disability. Pet. App. 62a. The State's expert concluded that Brumfield had an IQ score of 70. Pet. App. 61a. Brumfield's experts obtained scores of 70 and 72, which, when adjusted for the Flynn Effect,[3] were more

[3] As the district court described, the Flynn Effect is based on the "widely accepted . . . fact in the scientific community" that "over time, the mean IQ scores of the American public on any given test increase." Pet. App. 63a-64a. This phenomenon requires that IQ scores from tests taken in the past be subject to a "downward

accurately considered scores of 65 and 70. Pet. App. 60a-61a, 65a. The evidence further showed that Brumfield's score of 75 from the time of his trial, properly adjusted, was itself a score of 70. Pet. App. 65a. As the district court observed, the uncontroverted evidence was that Brumfield's IQ scores – with or without adjustment – were consistent with intellectual disability, as that term is defined by Louisiana law. The State did not even attempt to argue otherwise. Pet. App. 62a.

With respect to Brumfield's adaptive skills, experts for both the State and Brumfield agreed, and found it uncontroversial, that Brumfield's prior diagnoses of antisocial conduct and attention deficit disorder were entirely consistent with intellectual disability. Fed. Tr. Vol. V[4] at 35-36 (State's expert testifying that a person can be diagnosed with conduct disorders, such as antisocial personality or attention deficit, *and* intellectual disability); Fed. Tr. Vol. IV at 34; Fed. Tr. Vol. I at 97-98, 185; Fed. Tr. Vol. VI at 42-43, 79-80. The evidence established that conduct disorders are on an entirely different "continuum" than intellectual disability, *see* Fed. Tr. Vol. VI at 118, and that there is a high instance of conduct problems in students who are intellectually disabled because they are consistently "being asked to do things that they can't do," Fed. Tr.

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adjustment . . . to account for the subsequent IQ rise of the public which the older test itself does not capture." Pet. App. 64a.

[4] The federal evidentiary hearing transcripts are divided into seven volumes and can be found on the district court docket, at ECF Nos. 101-107.

Vol. VI at 79-80. The State's expert also expressed the view that intellectual disability is "much more difficult" to diagnose than a conduct disorder. Fed. Tr. Vol. V at 35.

As the district court observed, the expert evidence demonstrated that Brumfield suffers from severe deficits in the basic conceptual skills of language, reading, and writing. Due to a limitation in motor skills, for instance, Brumfield is unable to write freehand. Rather, he must use a piece of cardboard to write, whether the paper is lined or not. Pet. App. 75a; Fed. Tr. Vol. VI at 97-98. It takes Brumfield several days to write a single one-page letter. Fed. Tr. Vol. II at 73.

Furthermore, the evidence showed, and the State did not contest, that Brumfield had severe deficits in reading ability. Pet. App. at 75a-76a. Brumfield's reading skills reached a plateau at a fourth-grade level, Fed. Tr. Vol. VI at 104; *see also* Pet. App. 76a, and his adult reading habits remain consistent with someone who is intellectually disabled, Pet. App. 76a; Fed. Tr. Vol. VI at 101-06.

Experts further explained that Brumfield has basic "problems understanding language." Fed. Tr. Vol. VI at 122. As a child, he was unable to perform basic activities, unable to follow the rules of games, and unable to follow basic instructions. Fed. Tr. Vol. II at 68-69. He could not learn to tie his shoes until the age of 14 or 15. Fed. Tr. Vol. II at 72.

Experts also testified that Brumfield's "[s]chool testing records show lack of competence in virtually

every area," Pet. App. 76a, and that every historical record indicated that he was developmentally delayed and slow in comparison to his peers and siblings. Fed. Tr. Vol. II at 68-69. Furthermore, all of Brumfield's academic abilities "plateaued for the rest of his career" sometime around the fourth or fifth grade, notwithstanding that he later received individual attention and resources in special education classes – an outcome characteristic of persons with intellectual disability. Fed. Tr. Vol. VI at 86; Pet. App. 76a. Brumfield was "constantly shuttled between different schools and remained periodically in-and-out of mental health centers and special education classes." Pet. App. 76a. From ages eleven to sixteen alone, Brumfield was assigned to special education and placed in at least ten different schools and, in total, he attended fourteen to fifteen schools before dropping out in the ninth grade. Pet. App. 77a.

With respect to the age of onset of Brumfield's intellectual disability, as the district court observed, there was hardly any dispute that it set in before Brumfield reached adulthood. Pet. App. 91a, 94a, 96a. Furthermore, experts testified to several etiological factors signaling that Brumfield is intellectually disabled. Brumfield's mother had psychiatric problems during her prenatal period and took psychotropic medication during pregnancy. Pet. App. 94a. Brumfield suffered from fetal stress and was only 3.5 pounds at birth. Pet. App. 94a. In addition, several of Brumfield's family members suffer from intellectual disability, including at least one cousin with severe to moderate intellectual disability. Pet. App. 94a.

Throughout his childhood, Brumfield was institutionalized, neglected, and suffered severe physical abuse at home. Pet. App. 95a.

Based on this evidence, the district court found that Brumfield is intellectually disabled and that it would be cruel and unusual to execute him.

V. Fifth Circuit's Reversal.

The State appealed to the Fifth Circuit. The State never disputed that the state court's denial of Brumfield's *Atkins* claim violated § 2254(d)(2) because it was based on the unreasonable determination that the evidence presented at the penalty phase hearing was determinative of his intellectual disability. Rather, the State argued (incorrectly) that this Court's decision in *Pinholster*, 131 S. Ct. 1388, necessarily barred a district court from holding an evidentiary hearing whenever the state court adjudicated the petitioner's claim on the merits. According to the State, "where, as here, the state district court issued a ruling on the claim's merits" it necessarily followed that "[n]o federal court evidentiary hearing was appropriate." Brief of Respondent-Appellant at 15, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713227. The State thus found no occasion to address § 2254(d)(1) or (2).

In response, Brumfield argued that the evidentiary hearing was proper because the state court's decision was not entitled to AEDPA deference. He specifically argued that "[t]he state court's reliance on penalty phase evidence to establish adaptive skills deficits" was "an unreasonable determination of the facts in light of the evidence presented in the state habeas proceedings

in violation of § 2254(d)(2)." Brief of Petitioner-Appellee at 50-51, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713226. Brumfield further argued that "[w]hen a Louisiana state court relies on record evidence from a pre-*Atkins* sentencing that, on its own terms, does not even relate to mental retardation, it cannot be deemed to have made a reasonable factual determination as a matter of law." *Id.* at 51-52. In addition, Brumfield argued that the state court's refusal to fund access to an expert was contrary to *Atkins*, *Ford*, and *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See id.* at 42-50.

The Fifth Circuit reversed, concluding on its own accord that the state court had not violated § 2254(d)(1) or (d)(2). In its opinion, the Fifth Circuit expressly acknowledged the district court's conclusion that the state court based its decision on an unreasonable determination of the facts by treating Brumfield's penalty phase evidence as determinative of his intellectual disability. *See* Pet. App. 14a (stating that the district court "chided the state court for relying on evidence presented for mitigation purposes"). Inexplicably, however, the Fifth Circuit reversed the district court without even considering that dispositive analysis.[5] Instead, the Fifth Circuit held in conclusory

[5] The Fifth Circuit's failure to confront the district court's reasoning may have been because, as described above, the State itself never contested the district court's § 2254(d)(2) analysis, or because the Fifth Circuit initially held that Brumfield had waived any argument under § 2254(d)(2), *see Brumfield v. Cain*, 740 F.3d 946, *withdrawn and superseded by*, 744 F.3d 918 (5th Cir. 2014) (Pet. App. 1a) – an inexplicable conclusion in the face of Brumfield's explicit briefing on § 2254(d)(2). On rehearing, the

fashion that "the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing" because "the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation." Pet. App. 14a. In doing so, the Fifth Circuit itself turned to the record at Brumfield's pre-*Atkins* penalty phase proceeding. The state court's denial of an *Atkins* hearing was reasonable, according to the Fifth Circuit, because "no one testified that Brumfield was mentally retarded," and because "the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality," and "[t]here was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships." Pet. App. at 15a.

The Fifth Circuit also held that the state court's failure to provide funding for an expert was not contrary to this Court's precedent because "there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case." Pet. App. at 12a.

Ultimately, the court concluded that "there was no reason for the district court to conduct an evidentiary hearing" and that it must "disregard the evidence adduced for the first time before the district court." Pet. App. 15a.

Fifth Circuit amended its original opinion to make clear that Brumfield had not waived the argument, but did not further supplement its analysis on the § 2254(d)(2) issue. *See* Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

In the wake of *Atkins v. Virginia*, the state postconviction court's refusal to grant Brumfield's request for a hearing on his claim of intellectual disability was inexplicable.

That refusal was based solely on a review of a sentencing record that had been developed years before this Court first held that persons who are intellectually disabled are ineligible for the death penalty, years before this Court endorsed the prevailing clinical standards for intellectual disability, and years before the State of Louisiana first adopted its own definition of intellectual disability based on those standards.

At the time Brumfield's penalty phase record was developed, intellectual disability did not render one ineligible for the death penalty. Nor, at that time, were the clinical standards relevant for any other purpose under Louisiana's criminal law. It is thus unremarkable that the sentencing record reviewed by the state postconviction court did not directly address those clinical standards and definitions. The record says little or nothing about Brumfield's deficiencies in adaptive skills and, in fact, does not directly address intellectual disability at all. No witness testified as to whether Brumfield was intellectually disabled or whether he met any of the clinical criteria that define intellectual disability. No witness was ever asked. The state court's conclusion that Brumfield had not "demonstrated impairment based on the record in adaptive skills" should have been expected.

Nevertheless, Brumfield's pre-*Atkins* record revealed that he scored an IQ of 75 on the Wechsler Adult Intelligence Scale – a score that is consistent with intellectual disability. The record showed, moreover, that "something was wrong" with Brumfield from birth. He was born with abnormally slow responses. He was recommended for special education programs as early as the third grade, and was enrolled in them two years later. One of his most significant problems, the record indicated, was that he simply could not process information the way everyone else did. Even in adulthood, Brumfield could read only at a fourth-grade level at best. The record showed that his math and spelling skills were at a sixth-grade level.

This, in the language of § 2254(d), was "the evidence presented in the State court proceeding." The state court's determination that these facts did not even require a hearing on Brumfield's intellectual disability was patently unreasonable. Accordingly, the district court was justified in conducting an evidentiary hearing under § 2254(d)(2), and the Fifth Circuit erred in reversing that decision.

The Fifth Circuit's decision was erroneous for the second, independent reason that the state court's decision was contrary to, and an unreasonable application of, this Court's clearly established law. In *Ake v. Oklahoma*, this Court held that, when an indigent capital defendant shows that his mental condition will be a "significant factor" at trial or sentencing, the centrality of expert testimony in evaluating insanity requires a state to assure access to a mental health expert. 470 U.S. 68, 83-84 (1986).

Here, the postconviction proceeding was Brumfield's first opportunity to raise his *Atkins* claim. In that posture, the state court's denial of his repeated requests for assistance in obtaining expert testimony to demonstrate his intellectual disability cannot be squared with *Ake* or any reasonable application of its principles.

Similarly, in *Ford v. Wainwright*, this Court held that due process guarantees to capital defendants asserting an insanity defense the opportunity to present expert testimony in opposition to the state's contrary evidence. Otherwise, the state denies the defendant his constitutionally guaranteed "opportunity to be heard" and "invites arbitrariness and error." 477 U.S. 399, 424 (1986). Here, the state court denied Brumfield's claim for assistance to develop expert evidence of intellectual disability only *after* denying his *Atkins* claim altogether. That deprived Brumfield of the opportunity to obtain an expert by any other means, thus depriving him of the right guaranteed under *Ford*.

"The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Brumfield was denied that fair opportunity. The state court's refusal to assure him access to the expert assistance necessary to demonstrate his intellectual disability – and therefore his ineligibility for the death penalty – was contrary to, and an unreasonable application of, the rules announced in *Ake*, *Ford*, and *Atkins*.

Accordingly, the Fifth Circuit erred in holding that § 2254(d)(1) precluded an evidentiary hearing in federal court.

ARGUMENT

Under 28 U.S.C. § 2254(d), a federal court may grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" where the adjudication "resulted in a decision" that (1) was "contrary to, or involved an unreasonable application of" this Court's clearly established precedent or (2) was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Though these standards are "highly deferential," *Pinholster*, 131 S. Ct. at 1388 (quotation marks omitted), this Court has made clear that "deference does not imply abandonment or abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A federal court may, "when guided by AEDPA, conclude [a state court's] decision was unreasonable or that the factual premise was incorrect." *Id.*

Section 2254(d) poses no bar to federal habeas relief in this case for two independent reasons. First, the state postconviction court's denial of Brumfield's *Atkins* claim was based on an unreasonable determination of the facts, under § 2254(d)(2). Second, the same court's failure, notwithstanding Brumfield's indigence, to fund access to expert assistance qualified to evaluate intellectual disability was contrary to and an unreasonable application of this Court's clearly established precedent, under § 2254(d)(1). Accordingly, AEDPA imposed no bar to the federal district court's

decision to provide Brumfield with his first and only opportunity to have a hearing regarding his intellectual disability. That court – the only court to hear expert testimony on whether Brumfield is intellectually disabled under *Atkins* and the relevant clinical standards implementing it – found that Brumfield is, in fact, intellectually disabled. Contrary to the Fifth Circuit's erroneous legal conclusion, there is no basis for invalidating that determination of ineligibility, and no reason to insist that Brumfield should not have been afforded a hearing in any court.

I. The Denial Of Brumfield's *Atkins* Claim Was Based On The Unreasonable Determination That His Pre-*Atkins* Penalty Phase Record Provided An Adequate Basis To Resolve His Intellectual Disability.

Brumfield was sentenced in 1995, when this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), taught that intellectually disabled persons were not ineligible for the death penalty. Seven years after Brumfield was sentenced, this Court recognized the nation's "evolving standards of decency" and articulated for the first time that the Eighth Amendment prohibits the execution of an intellectually disabled person. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quotation marks omitted). The Court explained that "because of their impairments," intellectually disabled persons "by definition . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the

reactions of others." *Id.* at 318. These diminished capacities increase the risk that the death penalty will be misapplied because defendants with intellectual disabilities are more likely to give false confessions, are less able to assist their counsel and make a persuasive showing in mitigation, and are typically poor witnesses whose demeanor is often misinterpreted by juries. *Id.* at 320-21.

Though implementation of the new proscription was left to the states, the Court endorsed a "clinical definition[] of mental retardation" that reflected a consensus among the states. *Id.* at 318. Specifically, the Court explained that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Id.* This three-part inquiry was taken directly from the tests set forth in the two leading psychiatric diagnostic manuals, from which the Court quoted at length. *See id.* at 308 n.3 (quoting American Association on Mental Retardation (AAMR), *Mental Retardation: Definition, Classification, and Systems of Support* 5 (9th ed. 1992); American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000) ("DSM-IV-TR")).

Shortly thereafter, the Louisiana Supreme Court adopted for the first time essentially the same clinical definition. *See Williams*, 831 So. 2d 835. It held that a defendant must show "three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in

several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *Id.* at 854; *see also id.* at 853 & n.26 (relying on AAMR, *Mental Retardation: Definition, Classification, and Systems of Support* 1 (10th ed. 2002) ("AAIDD 10th ed."),[6] and DSM-IV-TR at 41).[7] *Williams* explained that not every death row defendant would be entitled to a post-*Atkins* hearing to determine his or her intellectual disability. Rather, "[i]t will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation." *Id.* at 857; *see also id.* at 858 n.33 (a defendant establishes his entitlement to a hearing by "coming forward with some evidence to put his mental condition at issue").

Because Brumfield was convicted and sentenced long before *Atkins*, it was during his state postconviction proceeding that he was first able to assert that his intellectual disability rendered him ineligible for the death penalty. Upon doing so, the state court not only denied him postconviction relief on that basis, but denied him even a hearing to

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[6] AAMR has since changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD").

[7] Louisiana subsequently adopted a statutory definition of intellectual disability, which was based on the same three factors. *See* 2003 La. Sess. Law Serv. Act 698 (current version at La. C. Crim. P. art. 905.5.1(H) (2014)). The procedures set forth in that statute do not apply to cases such as this one, in which the defendant was convicted and sentenced prior to its passage. *See State v. Dunn*, 974 So. 2d 658, 662 (La. 2008).

demonstrate that he met the clinical definition of intellectual disability articulated in *Atkins*.

In a two-paragraph oral ruling at what was labeled a "motions hearing," the state court looked exclusively to the existing pre-*Atkins* sentencing record and denied a hearing because "the defendant hadn't carried his burden placing the claim of mental retardation at issue." Pet. App. 171a-72a. The court justified its determination with three points. First, a defense expert called at the penalty phase found that Brumfield had an IQ score of 75 and another expert – who did not testify – "came up with a little bit higher IQ." Pet. App. 171a. Second, Brumfield had not "demonstrated impairment *based on the record* in adaptive skills." *Id.* (emphasis added). Third, the defense mitigation expert testified that Brumfield "did have an anti-social personality or sociopath, and explained it as someone with no conscience." *Id.*

None of those facts – individually or collectively – provided a reasonable basis for denying Brumfield a hearing on his *Atkins* claim. Nothing in his pre-*Atkins* sentencing record was dispositive of whether Brumfield was or was not intellectually disabled. Nevertheless, the record contained testimony regarding numerous objective factors that were not only consistent with, but strongly indicative of, intellectual disability. That there was not more evidence in the record, or that the record did not address all of the elements of the clinical definition of intellectual disability and adaptive functioning was irrelevant to whether Brumfield was, in fact, intellectually disabled. To expect more would demand

far too much of the pre-*Atkins* record, as it simply was not developed for that purpose. It was an unreasonable determination for the state court to definitively reject Brumfield's claim of intellectual disability without a hearing and based solely on the pre-*Atkins* penalty phase record in this case. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court acted unreasonably under § 2254(d)(2) when it made a finding that was unsupported by the record); *Miller-El*, 537 U.S. at 340 (§ 2254(d)(2) does not bar federal court review where state court's determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding").

1. *Brumfield's IQ Score.* The only evidence cited by the state court that was relevant to Brumfield's intellectual disability was Dr. Bolter's testimony that Brumfield received an IQ score of 75 on the Wechsler Adult Intelligence Scale. Pet. App. 171a, JA 133. As the state court appeared to recognize by proceeding to consider Brumfield's adaptive functioning, Pet. App. 171a, an IQ test score of 75 is entirely consistent with intellectual disability. Louisiana courts have recognized as much. *State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) (explaining that the petitioner's "two scores of 75 brush the threshold score for a mental retardation diagnosis" making his diagnosis "heavily dependent on his adaptive functioning"). So, too, has this Court. *See Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation

definition."); *Hall*, 134 S. Ct. at 2000-01 (holding that it is unconstitutional to prevent a defendant from presenting evidence of deficits in adaptive skills where the defendant's IQ score ranged from 70 to 75). Likewise, the DSM-IV, which was relied on authoritatively both by the Supreme Court of Louisiana, *Williams*, 831 So. 2d at 853; *Dunn*, 41 So. 3d at 469-70, and *Atkins* itself, 536 U.S. at 308 n.3, made that clear. *See* DSM-IV-TR at 41 (a score of 75 on the Wechsler IQ scale is consistent with subaverage intellectual functioning).[8]

2. *Adaptive Skills*. Turning to the second prong of the inquiry, the state postconviction court found, without elaboration, that "I do not think that the defendant has demonstrated impairment based on the record in adaptive skills." Pet. App. at 171a. The "record" to which the court referred was the pre-*Atkins* penalty phase record. That reveals starkly just

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[8] The state court also stated that "Dr. Jordan actually came up with a little bit higher IQ." Pet. App. 171a. Dr. Jordan did not testify at the trial or penalty phase and thus did not explain his results. Rather, this comment was a reference to the following snippet of Dr. Bolter's testimony: "Dr. Jordan rated his intelligence just a little higher than I did. But Dr. Jordan also only did a screening test and I gave a standardized measure of intellectual functioning." JA 133a. Given that the record contained no further evidence of Dr. Jordan's test methodology or results beyond this vague comment from Dr. Bolter, and that Dr. Bolter was *critiquing* Dr. Jordan's methodology, this testimony is not a basis to reject Brumfield's intellectual disability claim. Indeed, the state court itself seemed not to think so, given that it turned to Brumfield's adaptive functioning.

how unreasonable the court's factual determination was.

At the time of Brumfield's sentencing hearing in 1995, Louisiana, consistent with *Penry*, 492 U.S. 302, did not prohibit the execution of intellectually disabled persons, and did not recognize a definition of intellectual disability (or adaptive functioning) for *any* purpose in criminal cases. *See Williams*, 831 So. 2d at 853 ("Louisiana is not one of the states that has directly addressed, either legislatively or jurisprudentially, the issue of mental retardation in the criminal context."). Only *after Atkins* did Louisiana first recognize a clinical standard of intellectual disability in the criminal context, which required a defendant to establish significant impairment in adaptive skills, *id.*, and explain that, concurrent with the AAMR and APA, this requires specific inquiry into the defendant's "conceptual, social, and practical adaptive skills," *Dunn*, 41 So. 3d at 459.

That there was no discussion of adaptive skills in Brumfield's pre-*Atkins* sentencing record was determinative of nothing and should not have been surprising. At sentencing, Brumfield did not attempt to mitigate on the basis that he met the clinical definition of intellectual disability. No witness – expert or lay – offered an opinion or was ever asked whether Brumfield was intellectually disabled under any definition. Nor were either of the two mitigation experts engaged to opine on whether Brumfield was intellectually disabled. Dr. Guin was a social worker who testified regarding Brumfield's social and family history. JA 62a, 71a. She did not, nor would she have

been qualified to, testify about whether Brumfield met the clinical definition of intellectual disability. Dr. Bolter was an expert qualified to testify to "the effects of brain injury or insult to somebody's central nervous system on their behavior." JA 124a. He gave testimony on whether Brumfield exhibited "neurological deficits" or "organic based amnesia," gave brief testimony about Brumfield's very low birth weight, and about the medications that Brumfield was taking. JA 127a-29a, 130a-32a. He further acknowledged that he had only a "cursory understanding" of Brumfield's personal history. JA 131a.

Thus, as the district court observed, numerous factors that would have been necessary to evaluate Brumfield's adaptive functioning – "including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naive, and (4) whether he has any practical skills" – were "simply lacking in discussion or even mention." Pet. App. 45a; *see also* Pet. App. 44a ("[T]he actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts [now] use to assess mental retardation.").

This demonstrates the dramatic difference between Brumfield's mitigation case (in which clinical intellectual disability was not raised) and an *Atkins* hearing. The penalty phase testimony of Dr. Bolter, upon which the state court relied in denying Brumfield's *Atkins* claim, filled a total of nine pages of double-spaced transcript. *See* JA 123a. By contrast,

when Brumfield finally was provided the opportunity to present clinical evidence of his intellectual disability in federal court, experts testified over the course of seven days, filling over 1,200 pages of transcript and hundreds of pages of expert reports and exhibits. The absence of direct testimony regarding Brumfield's adaptive functioning in the penalty phase record, notwithstanding his 75 IQ score, underscores the unreasonableness of relying on that record to determine the clinical fact of intellectual disability. *Cf. Hall*, 134 S. Ct. at 1999 (holding that when a defendant's IQ score is 75 or below, "the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits").

There is good reason why the clinical criteria of intellectual disability that are the focus of an *Atkins* hearing would go unaddressed in a pre-*Atkins* mitigation presentation. Prior to *Atkins*, a defendant's intellectual disability was one individualized factor out of an "extremely broad" universe that could have been introduced in mitigation. American Bar Association (ABA), *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1060-61 (2003). Moreover, it was often *not* the most effective way "to construct a persuasive narrative in support of the case for life." *Id.* at 1060-61. Indeed, in *Penry* – which was governing law at the time of Brumfield's trial – this Court rejected the contention that clinically intellectually disabled people "inevitably lack the cognitive, volitional, and moral capacity to act with the

degree of culpability associated with the death penalty." 492 U.S. at 338 (opinion of O'Connor, J.). If the contention that intellectually disabled persons should be spared the death penalty did not convince a majority of this Court at that time, it is hardly noteworthy that intellectual disability was not presented to a death-qualified jury in East Baton Rouge Parish, Louisiana.

Furthermore, as this Court explained in both *Penry* and *Atkins*, "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321 (citing *Penry*, 492 U.S. at 323-25); *see also Bobby v. Bies*, 556 U.S. 825, 836 (2009) (prior to *Atkins*, evidence of intellectual disability was so damaging that prosecutor "had little incentive vigorously to contest" it); *Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010).[9] As the Louisiana Supreme Court explained shortly after *Atkins*,

> Because trial of this matter was conducted prior to *Atkins*, mental retardation as a factor exempting defendant from the death penalty was not an issue. Therefore, counsel's trial strategy may have been to shift the focus away

[9] Although "future dangerousness" was not an explicit aggravating factor in Louisiana, it was common that the State would argue it to the jury – as the State did here. *See* JA 152a-53a ("[T]his man, as long as he lives and breathes, is a danger at the very least to other inmates and whatever jail he's housed in, he's a danger to whatever people in law enforcement he will be connected with.").

> from any diagnosis of mental retardation. As mentioned previously, the mere term "mental retardation" connotes negative images in some people.

Williams, 831 So. 2d at 856 n.31.

Atkins entirely changed the landscape. As the Louisiana Supreme Court observed in a case arising in a similar posture:

> The United States Supreme Court essentially altered the rules and altered a relevant fact after the trial. The State and the defense are both put in the impossible position of arguing whether a fact was established – i.e., whether the defendant is mentally retarded – when that fact was simply not an issue which a fact finder was called upon to decide. A fact that was marginally relevant when this case was tried (whether the defendant is mentally retarded) became a fact which could determine the sentence to be imposed after the trial. The State and defense gallantly attempt to argue from this record; however, their efforts must fail because the significance of the issue of mental retardation was drastically changed after the trial as a result of *Atkins*. The relevance of whether or not this defendant is mentally retarded has increased exponentially. Neither the State nor defense was required to anticipate this change.

State v. Dunn, 831 So. 2d 862, 886 (La. 2002).

Thus, to have demonstrated clinically significant "impairment . . . in adaptive skills" at his sentencing, Pet. App. 171a, Brumfield would have had to predict, well before either *Atkins* or *Williams* were decided, that he should call an expert to engage in what is "inherently an intensively factual inquiry," *State v. Williams*, 22 So. 3d 867, 887 (La. 2009), and "to make exceedingly fine distinctions," *Dunn*, 41 So. 3d at 469, required by the clinical standard. Because that was not part of the governing law in 1995, the absence of such testimony says nothing about whether *in fact* Brumfield is impaired in adaptive skills. *See Bies*, 556 U.S. at 829 (explaining that "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues"); *id.* at 834-35 (pre-*Atkins* finding of intellectual disability was not determinative where *Atkins* and the relevant state standard "had not then been decided" and it had not been shown that the defendant "suffered 'significant limitations in two or more adaptive skills'" (citation omitted)); *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1318 (11th Cir. 2013) ("The intervening decision in *Atkins* 'substantially altered the [parties'] incentive[s]' regarding evidence of mental retardation such that it would be a gross inequity to hold [petitioner] to an undeveloped, pre-*Atkins* record." (quoting *Bies*, 556 U.S. at 837) (last brackets added)).

This is not to say that, as a matter of law, a pre-*Atkins* record can never support a finding that a defendant is not entitled to an *Atkins* hearing. Having nothing to do with clinical intellectual disability, a

record could show, for example, that the defendant had earned a graduate degree, or was a university professor. Such a record might well support a determination that the defendant was not entitled to an *Atkins* hearing. But that is not this case. To the contrary, though there was no discussion in the pre-*Atkins* record of intellectual disability or "adaptive skills," the record was replete with "objective factors," *Williams*, 831 So. 2d at 856-57, that were strongly indicative of deficits in adaptive skills. All were ignored by the state court.

For example, in addition to Brumfield's low IQ score of 75, Dr. Bolter testified that Brumfield's "academic skills are very poor" and that he reads at a fourth-grade reading level at best. JA 128a. Dr. Bolter described this as a matter of "simple word recognition. That's not comprehension; that's just identifying [the words]." JA 128a. He testified that Brumfield's math and spelling are at a sixth-grade level. JA 128a. The record also showed that Brumfield was born weighing only 3.5 pounds. Dr. Bolter testified that this "places him in a risk of some form of potential neurological trauma . . . . It portends the possible problem." JA 130a-31a. He concluded that "this individual was in trouble many many many many years ago." JA 131a.

Similarly, the social worker, Dr. Guin, testified that Brumfield "was born with slower responses than normal babies." JA 76a. His teachers "knew something was wrong" with him by the third grade and repeatedly sought to get him into special education classes, "where he could be helped" and where he spent much of his schooling. JA 86a-87a. His school board referred him

to a mental health facility, which "questioned his intellectual functions" and whether he had a "learning disability related to some type of slowness in motor development." JA 89a. He had been transferred to fourteen or fifteen different schools by the time he was fourteen. JA 101a. He was admitted to six different out-of-home placements, including multiple residential hospitals, after the age of twelve. JA 90a-94a. At school, he did poorly even at recess and "could not function with a lot of chaos around him." JA 88a. He suffered from "impaired impulse control" and at both school and home, he needed someone to "help him function." JA 92a, 101a. Dr. Guin concluded that Brumfield had a "neurological problem" such that he "could not process information correctly." JA 101a.

None of these, on their own, definitively established deficits in adaptive skills or clinical intellectual disability. But all of them were consistent with adaptive skills deficits or clinical intellectual disability. *Cf. Atkins*, 536 U.S. at 318 (intellectually disabled persons "by definition . . . have diminished capacities to understand and process information"); DSM-IV-TR at 43 (people with mild intellectual disability "often are not distinguishable from children without Mental Retardation until an older age," and "can acquire academic skills up to approximately the sixth-grade level"). All of them were objective factors that put Brumfield's mental condition at issue. All of them were ignored by the state court because they were not packaged in *Atkins*' language of adaptive skills and clinical intellectual disability.

3. *Antisocial Behavior.* Finally, the state court noted, again without elaboration, Dr. Bolter's testimony that Brumfield had an "antisocial personality or sociopath, and explained it as someone with no conscience." Pet App. 171a. To the extent that this was a factual basis for the denial of Brumfield's *Atkins* claim, it was unreasonable. In fact, it was a non-sequitur. There was no evidence in the trial record that being antisocial, sociopathic, or lacking a conscience is inconsistent with clinical intellectual disability. To the contrary, in the very same paragraph where Dr. Bolter characterized Brumfield as antisocial and sociopathic, he also stated: "[Brumfield]'s on the low end of intelligence. His academic skills are very poor. He's reading at about the fourth grade level. . . . That's not even comprehension; that's just identifying." JA 128a. Nowhere did Dr. Bolter suggest that sociopathic behavior and intellectual disability are mutually exclusive.

To the contrary, there is unanimous agreement in the scientific literature that they are *not* mutually exclusive. Mental disorders, including conduct disorders such as antisocial personality disorder, and intellectual disability may coexist. *See* DSM-IV-TR at 47 ("The diagnostic criteria for mental retardation do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder"); AAIDD, *User's Guide: Mental Retardation Definition, Classification and Systems of Supports* 12 (10th ed. 2007) ("AAIDD 10th ed. Users Guide") (recognizing the dual diagnosis of mental health disorders and

intellectual disability); *Handbook of Mental Illness in the Mentally Retarded* (Frank J. Menolascino & Jack A. Stark eds., 1984). Indeed, at Brumfield's federal habeas hearing, even the *State*'s expert agreed and found it uncontroversial that conduct disorders, such as antisocial personality disorder, may be coextensive with intellectual disability. Fed. Tr. Vol. V at 35-36; Fed. Tr. Vol. IV at 34; Fed. Tr. Vol. VI at 42-43, 79-80.

If anything, intellectually disabled individuals are *more* likely to develop such disorders. *See* DSM-IV-TR at 45 ("Individuals with Mental Retardation have a prevalence of comorbid mental disorders that is estimated to be three to four times greater than in the general population"); AAIDD 10th ed. User's Guide at 15-16 ("In general, mental health disorders are *more prevalent* among individuals with MR/ID than the general population."); Irving Phillips & Nancy Williams, *Psychopathology and Mental Retardation: A Study of 100 Mentally Retarded Children*, 132 Am. J. Psychiatry 1265 (1975) (finding, in study of 100 children with mental retardation, that the largest categories of co-morbidity were behavioral disorders, followed closely by personality disorders).[10]

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[10] *See also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 142 (11th ed. 2010) ("[I]t has become the standard of practice to acknowledge that mental illness may occur more frequently in people with ID than the general population."); George W. Woods, et al., *Intellectual Disability and Comorbid Disorders*, *in* AAIDD, *The Death Penalty and Intellectual Disability* 279, 279 (Edward A. Polloway ed., 2015) ("More than 40% of people with intellectual disability . . . are also clinically diagnosed with another form of mental disorder").

Accordingly, to the extent the state court rejected Brumfield's *Atkins* claim based on its own view that conduct disorders and intellectual disability are mutually exclusive, that determination found no support in the record and was demonstrably wrong. *See Atkins*, 536 U.S. at 309 (holding that the petitioner was entitled to a hearing notwithstanding testimony at the penalty phase that he was "diagnosable as having antisocial personality disorder").

It was patently unreasonable to deny Brumfield even a hearing on his *Atkins* claim based solely on his pre-*Atkins* penalty phase record. The pre-*Atkins* record was in no way developed for the purpose of establishing the clinical criteria of Brumfield's intellectual disability. Yet it contained a plethora of objective factors that support such a diagnosis. As a result, the decision to deny Brumfield a hearing on his *Atkins* claim was based on an entirely unreasonable determination of the facts that were before the state court under § 2254(d)(2). *See Wiggins*, 539 U.S. at 528 (concluding that the state court's decision was based on an unreasonable determination of the facts where it made incorrect assumptions about whether certain social service records mentioned sexual abuse). The decision of the state court therefore posed no bar to the granting habeas relief in federal court.

II. The State Court's Failure To Assure Brumfield Access To Expert Assistance To Develop Evidence Of His Intellectual Disability Violated Clearly Established Federal Law As Determined By This Court.

The state court decision posed no bar to relief in federal court for a second, independent reason under § 2254(d)(1): namely, the state court's failure to assure Brumfield access to expert assistance in order to develop evidence for his claim of intellectual disability violated clearly established law determined by this Court.

Being intellectually disabled renders a person constitutionally ineligible to be executed by the state. In turn, it is beyond question that one cannot possibly prove the clinical criteria of intellectual disability without the assistance of an expert. Here, despite Brumfield's undisputed indigence, and despite his repeated assertions to the state court of its obligation to provide access to an expert, the court failed to do so. Pet. App. 181a. Exacerbating the error, the court denied Brumfield's claim for postconviction relief *before* addressing his request for assistance. Pet. App. 171a-72a, 181a. That deprived Brumfield of the opportunity to develop and make out his claim through other means, including possible *pro bono* sources, and thus effectively deprived him of an opportunity to be heard with respect to his intellectual disability and ineligibility for the death penalty.

This Court has articulated three circumstances under which a federal court may grant habeas relief consistent with § 2254(d)(1). "[A] federal habeas court

may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). Furthermore, a state court's decision constitutes an unreasonable application of clearly established federal law when the state court "misapplie[s] a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Wiggins*, 539 U.S. at 520 (internal quotation marks omitted). Under this last prong, "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. . . . The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

A. The State Court's Decision Was Contrary To, And An Unreasonable Application Of, *Ake v. Oklahoma*.

The state court's failure to provide Brumfield with access to an expert to develop his claim of intellectual disability was contrary to, and an unreasonable application of, the rule of law announced in *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, this Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the

defense." *Id.* at 83; *see also Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (holding that *Ake* requires a state to provide "the assistance of an independent psychiatrist"). *Ake* unquestionably mandated access to a clinical evaluation in Brumfield's circumstances.

1. *The Rule of* Ake. *Ake* was grounded on the principle that "fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." 470 U.S. at 77 (internal quotation marks omitted). Thus, in the case of an indigent defendant, the state must provide "the basic tools of an adequate defense" to "defendants who cannot afford to pay for them." *Id.* (internal quotation marks omitted); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984). This essential right flowed from the due process guarantee of "fundamental fairness," and "from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. at 76.

Ake instructed that a court should consider three factors when determining whether an expert must be provided for an indigent defendant. The first factor is the defendant's "private interest" that "will be affected by the action of the State." *Id.* at 77. The second is the "governmental interest that will be affected if the safeguard is to be provided." *Id.* The third factor is the "probable value" of the safeguard and "the risk of an erroneous deprivation of the affected interest" if it is not provided. *Id.*

Applying these factors, the Court found that the state was required to provide the defendant in *Ake* with access to a mental health expert. *Id.* at 78-83. The Court first observed that a defendant in a capital case has a "uniquely compelling" private interest because his "life [and] liberty" are "at risk." *Id.* at 78. Second, ensuring access to an expert advances the state's interest in providing robust access to justice, in maintaining the fairness of judicial proceedings, and in the state's "profound interest" in ensuring that the ultimate punishment of execution is not improperly imposed. *Id.* at 76-77, 83-84. These interests are not outweighed by the comparatively minor imposition on the state's fisc caused by providing this limited assistance to indigent defendants in capital cases. *Id.* at 78-79.

Most important to the Court's analysis was the final factor, which looks at the value of a mental health expert to the integrity of the judicial proceeding and the risk of error if one were not provided. *Id.* at 78-79. This Court recognized the "pivotal role that psychiatry has come to play in criminal proceedings" where the defendant's "mental condition [is] relevant to his criminal culpability and to the punishment he might suffer." *Id.* at 80. Mental health experts "gather facts . . . that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior." *Id.* at 80. Such experts ensure "a sensible and educated determination about the mental condition of the defendant." *Id.* at 81. By contrast, without the

assistance of a psychiatrist, the "risk of an inaccurate resolution" of the defendant's mental condition is "extremely high." *Id.* at 82.

The Court therefore held that where a defendant's sanity is "a significant factor," due process requires that the defendant be provided with funding for, or access to, a competent psychiatrist to help pursue his defense. *Id.* at 83.

The Court further held that its analysis "compels a similar conclusion in the context of a capital sentencing proceeding." The right of "access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation" extends to the penalty phase, in mitigating the state's evidence of future dangerousness. *Id.* at 83-84. "Without psychiatric assistance" in such circumstances, the defendant is prevented from offering a well-informed expert's view "and thereby loses a significant opportunity to raise in the jurors' minds questions about" the State's case for death. *Id.* at 84.

2. *The State Court Violated* Ake. The state court's failure to fund or otherwise provide Brumfield with access to an expert was both contrary to, and an unreasonable application of, the rule of *Ake*.

Application of *Ake*'s three factors compels the same analysis and outcome here as it did in *Ake*. Brumfield's "private interest in the accuracy of a criminal proceeding that places [his] life [and] liberty at risk is almost uniquely compelling." *Ake*, 470 U.S. at 78; *see also id.* at 87 (Burger, C.J., concurring). Likewise, Louisiana's interest here is indistinguishable from

Oklahoma's in *Ake*. Louisiana has a significant interest in ensuring that its intellectually disabled citizens have a meaningful opportunity to be heard in its courts, and a profound interest in avoiding the cruel and unusual execution of intellectually disabled Louisianans. Just like Oklahoma, Louisiana "may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* at 79. And, like Oklahoma, Louisiana has only a negligible interest in protecting its fisc by refusing to provide the means to obtain expert assistance to intellectually disabled defendants facing execution. *See id.* at 78-80 & nn. 4-5.[11]

Turning to the value of the assistance of a mental health expert and the risk of error if one is not provided, there is no disputing "the pivotal role" of mental health experts in proving intellectual disability in the criminal justice system. Indeed, it is effectively impossible to put on an *Atkins* case without an expert. Likewise, it was clear at the time of the state court's 2003 decision that proof of intellectual disability under *Atkins*, as implemented by Louisiana, was premised on

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[11] Indeed, a decision in favor of Brumfield would result in no meaningful prospective effect on the state's fisc because Louisiana already provides funding for defendants who raise a claim of intellectual disability. *See* La. Admin. Code tit. 22, pt. 15, ch. 9, § 913(B), (C) (Nov. 2014), *available at* http://www.doa.louisiana.gov/osr/lac/22v01/22v01-13.doc ("The state public defender shall provide funds for the assistance of experts, including mitigation specialists, and extraordinary investigative services.").

clinical standards within the exclusive domain of psychiatric professionals. *See Atkins*, 536 U.S. at 308 n.3 (endorsing clinical standards developed in professional texts published by the APA and AAIDD); *id.* at 318; *Williams*, 831 So. 2d at 859 ("experts with the appropriate expertise to diagnose mental retardation shall be utilized"); *see also Hall*, 134 S. Ct. at 1993 (it is "unsurprising" that courts "consult and are informed by the work of medical experts in determining intellectual disability" because "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" it).

Without expert "examination and testimony" on the issue of intellectual disability, *Ake*, 470 U.S. at 83, Brumfield's *Atkins* claim had no "chance of success," *id.* at 81 (quotation marks omitted), and there was an "extremely high" risk of "an inaccurate resolution," *id.* at 82. Given the essential nature of a mental health expert's examination and testimony in showing intellectual disability, as well as the unacceptable risk of error without such testing, access to such an expert was a "basic tool[]" of Brumfield's defense just as much, if not more so, than it was for the defendant in *Ake*. *See id.* at 77.

As in *Ake*, Brumfield's mental condition was a "significant factor" in addressing the issue before the court. *Id.* at 83. A defendant's mental status will always be a "significant factor" in litigating an *Atkins* claim – indeed, it is the *only* factor. *See Atkins*, 536 U.S. at 318. Moreover, the state court here certainly "was on notice" of Brumfield's assertion that he was ineligible for the death penalty because of his

intellectual disability. *Ake*, 470 U.S. at 86. Brumfield's *Atkins* claim was the first issue presented in his First Amended Petition For Postconviction Relief, JA 189a-205a, and the court recognized the issue of Brumfield's intellectual disability as "the biggest one we need to address." Pet App. 171a.

To the extent *Ake* requires a defendant to make a preliminary *factual* showing in order to obtain access to a mental health expert, Brumfield made that showing. *See supra* at 36-37. To be sure, Brumfield's pre-*Atkins* sentencing record did not conclusively establish his impairments in adaptive functioning. But requiring such conclusive proof would render meaningless the access to expert assistance mandated by *Ake*. The entire point of Brumfield's request for resources was that an expert was necessary to develop and present the requisite clinical evidence of Brumfield's intellectual disability. In other words, for the rule of *Ake* to have any meaning, a defendant must be able to satisfy the preliminary threshold required to obtain access to an expert *without* first having an expert's assistance.

That *Ake* mandated access to an expert in this case is made even more clear by the Court's observation that its reasoning not only required state-assisted access to a mental health expert for establishing competency at trial, but "compel[ed] a similar conclusion in the context of a capital sentencing" for preparing mitigation evidence in response to the state's claim of future dangerousness. 470 U.S. at 83. If "the probable value" of the assistance of a mental health expert was sufficient in the context of enabling the

defendant to rebut an aggravating factor which, at best, would decrease the odds of receiving the death penalty, it necessarily would be so where, as here, the defendant is attempting to demonstrate his categorical ineligibility.

It is immaterial that Brumfield's *Atkins* claim was litigated at postconviction, as opposed to at trial or sentencing. Because Brumfield was convicted and sentenced prior to this Court's decision in *Atkins*, postconviction necessarily was his first opportunity to argue that he is intellectually disabled under *Atkins*' retroactively applicable right.[12]

Brumfield's interest, the State's interest, and the value to the specific judicial process of expert assistance are identical to *Ake*, and the factual contexts materially indistinguishable.

Finally, Louisiana exercised its discretion "on how to implement" *Ake* by permitting defendants, including those on postconviction, to request that resources be provided by the Court.[13] Brumfield followed that

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[12] *See Hooks v. Workman*, 689 F.3d 1148, 1183 (10th Cir. 2012) (holding that an *Atkins* determination in such a situation would be "'postconviction' only in the strict chronological sense: *Atkins* was handed down in 2002, after [petitioner] had been convicted . . . . Of far greater importance is that his *Atkins* [hearing] was 'the first designated proceeding' at which he could raise a claim of mental retardation" (citation omitted)); *see also In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (observing unanimity among the circuits that there is "no question" that *Atkins* announced a retroactive rule).

[13] *See, e.g.*, *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287, 1287 (La. 1992) (holding that Louisiana courts have a "duty" to award

process. He expressly asserted his right to funding in the First Amended Petition for Postconviction Relief and requested that the court not proceed until such funding was provided. JA 207a. That funding never came. Nor did the court appoint an expert of its own. The State thus failed to provide *any* manner of assurance of expert assistance to this indigent capital defendant seeking to prove his intellectual disability.

For these reasons, the state court's decision was both contrary to, and an unreasonable application of, the rule of *Ake*. Accordingly, § 2254(d)(1) imposed no limitation on the federal district court's authority to grant Brumfield habeas relief.

"the funds necessary" to hire experts so that a postconviction petitioner can "present his claim fairly" (citing *Ake*, 470 U.S. 68)); *Copeland v. Smith*, 614 So. 2d 1245, 1245 (La. 1993) (recognizing that a postconviction petitioner obtains expert assistance by requesting that the court "order payment by the appropriate office or entity" (citing *Deboue*, 592 So. 2d 1287)); *State v. Craig*, 637 So. 2d 437, 446 (La. 1994) ("[W]hen an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the State ought to supply the funds." (quotation marks omitted)), *superseded by statute on other grounds as recognized by State v. Citizen*, 898 So. 2d 325 (La. 2005); *see also State v. Reeves*, 11 So. 3d 1031, 1044 (La. 2009) ("[A]n indigent defendant must also have a fair opportunity to present his defense. This often requires the assistance of expert witnesses. When a defendant is indigent, he must obtain funding to pay for this expert assistance." (citing *Ake*, 470 U.S. at 77)).

B. The State Court's Adjudication Denied Petitioner A Meaningful Opportunity To Be Heard In Violation Of The Rule Of *Ford v. Wainwright*.

The state court's refusal to afford Brumfield the means of developing expert testimony relevant to his intellectual disability also constituted an unreasonable application of *Ford v. Wainwright*, 477 U.S. 399 (1986). The *Ford* plurality recognized that,

> consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity . . . is necessarily inadequate. [T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.

Ford, 477 U.S. at 414 (internal quotation marks omitted). In turn, Justice Powell's controlling concurrence held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard'" on his claim that he is ineligible for the death penalty due to mental infirmity. 477 U.S. at 424 (Powell, J., concurring) (alteration in original).

As this Court observed in *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Ford* established that "[o]nce a

prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Id.* at 949 (quoting *Ford*, 477 U.S. at 426, 424). The *Panetti* Court held that the state court there had failed to provide this basic element of due process. Notwithstanding the petitioner's substantial threshold showing of incompetency, the court resolved his claim without a hearing based on a process that "invite[d] arbitrariness and error," *id.* at 951 (quoting *Ford*, 447 U.S. at 424), and denied the petitioner "an adequate opportunity to submit expert evidence," *id.* at 951-52.

The state court here violated the clearly established law of *Ford* for the same reasons. As described above, there can be no doubt that Brumfield made "a substantial threshold showing" of intellectual disability. *See supra* at 36-37. Notwithstanding that showing, the state court, as in *Ford* and *Panetti*, based its decision regarding Brumfield's eligibility for the death penalty on an unreliable record that "'[i]nvite[d] arbitrariness and error.'" *Panetti*, 551 U.S. at 951 (quoting *Ford*, 447 U.S. at 424). The state postconviction court based its decision regarding Brumfield's intellectual disability on the expert testimony from Brumfield's pre-*Atkins* sentencing record – testimony that was provided years before *Atkins* was decided and did not address the clinical standards that governed Brumfield's intellectual disability. The decision to rely on that record out of context was, if anything, *more* arbitrary than relying on the records built by state- and court-appointed

experts in *Ford* and *Panetti*, which at least were developed for the relevant purpose. *See Ford*, 477 U.S. at 424; *Panetti*, 551 U.S. at 949.

Furthermore, as in *Panetti*, the state court denied Brumfield an adequate opportunity to submit evidence by virtue of the unfair sequence in which it rejected his requests for funding and his claim of intellectual disability. As the Court observed in *Panetti*, the state court in that case violated *Ford* by rejecting the petitioner's claim that he was mentally ill *before* ruling on his pending motions for expert funding. 551 U.S. at 951-52. As the Court explained,

> [h]ad the court advised counsel it would resolve the case without first ruling on petitioner's motions and without holding a competency hearing, petitioner's counsel might have managed to procure the assistance of experts, as he had been able to do on a *pro bono* basis the day before petitioner's previously scheduled execution. It was, in any event, reasonable for counsel to refrain from procuring and submitting expert psychiatric evidence while waiting for the court to rule on the timely filed motions, all in reliance on the court's assurances.

Id. at 952.

That is precisely what happened to Brumfield here. He asserted his entitlement to expert funding and specifically argued that it would be "premature . . . to address [his] claims" before resolving his entitlement to expert assistance. JA 207a. As in *Panetti*, it was reasonable for Brumfield to rely on his state law

entitlement to expert assistance. As in *Panetti*, if the state postconviction court would have denied Brumfield's request for funding before denying him a hearing and dismissing his petition, he could have attempted to secure appropriate expert assistance on a *pro bono* basis. Instead, the state court gave Brumfield no notice that he should look elsewhere for assistance and instead "simply ended the matter" by denying his *Atkins* claim while he was reasonably waiting to obtain a ruling on funding from the court. *Panetti*, 551 U.S. at 952. These procedural deficiencies violated the principles articulated in *Ford* and "failed to provide petitioner with a constitutionally adequate opportunity to be heard" on his intellectual disability. *Id.*

Lastly, the state court's arbitrary decision is not justified by Louisiana's "substantial leeway to determine what process balances the various interests at stake." *Ford*, 447 U.S. at 427. As in *Panetti*, the state court failed to follow the procedural framework that the State had put in place by disregarding Brumfield's entitlement to funding and denying it only after rejecting Brumfield's claim for postconviction relief based on his intellectual disability. *Panetti*, 551 U.S. at 950-51 ("[A] violation of the procedural framework [the state] has mandated . . . undermines any reliance the State might now place on Justice Powell's assertion that 'the States should have substantial leeway to determine what process best balances the various interests at stake'" (quoting *Ford*, 447 U.S. at 427)). As discussed above, Louisiana law was clear at the time of Brumfield's postconviction petition that the state court had a "constitutional duty

to determine whether [Brumfield was] entitled to" fees for experts. *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287, 1287 (La. 1992); *Copeland v. Smith*, 614 So. 2d 1245, 1245 (La. 1993) (explaining that postconviction courts are required to hold an evidentiary hearing to determine whether the petitioner is entitled to funds and, if so, "fix them in the proper amount"). The state court's treatment of Brumfield's funding requests in this case was an affront to, not an application of, Louisiana's exercise of its discretion in implementing *Ake*.

Because the state court's decision was based on an unreasonable application of *Ford*, it was not deserving of AEDPA deference from the federal district court under § 2254(d)(1).

C. The State Court's Decision Violated *Atkins v. Virginia*.

Finally, the state court's decision was contrary to, and an unreasonable application of, *Atkins* itself. Although this Court left the implementation of *Atkins* to the states, it left no doubt that executing intellectually disabled persons is prohibited by the Eighth Amendment. *Atkins*, 536 U.S. at 321. As discussed above, *Atkins* also endorsed a clinical definition of intellectual disability that had been developed over time by the scientific community and was the domain of properly trained experts. *Id.* at 308 n.3, 309 n.5. In turn, Louisiana adopted the same clinical definition endorsed in *Atkins* and instructed that its application should be "guided by experts

capable of diagnosing mental retardation." *Williams*, 831 So. 2d at 858.

Regardless of the adequacy of Louisiana's procedures in theory, their application in this case cannot be squared with *Atkins*' most fundamental principle that the Constitution prohibits the execution of intellectually disabled persons. Intellectually disabled persons *cannot* demonstrate their ineligibility for the death penalty without the assistance of a qualified expert. It follows that a state court applying *Atkins* utterly fails to effectuate its most basic command where, as here, it fails to fund or otherwise assure expert assistance for an indigent defendant at his first opportunity to argue that his intellectual disability renders him ineligible for the death penalty. Without relevant expert testimony in the record before it, the state court's application of the clinical definition of intellectual disability was inherently untrustworthy and cannot be presumed to adequately protect the constitutional guarantee of ineligibility announced in *Atkins*. *See Atkins*, 536 U.S. at 309, 321 (holding that it was necessary to hold further proceedings to evaluate petitioner's intellectual disability, notwithstanding that he had been provided a penalty phase at which there was evidence that he was "of 'average intelligence at least'" and he was "diagnosable as having antisocial personality disorder"). The state court's decision is thus not deserving of deference under § 2254(d)(1).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

NICHOLAS J. TRENTICOSTA
SUSAN HERRERO
ATTORNEYS AT LAW
7100 St. Charles Ave.
New Orleans, LA 70118
nicktr@bellsouth.net

MICHAEL B. DESANCTIS
Counsel of Record
AMIR H. ALI
ADAM G. UNIKOWSKY
R. TRENT MCCOTTER
LEAH J. TULIN
DAVID A. WISHNICK*
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mdesanctis@jenner.com

*Admitted in Illinois only;
supervised by principals of the firm