No. 13-1433

IN THE

Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN,

Respondent.

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

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Petitioner asked the Court to resolve the following questions:

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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STATEMENT

Petitioner Kevan Brumfield was sentenced to death for murdering an off-duty police officer in Baton Rouge, Louisiana, during the course of a premeditated armed robbery he orchestrated. The Fifth Circuit, reversing the district court, denied his petition for federal habeas corpus relief under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This Court should affirm. Brumfield mischaracterizes the record, ignores his failure to exhaust the constitutional claims he advances, and inappropriately seeks to extend this Court's decisions to encompass novel arguments. The state court reasonably determined the facts based on the record and did not contravene any clearly established law. Brumfield's death sentence is lawful under *Atkins v. Virginia*, 536 U.S. 304 (2002).

A. The Crime

On January 7, 1993, at approximately 12:10 am, Corporal Betty Smothers, a 36-year-old off-duty police officer, escorted Kimen Lee, the assistant manager of a Piggly Wiggly grocery store in Baton Rouge, Louisiana, to a bank across town to make the store's nightly deposit. When the police car pulled up to the bank and backed into the night depository lane, Ms. Lee rolled down the passenger window to make the deposit. In tandem, two shooters who had been lying in wait quickly converged on opposite sides of the car and began shooting rapid-fire at Corporal Smothers and Ms. Lee. Corporal Smothers was struck in the hail of gunfire, and she slumped to the side motionless. Ms. Lee reached over Corporal Smothers's body and took control of the vehicle. Although she too had

been shot, she managed to drive the car half a mile to a convenience store.

Police and emergency medical services responded to the scene. Corporal Smothers had sustained five gunshot wounds to her head, back, shoulder, and forearm. She could not breathe on her own and had no pulse or blood pressure. She was pronounced dead at 12:42 am. Ms. Lee survived, despite having been shot four times in the crossfire of the two gunmen.

Three days later, Eddie Paul called the police and told them Brumfield had murdered Corporal Smothers. Brumfield initially denied involvement, claiming he was with his brother when the crime occurred. But once informed that his brother had not corroborated his alibi, Brumfield gave a videotaped statement admitting his involvement. Yet, Brumfield attempted to minimize his culpability by claiming he was the getaway driver while two others, West Paul and Henri Broadway, fired the shots that killed Corporal Smothers and wounded Ms. Lee.

Upon apprehension, Paul and Broadway each identified Brumfield as Corporal Smothers's shooter. After the police informed Brumfield of their statements, he gave a second videotaped interview in which he admitted to shooting her. Brumfield's confession demonstrated the attempted armed robbery that resulted in Corporal Smothers's death had been premeditated. Brumfield described how he had been "scoping things out" in the preceding days and knew a Piggly Wiggly employee protected by a police officer made deposits every night at that time. He admitted he arrived at the bank before the nightly deposit and hid in

the bushes waiting for the police car to arrive. He further admitted that he had recently procured the car and two handguns to use in the robbery and disposed of them afterward. He apologized for killing Corporal Smothers.

B. The State Trial

The State charged Brumfield with first-degree murder. Before trial, Brumfield was granted state funding for investigation, mitigation, and examination by psychologists. Through these funds, Brumfield obtained his educational and medical records, interviewed potential witnesses, and hired a sociologist, Dr. Cecile Guin, and two neuropsychologists, Dr. Brian Jordan and Dr. John Bolter, to examine him. Dr. Guin produced a thorough social history of Brumfield; Dr. Jordan and Dr. Bolter each produced comprehensive neuropsychological reports.

The evidence presented against Brumfield at trial was overwhelming. In addition to his taped confessions, the jury heard testimony that a few days before the murder Brumfield told his pregnant girlfriend he would give her money before his anticipated incarceration set to begin January 13, 1993;[1] that Brumfield had been seen in the Piggly Wiggly with Henri Broadway, who Ms. Lee identified as one of the shooters, an hour before the crime; that Brumfield asked his girlfriend to lie about his whereabouts during the time when the murder occurred;

1. On October 13, 1992, Brumfield pleaded guilty to attempted possession of cocaine and felony theft of a gun; he was scheduled to be sentenced on January 13, 1993, six days after Corporal Smothers was murdered. Transcript of Sentencing Hearing ("Sent.") 15-16 (July 3, 1995).

and that Brumfield told Eddie Paul on the morning after the murder that he had killed someone but the crime had been "a waste of time" because he made no money. The jury convicted Brumfield of first-degree murder.

The State sought the death penalty. It called several witnesses at the sentencing hearing. The witnesses testified to Brumfield's crime spree in the weeks leading up to Corporal Smothers's murder.

Anthony Miller testified that on December 25, 1992, thirteen days before Corporal Smothers was murdered, Brumfield offered to give him a ride from a club back to Baton Rouge. While in transit, Brumfield ordered Miller out of the car at gunpoint, robbed him of a gold chain, a jacket, and 80 dollars, put a gun to his head, and pulled the trigger; Mr. Miller only survived because Brumfield's gun misfired. Sent. 18-20.

Edna Perry and her daughter, Trina Perkins, testified that on January 2, 1993, five days before the murder, Brumfield robbed them at gunpoint while they were walking along North Boulevard in Baton Rouge. After having ridden in a car past Perry and Perkins, Brumfield exited the car on the same side of the street and acted as if he had a foot injury. As Perry and Perkins walked by, Perry pulled a knife out of her purse fearing that "something was going to happen right then." Brumfield let them walk by but then returned to the car and followed them. As he drove up along side them, he put a sawed-off shotgun in Ms. Perry's face and said "hand it [her purse] over, bitch." Ms. Perry asked if she could keep pictures of her deceased son that were in her purse. Brumfield responded, "bitch, you dead," and drove away. Sent. 31-32, 43-44.

The State also called as witnesses Corporal Smothers's mother and her two sons, Warrick Dunn and Derrick Green. Each testified as to the impact of her death on the family and their difficulty living without her. Sent. 53-57, 59-60.

Brumfield's parents, brother, and fourth grade teacher testified on his behalf. They testified that through first and second grade he "was a straight 'A' student," but that problems started in the third grade when Brumfield's parents separated and an abusive stepfather entered the picture. While Brumfield was at times "a very affectionate, very loving child" who "loved to make people laugh," he also could be "completely disruptive" and "distracting [to] the class." Brumfield was diagnosed with attention deficit disorder. Sent. 66-67.

Brumfield also called Dr. Cecile Guin, a professor at Louisiana State University's School of Social Work. At Brumfield's request, Dr. Guin had conducted a "social history," in which she tried to "find every single source of information" about Brumfield's life. To that end, Dr. Guin interviewed approximately thirty people, including Brumfield, his teachers, family, and officials at state agencies. She also reviewed "every single psychological report that was ever done on [Brumfield]." Sent. 112-13, 141.

Dr. Guin found that, although Brumfield had a low birth weight of 3.5 pounds, he was born "just about full term" and had a birth that was "normal in every other way." Sent. 114; Report of Dr. Cecile Guin ("Guin Report") 1-2. Brumfield's early life was "probably the happiest time of his life," and Dr. Guin found no "medical

records or anything that would indicate there was any trauma from after the time that he was born until age four or five." Sent. 117. Brumfield "did pretty well in the first and second grade," but by third grade his behavior had deteriorated. The timing corresponded with the breakup of the family and abuse from a stepfather. Sent. 118-19. During his childhood, Brumfield had multiple psychological evaluations, which revealed that he had a "behavior disorder" and "attention deficit disorder." Brumfield had maintained a job at a restaurant for three months, but quit because drug dealing was more profitable. Sent. 138. At the time of his sentencing, Brumfield had five children with three different women. Sent. 139.

Last, Brumfield called Dr. John Bolter, a well-regarded clinical neuropsychologist at the NeuroMedical Center in Baton Rouge, Louisiana, to "testify as an expert in the field of neuropsychology." Sent. 145. Brumfield had asked Dr. Bolter to perform "a neuropsychological evaluation to determine to what extent [Brumfield] may be manifesting neurocognitive deficits associated with organic brain impairment." Report of Dr. John F. Bolter ("Bolter Report") 1. Dr. Bolter thus "administered a comprehensive battery of neuropsychological measures directed to assessing his level of intelligence, basic achievement skills, psychomotor functions, psychosensory and perceptual skills in visual, auditory and tactile domains, mental flexibility, attention and concentration, receptive and expressive language functions, learning and memory and complex problem solving or abstraction." *Id.* 6. Specifically, Dr. Bolter administered the following tests:

- National Adult Achievement Reading Test (NAART)

- Wechsler Adult Intelligence Scale-Revised (WAIS-R)
- Wide Range Achievement Test-Revision 3 (WRAT-3)
- Lateral Dominance Test
- Mechanical Grip-Strength Test
- Name Writing Speed Test
- Finger Tapping Test
- Grooved Pegboard Test
- Luria Motor Skill Assessment
- Reitan-Klove Sensory-Perceptual Examination
- Seashore Rhythm Test
- Speech Sounds Perception Test
- Benton Facial Recognition Test
- Hooper Visual Organization Test
- Trail Making Test
- Stroop Neuropsychological Screening Test
- Intermediate Visual and Auditory Continuous Performance Test (IVA)

- Reitan-Indiana Aphasia Screening Test
- Clock Drawing Test
- Benton Controlled Oral Word Association Test
- Benton Visual Naming Test
- California Verbal Learning Test
- Wechsler Memory Scale-Revised (Logical Memory I and II, and Visual Reproductions I and II portions)
- Halstead Category Test

Id.

After reviewing the results, Dr. Bolter found that Brumfield's motor functions and auditory functions were intact, he had normal language articulation, and he had an IQ score of 75, which indicated he was functioning within the borderline range of general intelligence. Dr. Bolter noted that Dr. Brian Jordan had "rated [Brumfield's] intelligence just a little higher."[2] Sent. 149. Dr. Bolter agreed with Dr. Jordan's assessment that Brumfield had attention deficit disorder and an antisocial personality. Sent. 149. Dr. Bolter further found that Brumfield's

2. After Dr. Jordan produced an expert report, the defense neither called him as a witness nor disclosed his report to the State. The State learned of and obtained a copy because Drs. Guin and Bolter both considered it in producing their respective reports. Drs. Guin and Bolter both referenced Dr. Jordan's report in their testimony; the State read portions into the record. Sent. 135-140, 149.

"problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." Bolter Report 9.

Dr. Bolter's report summarized his findings:

> Based on the present evaluation, Mr. Brumfield appears to be functioning within the Borderline range of general intelligence and within the Low Average to Borderline range for basic academic skills. Except for problems with complex attention associated difficulty in acquisition secondary to that problem, he appears to be normal from a neurocognitive perspective. He also has a normal capacity to learn and acquire information when given the opportunity for repetition …. His problem solving and reasoning skills are also adequate and he is not showing lateralizing or focal deficits in neuropsychological functioning that would otherwise be indicative of an organic mental disorder.

Id. 10.

The jury unanimously recommended a sentence of death. The Louisiana Supreme Court affirmed his conviction and sentence. Petition Appendix ("Pet.App.") 208a. This Court denied Brumfield's petition for a writ of certiorari. *Id*. 184a.

C. The State Post-Conviction Proceeding

On March 25, 2000, Brumfield filed an application for post-conviction relief with the state trial court. The application alleged, among other things, he was ineligible for execution due to insanity, notwithstanding the fact that the opinions of Drs. Guin, Jordan, and Bolter, and the historical data, which included six psychological, learning, and IQ assessments, did not support the theory. Brumfield also filed a motion to allow him to "amend and supplement his Petition within 120 days (or such later fixed date as the court may hereafter set)." Joint Appendix ("JA") 175a-76a. The motion was granted.

More than a year later, on May 9, 2001, Brumfield filed a second motion asking for a continuance, which was granted. On September 5, 2001, Brumfield filed a third motion for a continuance, which was granted. On November 19, 2002, Brumfield filed a fourth motion for continuance and to amend his application in light of *Atkins*, which was granted. None of these motions sought state-appointed expert assistance.

On June 16, 2003, Brumfield filed an amended post-conviction application. It alleged that under *Atkins* and *State v. Williams*, 831 So. 2d 835 (La. 2002), the state court was "required to hold an evidentiary hearing and, following that hearing, to find that Brumfield is mentally retarded." JA 202a.[3] Brumfield did not submit additional

3. 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).

evidence to support the *Atkins* claim. He relied on selected evidence that had been presented during his sentencing proceedings. Pet.App. 122a n.6.

Brumfield also asserted cumulative error, ineffective assistance of counsel, jury misconduct, and lack of impartiality. JA 209a. At the end, under the title "Other Claims and Issues," Brumfield stated the following:

> Under La. R.S. 15:149.1 and otherwise, Brumfield is entitled to funds for his counsel to investigate his claims and defenses, to pursue post-conviction proceedings on his behalf, and to retain the services of various experts …. However, the Legislature has not yet allocated any amounts to fund this statutory mandate. Thus, until such funds are available to Brumfield, it is premature for this court to address Brumfield's claims and thus also for the state to schedule any execution date for Brumfield.
>
> Because undersigned counsel have not been provided funds for their representation, for retaining any experts, or otherwise and have not had adequate resources to fully set forth all reasons why Brumfield is entitled to have his conviction and sentence set aside, petitioner will separately seek funding from [] this Court and request additional time to amend this petition once funding issues have been resolved.

JA 207a.

Thus, although Brumfield asserted he was entitled to funding under state law, specifically La. R.S. 15:149.1,[4] he never claimed entitlement to State-funded expert assistance under federal law. In addition, despite asserting he intended to "separately seek funding from [the] Court," JA 207a; JA 244a ("Brumfield will, prior to the hearing on procedural bars, be submitting a separate motion for funding in this matter."), Brumfield never filed any such funding motion.

On October 23, 2003, the state court held a hearing on Brumfield's amended application in accordance with *Williams*.[5] In that decision, the Louisiana Supreme Court noted that *Atkins* "left to the states the task of developing appropriate ways to determine which offenders will be spared the death penalty because of mental retardation." *Williams*, 831 So. 2d at 853. The decision set forth substantive and procedural rules for handling such claims. Substantively, the court explained "that a diagnosis of mental retardation has three distinct

4. In 1999, the Louisiana legislature passed La. R.S. 15:149.1, requiring state trial courts "after imposition of the sentence of death" of an indigent defendant to appoint the Louisiana Indigent Defense Assistance Board "to represent the defendant on direct appeal and in any state post-conviction proceedings, if appropriate." But Brumfield's conviction became final before the statute's enactment, and he already was being represented by *pro bono* counsel on post-conviction review. Brumfield has never articulated his legal basis for believing that La. R.S. 15:149.1 entitled him to state-appointed expert assistance. JA 207a, 259a-60a, Petitioner's Brief ("Pet. Br.") 10-12, 53-54.

5. Brumfield implies he was unaware that his claims would be resolved at this hearing, Pet. Br. 11, 27, but the record belies any such implication, Pet.App. 170a-71a.

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, *i.e.,* by the age of 22 years," although "*Atkins* also subscribed to the diagnostic criteria that the onset of mental retardation must occur before the age of 18 years." *Id.* at 854.[6]

Procedurally, the court explained "that not everyone faced with a death penalty sentence will automatically be entitled to a post-*Atkins* hearing. It will be an individual defendant's burden to provide objective factors that will put at issue the fact of mental retardation. A defendant's entitlement to a post-*Atkins* hearing will be made on a case-by-case basis." *Id.* at 857. The court then instructed "trial courts to treat the issue procedurally as they would treat pre-trial competency hearings, for which statutory criteria already exist in Louisiana." *Id.* at 858. "There is no automatic right to a hearing on the issue of mental retardation, whether the hearing is sought pre-trial, while the case is on appeal, or as post-conviction relief." *Id.* at n.33.

The first step, therefore, was for the state court to decide whether Brumfield made the threshold showing of intellectual disability triggering his right to an evidentiary hearing. The court, after reviewing the record, found that Brumfield had not made the requisite showing. The judge explained his reasons in open court:

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6. Louisiana later adopted a statutory definition of intellectual disability, La. C. Crim. P. art. 905.5.1(H) (2014), but that definition is inapplicable to this case, Pet. Br. 26 n.7.

> [T]here are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. 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. Guin'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 of 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. 171-72a.

The court also rejected Brumfield's other claims for post-conviction relief. In particular, the court rejected the funding claim because it did not "fit[] within the grounds under [Louisiana Code of Criminal Procedure Article] 930.3," and was "not set out with enough particularity." Pet.App. 181a.

On January 8, 2004, Brumfield filed an application for a supervisory writ with the Louisiana Supreme Court. JA 245a-60a. Brumfield again argued *Atkins* and *Williams* entitled him to an evidentiary hearing and, ultimately, a finding of intellectual disability, JA 254a. As to funding, he repeated verbatim the statement from his amended post-conviction application. JA 254a, 259a-60a. Thus, Brumfield again claimed that state law—not federal law—entitled him to funding. The application was denied. Pet. App. 168a. Brumfield did not file a petition for certiorari with this Court.

D. Federal Post-Conviction Proceeding

1. The District Court

On November 4, 2004, Brumfield filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Louisiana. District Court Record, Docket Entry ("Doc.") No. 1. In that petition, he asserted nearly identical rights to an evidentiary hearing and funding. Doc. 1. The only difference was that, as to funding, Brumfield claimed his entitlement arose "under [the] United States Constitution or otherwise" instead of "under La. R.S. 15:149.1 or otherwise." *Compare* Doc. 1 at 37, *with* JA 207a. In its Answer, the State noted that although "it appears that petitioner has exhausted his

state judicial remedies with respect to all claims he has presented in the instant petition [and] [t]he application for federal habeas corpus relief is timely," the petition should be dismissed because "adequate and independent state procedural bars foreclose[d] relief" and "the state court rulings on the merits [were] entitled to a presumption of correctness." Doc. 11 at 8.

The district court appointed counsel; the Federal Public Defender Board provided expert funding. The matter was then assigned to a magistrate judge. On November 1, 2007, Brumfield filed an amended petition that incorporated his expert's findings. Doc. 30. Brumfield asked the magistrate judge to consider his new evidence because he had been unable to obtain funding under La. Rev. Stat. §15:149.1, which in turn prevented him from "develop[ing] and uncover[ing] facts supporting his claims while he was in state post conviction proceedings." Doc. 30 at 1-6; *see supra* n.4. The State opposed the introduction of new evidence, arguing, among other things, that the new evidence would make his *Atkins* claim unexhausted. Doc. 36 at 6-18.

On April 15, 2008, the magistrate judge issued a report and recommendation. Pet.App. 101a-67a. The magistrate judge found the state court had properly concluded that the evidence in the record did not justify holding an evidentiary hearing under *Atkins*. In the magistrate judge's view, the record evidence showed that Brumfield was not intellectually disabled because he had an IQ of 75, there was no evidence of impairment in adaptive skills, and all evidence suggested that before the age of 18 Brumfield had attention deficit disorder and antisocial behavior. *Id*. 127a-29a.

The magistrate judge nevertheless considered the new evidence in her analysis of Brumfield's *Atkins* claim. The magistrate judge concluded she need not decide whether the new evidence fundamentally altered the *Atkins* claim (thus rendering it unexhausted) because even assuming it did, Brumfield demonstrated "cause" and "prejudice." *Id.* 122a. The "cause" was the state court's failure to provide Brumfield funding, and the "prejudice" was a Louisiana statute of limitations bar. *Id.* 143a.

After reviewing the new evidence, the magistrate judge concluded that Brumfield had established a *prima facie* case of intellectual disability under *Atkins* and was entitled to an evidentiary hearing. Pet.App. 143a-44a. On June 30, 2008, the district court adopted the magistrate judge's report and recommendation, Pet.App. 99a-100a, and scheduled an evidentiary hearing for the summer of 2010.

At the evidentiary hearing, Brumfield called three expert witnesses. Dr. Stephen Greenspan, a psychiatrist at the University of Colorado Medical School, testified generally as to the standard for evaluating intellectual disability; he never interviewed Brumfield and did not prepare a report. Federal Transcript Volume ("Vol.") I, pg. 5, 13. Dr. Ricardo Weinstein, a psychologist without a clinical practice and a frequent consultant to attorneys in death penalty cases, testified that Brumfield had "mild mental retardation." Vol. I, pg. 60, 229-31. He reached this conclusion after: (1) giving Brumfield a new IQ test, which showed an IQ of 72; (2) adjusting Brumfield's prior IQ scores downward based on the "Flynn Effect";[7] (3) relying

7. The "Flynn Effect" is "an adjustment used in interpreting standardized tests to account for the fact that IQ scores have been

on his low birth rate and circumstances of his childhood; and (4) witnessing Brumfield have problems performing certain tasks, such as writing a letter. Vol. II, pg. 42-51, 71-73, 89. Dr. Weinstein acknowledged that he was the first person to diagnose Brumfield as intellectually disabled. *Id.* 108. Brumfield also called Dr. Victoria Swanson, a psychologist from Lafayette, Louisiana. Without ever having interviewed Brumfield, Dr. Swanson produced a report that parroted Dr. Weinstein's conclusion that he had "mild mental retardation." Vol. VI, pg. 31-130.

The State called three expert witnesses. Dr. Donald G. Hoppe, a clinical psychologist from Baton Rouge, Louisiana, testified he had examined Brumfield and determined that he was not intellectually disabled. Dr. Hoppe found that Brumfield had a full-scale IQ of 70 and a functional IQ of 75, had normal adaptive skills, and had not shown any instance of intellectual disability before the age of 18. Vol. IV, pg. 23-25; Report of Donald G. Hoppe ("Hoppe Report") 3-12. He found two factors particularly relevant. First, Dr. Hoppe noted that "[p]rior to age 18, [Brumfield] was seen by at least six psychologists and a psychiatrist," and at trial "was evaluated by both Dr. Jordan and Dr. Bolter." Hoppe Report 9. Dr. Hoppe found it compelling that there was "not a single mention of mental retardation in any of the extensive records available on [Brumfield] from his developmental years, in spite of numerous educational and psychological evaluations."

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increasing from one generation to the next and calls for a reduction of approximately 0.33 points per year for each year between the time the test was administered and the test was normed." *Harris v. Thaler*, 464 F. App'x 301, 307 (5th Cir. 2012). The Fifth Circuit "does not recognize the Flynn Effect as a valid scientific theory." *Id*. at 308.

Id. That was especially compelling given that schools in that area had frequently over-diagnosed young African Americans with behavior problems as intellectually disabled. Vol. IV, pp. 116-17. Dr. Hoppe also found that Brumfield's criminal behavior was "the best example of how good his adaptive skills as an adult have been." Hoppe Report 11. "In planning, carrying out, and then attempting to evade arrest for several crimes," Brumfield "displayed well-developed skills in communication, time management, task organization, problem solving, transportation, self-preservation, and self-direction." *Id*.

Next, Dr. Robert Blanche, a psychiatrist from Baton Rouge, Louisiana, testified he had examined Brumfield and reached the same conclusion. He also found it significant there was "not one assessment that diagnosed mental retardation or an IQ below 70 prior to the age of 18, despite repeated efforts in testing him," and that "[a]ll of the intellectual assessments done prior to the age of 18 indicate that [Brumfield's] IQ consistently fell in the 70-85 range (low normal to normal range)." Report of Dr. Robert V. Blanche ("Blanche Report") 6. Dr. Blanche also found this significant because "if there was one thing that [the school system] did well, it was to identify the children who were mentally retarded." *Id*. Dr. Blanche identified numerous capabilities indicating Brumfield had normal adaptive functioning, including that he could plan and direct complicated actions, as shown by his previous experience as a drug dealer and the robbery and murder of Corporal Smothers. *Id*. 6-10. Dr. Blanche's expert opinion was that this is a "classic case of conduct disorder," not intellectual disability. Vol. IV, pg. 194.

The State then called Dr. Bolter, Brumfield's trial witness, to testify to the results of his prior examination. Dr. Bolter testified that he "didn't see any clear evidence of organic brain dysfunction" and instead found that Brumfield had "an attention deficit hyperactivity disorder, … nonspecific learning difficulties, … borderline intellectual functioning, and … an antisocial personality." Vol. VII, pg. 32. Dr. Bolter never suspected Brumfield was intellectually disabled. *Id.* 36. Had he, Dr. Bolter, "absolutely" would have conducted further testing. *Id.*

Last, the State called lay witnesses to testify as to their interactions with Brumfield. Officer Jerry Callahan, who witnessed Brumfield's confessions, explained that Brumfield "communicated easily," "never had a problem understanding [the officer's] questions," and had no "problem in making himself understood." Vol. III, pg. 146-49. Warrick Dunn, the son of Corporal Smothers, testified he had visited Brumfield in prison and "had a conversation like two adults…. I expressed myself and he was able to express himself…. He even talked about his own daughter, things that she was going through, getting ready for college." Vol. VII, pg. 59. Dunn noted his surprise that Brumfield had closely followed his football career, knowing details like how many yards Dunn needed to reach 10,000 for his career and how many times Dunn had been selected to the NFL Pro Bowl. The evidentiary hearing concluded on August 4, 2010.

Following the hearing's conclusion, this Court issued *Harrington v. Richter*, 131 S. Ct. 770 (2011) and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). These decisions clarified that the standard under 28 U.S.C. §2254(d) is "difficult to meet" and applies even where the state court

has summarily denied the claim. *Richter*, 562 U.S. at 784-86. *Pinholster* held that a review under §2254(d) is "limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. On the understanding that Section 2254(d)(2) indisputably limited review to the state court record, *see id.* at 1400 n.7, the Court held that "evidence introduced in federal court" also "has no bearing on §2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of §2254(d)(1) on the record that was before that state court." *Id.* at 1400.

In light of *Richter* and *Pinholster*, the State renewed its arguments in its post-hearing opposition brief that the court could not consider evidence produced in the evidentiary hearing. Doc. 118 at 3-21. In its post-hearing reply (to which the State was given no response), Brumfield argued for the first time anywhere that the state court had violated clearly established federal due process law by refusing to provide him with expert funding or allow him to supplement the record with expert testimony at the threshold stage. Doc. 121 at 1-20. That is, Brumfield's reply brief contained the first citations in this case to *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007).[8] *Compare* JA 189a (amended habeas petition), JA 245a (application for a writ to the Louisiana Supreme Court), Doc. 30 (amended federal habeas petition), *with* Doc 121 (post-hearing reply).

8. *Ford* was referenced in the amended habeas petition and the application to the Louisiana Supreme Court, but only as a secondary citation in the discussion of *Atkins*. JA 194a, 199a, 247a, 251a.

On February 22, 2012, the district court granted Brumfield's petition, ruling him ineligible for the death penalty under *Atkins*. The district court understood that, in light of *Richter* and *Pinholster*, it could no longer rely on "cause" and "prejudice" for procedural default as a justification for having held an evidentiary hearing or for using the new evidence adduced at that hearing to adjudicate Brumfield's *Atkins* claim *de novo*. Pet.App. 24a-26a. The district court correctly recognized that because the state court's decision was "on the merits," Brumfield's claims were all subject to Section 2254(d)'s relitigation bar absent a basis for withholding AEDPA deference. *Id*. 28a-30a. The district court held that "no AEDPA deference [was] due the state court's factual determination" because, for two reasons, the "state court unreasonably appli[ed] federal law as an antecedent to a factual determination." *Id*. 30a (citing *Panetti*, 551 U.S. at 953).

First, the district court held that the state court violated Section 2254(d)(1) by denying Brumfield his clearly established due process right to State-funded expert assistance. *Id*. 32a-36a. In the district court's view, Brumfield was entitled to expert funding as soon as he made a "rudimentary, preliminary showing of a colorable mental retardation claim." *Id*. 34a. Since Brumfield had made such a showing, according to the district court, the state court "violated [his] due process guarantees when it failed to allow him adequate funding to retain experts to address his claim." *Id*. 32a.

Second, the district court held that the state court violated Section 2254(d)(2) by making an unreasonable determination of the facts in light of the evidence

presented in that proceeding. *Id.* 36a-48a. The district court recognized that "[t]he record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation," and, as a result, the state court's "[f]inding that Brumfield failed to establish his *prima facie* case was not [an] unreasonable factual determination." *Id.* 42a. The state court's unreasonable factual determination, in the district court's opinion, was its decision to use "pre-*Atkins* sentencing evidence related to competency" to deny Brumfield an evidentiary hearing. *Id.* 46a. This error was "further compounded" by the fact that Brumfield "never had an opportunity to gain funding to hire experts to help support his claim of mental retardation." *Id.* 46a-47a.

The district court proceeded to *de novo* adjudication of the *Atkins* claim in light of the evidence adduced at the federal hearing. After reviewing the evidence, the district court found that Brumfield satisfied the three components of Louisiana's test for intellectual disability and issued a permanent injunction, forbidding the State from executing Brumfield. *Id.* 58a-98a.

2. The Court of Appeals

The Fifth Circuit reversed. As an initial matter, the Fifth Circuit agreed with the district court that the state court's judgment was "on the merits" and the state court's decision was entitled to deference under Section 2254(d) unless an exception applies. Pet.App. 11a. The Fifth Circuit concluded that no exception applied here.

First, the Fifth Circuit rejected the district court's conclusion that the state court violated Section 2254(d)(1)

by failing to provide Brumfield with the funds necessary to develop his claims. As the Fifth Circuit explained, "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." *Id.* 12a. The district court improperly "faulted the state court for failing to extend the due process precepts in *Atkins*, *Ford*, and *Panetti* to encompass this aspect of due process." *Id.*

Second, the Fifth Circuit rejected the district court's conclusion that the state court violated Section 2254(d)(2) by making the threshold determination based on the pre-*Atkins* record. After reviewing the record, the Fifth Circuit concluded "that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing." *Id.* 14a. Because Brumfield did not make a showing of intellectual disability based on the evidence in the record, the state court "did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue." *Id.* 15a.

Accordingly, the Fifth Circuit found that the district court should not have conducted an evidentiary hearing, disregarded the evidence adduced at it, and upheld the state court's decision under AEDPA's deferential standard. *Id.* 15a-16a. The Fifth Circuit made clear, however, that even if it "were to consider the new evidence presented to the district court, [it] likely would hold that Brumfield failed to establish an *Atkins* claim." *Id.* 16a n.8 (citing *State v. Dunn*, 41 So.3d 454 (La. 2010)).

SUMMARY OF ARGUMENT

"AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico v. Lett*, 559 U.S. 766, 779 (2010). Yet that is what Brumfield asks the Court to do. As the Fifth Circuit held, the state court reasonably determined the facts based on the record evidence and reasonably applied clearly established precedent to Brumfield's legal arguments. Brumfield's claims as to why the district court correctly held an evidentiary hearing and reviewed his *Atkins* claim *de novo* thus all miss the mark. In fact, Brumfield's claims, which mischaracterize the record below and are premised on unexhausted constitutional arguments, have less merit than even the Fifth Circuit realized.

First, Brumfield claims that the state court forfeited AEDPA deference by unreasonably determining "the facts" of his case "in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). To the extent he challenges the state court's determination based on the facts *in* the record, Brumfield's disagreement is with every federal judge to review his habeas petition—including the district court. These courts correctly found that the state court reasonably denied Brumfield's *Atkins* claim based on the record before it. That evidence showed Brumfield had an IQ of at least 75, had adaptive skills inconsistent with intellectual disability as demonstrated by his orchestration of this robbery and murder and other crimes, and had not manifested any signs of neuropsychological disorder before the age of 18. That the state court made this highly factual determination based on the testimony of *three* experts, all of whom conducted

exhaustive reviews and comprehensive intellectual testing, only confirms the reasonableness of its decision. There is no basis for overturning the state court's judgment on this ground.

Recognizing that his challenge to the state court's factfinding is untenable under AEDPA, Brumfield devotes most of his brief to arguing that the state court violated Section 2254(d)(2) by denying his claim based on the record from his pre-*Atkins* criminal trial and sentencing. But that argument fails as a matter of a law. Section 2254(d)(2)'s text limits the judicial inquiry to the "evidence" that *was* "presented in the State Court proceeding." The law is not a vehicle for objecting to the state court's decision to confine the record to certain matters. Even if the statute's terms were unclear, however, the Court's decision in *Pinholster* is not. That case holds that a Section 2254(d)(1) challenge is strictly limited to "the record that was before the state court." *Pinholster*, 131 S. Ct. at 1400. The majority and the dissent agreed that this understanding applies even more forcefully to Section 2254(d)(2). *Id.* at 1400 n.7; *id.* at 1416 (Sotomayor, J., dissenting). Accordingly, Brumfield's claim that the state court violated Section 2254(d)(2) by failing to admit additional expert testimony or otherwise hold a hearing cannot succeed.

Second, Brumfield claims that the state court forfeited AEDPA deference because its "decision involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). In particular, Brumfield argues that the refusal to provide him with state-funded expert assistance and/or allow him additional time to find his own expert at the threshold stage of the proceeding

violated his Fourteenth Amendment due process rights under *Atkins*, *Ake*, *Ford*, and *Panetti*. But Brumfield failed to exhaust this claim. To the extent he ever actually sought funding from the state court or asked for time to find *pro bono* expert assistance, Brumfield's claim was made only under state law. Brumfield's failure to properly exhaust enables the Court to either decline to reach the question or to reject his constitutional claim on the merits. 28 U.S.C. §2254(b)(2). But habeas relief is impermissible on this basis.

Brumfield's Section 2254(d)(1) claim also is meritless. No decision of this Court clearly establishes a due process right to state-funded expert assistance on state post-conviction review. *Atkins* did not establish procedural rights; the Court left it to the States to develop procedures for adjudicating intellectual disability claims. *Ake*, which affords defendants a right to state-funded assistance at trial, has not been extended to state post-conviction review because there is no right to appointed counsel at that stage of the proceeding. And *Ford*, which *Panetti* applied in the habeas setting, does not guarantee a right to funding at all, and certainly not at the threshold stage. Accordingly, there is no foundation for the due process right Brumfield asserts—let alone the "clearly established" right needed to prevail under Section 2254(d)(1).

Brumfield's contention that the simultaneous denial of his supposed funding request (which never materialized) and his request for an evidentiary hearing violated his due process rights is even weaker. The argument presumes that Brumfield had a clearly established right to submit expert testimony at the threshold stage of his *Atkins* claim. But he did not. The right cannot derive from *Atkins*,

and *Ford* and *Panetti* are the only other cases Brumfield relies on. He ignores, however, that the due process rights *Ford* addressed arose only *after* the threshold showing had been made. The sequencing problem *Panetti* identified likewise arose at a later stage because (unlike here) the threshold showing was not contested. Although he would like it to be the focus of the case, whether Brumfield should have such a right is not before the Court. That issue must be decided on direct review. Brumfield forfeited that chance when he did not seek certiorari after the Louisiana Supreme Court declined discretionary review.

Finally, if Brumfield prevails before this Court, the proper remedy is to remand the case to the Fifth Circuit for further proceedings. Although it indicated the district court likely erred in granting the habeas writ (even reviewing the *Atkins* claim *de novo* based on the evidence from the federal hearing), the Fifth Circuit has not yet decided the issue. The Court should follow its ordinary practice and allow the lower court to decide that question in the first instance. But regardless of which court decides the question, the answer is inescapable: Brumfield is not intellectually disabled. Brumfield was subjected to at least *six* evaluations before the age of 18 and not one diagnosed him as intellectually disabled. His behavior as an adult shows Brumfield has adequate adaptive skills. Brumfield's ability to orchestrate the sophisticated armed robbery that resulted in the cold-blooded murder of Corporal Smothers provides definitive proof. In short, Brumfield was lawfully sentenced to death under *Atkins*. The sentence should be affirmed.

ARGUMENT

I. The Court Should Deny Brumfield's Collateral Challenge To The State Court's Ruling Under Section 2254(d)(2).

Brumfield argues that the state court's adjudication of his *Atkins* claim is not entitled to AEDPA deference because it "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)(2). At times, Brumfield targets the state court's evaluation of the evidence actually in the record. *See, e.g.*, Pet. Br. 40 ("The pre-*Atkins* record … contained a plethora of objective factors that support … an intellectual disability diagnosis."). Other times, he targets the state court's refusal to expand the record before denying the *Atkins* claim at the threshold stage. *See, e.g.*, *id*. 40 ("It was patently unreasonable to deny Brumfield even a hearing on his *Atkins* claim based solely on his pre-*Atkins* penalty phase record."). Either way, Brumfield's claim lacks merit.

A. The State Court Reasonably Determined The Facts Of Brumfield's *Atkins* Claim In Light Of The Evidence In The Record.

Brumfield shoulders a heavy burden under Section 2254(d)(2) in arguing that the "state court's determination" that the facts in the evidentiary record did not "require a hearing on Brumfield's intellectual disability was patently unreasonable." Pet. Br. 21. Section 2254 imposes a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti,* 537 U.S. 19,

24 (2002). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

But Brumfield's Section 2254(d)(2) claim likely must be "reviewed under the arguably more deferential standard set out in §2254(e)(1)," *id.*, which provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); *see also* Pet.App. 37a ("When evaluating the different prongs of a mental retardation inquiry, it appears that state court determinations of each prong are considered historical fact determinations that are reviewed for clear error and thus receive the full benefit of §2254(e)(1).").

The Court need not resolve the interaction between Sections 2254(d)(2) and (e)(1), however, because the state court's determination that Brumfield had not "carried his burden [of] placing the claim of mental retardation at issue," Pet.App. 172a, was reasonable. First off, Brumfield tries to color the Court's review of this issue by repeatedly stating that the state court only had before it the "pre-*Atkins* sentencing record." Pet. Br. 27. But that is a highly misleading characterization of the record upon which the state court based its decision. The record encompassed all the evidence from the guilt phase and included volumes of factual material, including testimony and reports from several experts, concerning every detail of Brumfield's birth, childhood, development, intelligence, and adult behavior. And he submitted to a battery of comprehensive

tests designed to assess his mental condition. *See supra* 6-9; *infra* 34-35. As the state court understood, that the record was created before *Atkins* and initially used for a different purpose is not a basis for discounting or ignoring the factual conclusions that reasonably can be drawn from it.

Based on this well-developed record, the state court determined that Brumfield had failed to show significant enough limitations either in intellectual functioning or the adaptive behavior to warrant an evidentiary hearing. Pet.App. 172a. Brumfield nevertheless claims that this factual determination was objectively unreasonable because the record "contained a plethora of objective factors that support … a diagnosis" of intellectual disability. Pet. Br. 40. But Brumfield's argument cannot clear the high bar of Section 2254(d)(2) as the record evidence satisfied *none* of the objective factors necessary to warrant an evidentiary hearing or any other form of further review.

Intellectual functioning. Dr. Bolter found that Brumfield had an IQ of 75, and he noted that Dr. Jordan "rated his intelligence just a little higher than I did." Sent. 149. Both assessments are above the threshold for intellectual disability in Louisiana. *See Dunn*, 41 So.3d at 472 ("Not only has defendant never had a diagnosis of mental retardation prior to these proceedings, the range of possible IQ's that the more recently reported scores represent fall mostly above 70, indicating the defendant is not mentally retarded.").

Significant impairment in adaptive skills. Brumfield argues that he was entitled to a hearing because "there

was no discussion of adaptive skills in Brumfield's pre-*Atkins* sentencing record." Pet. Br. 30. The argument fails for three reasons. First, Brumfield's concession that he put forth insufficient evidence on this key issue confirms the correctness of the state court's decision that Brumfield had failed to put at issue an essential element of the test for intellectual disability.

Second, the absence of evidence on adaptive skills is conclusive given the exhaustive social history that was conducted by Dr. Guin, the testimony from multiple members of Brumfield's family, and the examinations by Dr. Bolter and Dr. Jordan. *Supra* 4-9. Despite the abundant testimony, there was nothing to "indicate that Brumfield was unable to live and function on his own in society or that he lacked the ability to care for himself, understand and use language, be mobile, or direct his life activities." Pet.App. 128a.

Third, and crucially, the evidence of Brumfield's crimes—including his planning and preparation, as well as his attempts to evade punishment—were in the record. In assessing adaptive skills it is "important to consider [his] behavior during the planning and commission of the instant crime." *Dunn*, 41 So.3d at 471. Brumfield scoped out the bank days in advance of the crime, rented a car off the street, and acquired both handguns used during the crime. *Supra* 1-4. Brumfield's plan, "with its premeditative aspects, clearly lacks the impulsiveness and non-leadership interactions associated with mentally retarded persons." *Dunn*, 41 So.3d at 472; *see id.* (finding no intellectual disability where "defendant engaged in the leadership and planning of a major bank robbery, which included discussing the robbery with [others] in advance,

borrowing a rental car from his girlfriend, driving … [the car] to the bank, and … [planning] to conceal commission of the crimes"). After the crime, Brumfield displayed survivor skills in his attempt to flee the scene, asking others to create alibis for him, disposing of the handguns and the car, and repeatedly lying to the police. *Supra* 1-4; *see, e.g.*, *State v. Brown*, 907 So.2d 1, 32 (2005) ("[Defendant's mental retardation] claim is undermined by his display of an intact survival mentality, which [he] exhibited when he destroyed all trace evidence of his crime[.]").

Manifestations of a neuropsychological disorder before the age of 18. None of the experts (including Brumfield's) testified that he showed signs of intellectual disability before the age of 18; all joined in Dr. Jordan's assessment that he instead had antisocial or sociopathic personality disorder and attention deficit disorder. *See supra* 6-9. And, Brumfield's reliance on his below average birth weight of 3.5 pounds as indicative of intellectual disability was undermined by Dr. Guin, who found he had a mostly normal birth and no "trauma from after the time that he was born until age four or five," Sent. 114, and by Dr. Bolter, who said that a weight in Brumfield's range is "not always predicting of [mental difficulties], and there can be children that are just fine at that weight," *id.* 148.

Accordingly, even discounting the record because it was created "pre-*Atkins*," which the Court should not, the state court did not unreasonably determine that Brumfield failed to meet his threshold burden. The expert testimony in the record was more than sufficient for the state court to make a factual determination. Dr. Guin had conducted a "social history," in which she tried to "find every single

source of information" about his life; Dr. Guin not only interviewed Brumfield, his teachers, his family, and state officials, she reviewed "every single psychological report that was ever done on him." Sent. 112-13, 141. Despite this exhaustive review, she found no evidence that anyone who came into contact with Brumfield suspected he might be intellectually disabled.

Even more probatively, Dr. Bolter "administered a comprehensive battery of neuropsychological measures," which included more than twenty intellectual assessment tests, all of which were "directed to assessing [Brumfield's] level of intelligence, basic achievement skills, psychomotor functions, psychosensory and perceptual skills in visual, auditory and tactile domains, mental flexibility, attention and concentration, receptive and expressive language functions, learning and memory and complex problem solving or abstraction." Bolter Report 6. After performing these tests, Dr. Bolter concluded that Brumfield's academic skills were "within the Low Average to Borderline range for basic academic skills" and his "problem solving, judgment and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." *Id.* 9.

Both Dr. Guin and Dr. Bolter also reviewed and relied upon Dr. Jordan's report. Sent. 113, 149. Dr. Jordan conducted a clinical interview, a psychological history, an Ammons Intelligence Test, a Rorschach Test, a Minnesota Multiphasic Personality Inventory, a Thematic Apperception Test, an Incomplete Sentences Test, a State-Trait Anxiety Test, a Draw-A-Person Test,

a Wide Range Achievement Test, and a Bender Gestalt Test. Report of Dr. Brian T. Jordan ("Jordan Report") 1. After conducting these tests, he concluded that Brumfield was "intellectually functioning at the lower end of the Low Average Range" and likely had a sociopathic personality and hyperactive disorder. *Id.* 4. Dr. Jordan made no finding of intellectual disability.

Given all this evidence, the state court was well within the bounds of reasonableness to reject a request for an evidentiary hearing that was predicated on chronology not substance. Brumfield received two neuropsychological evaluations and presented a social report that purported to document his entire life history, including every intellectual assessment he undertook before the age of 18. Brumfield attempts to minimize the experts' testimony involvement by arguing that they did not evaluate him for the *specific* purpose of detecting intellectual disability. Pet. Br. 5. But Brumfield makes no argument as to why or how such an instruction could have altered his experts' evaluations. It is unlikely Dr. Guin would have refrained from reporting evidence from Brumfield's childhood showing intellectual disability had she discovered it, or that Dr. Jordan or Dr. Bolter would have refrained from making a diagnosis of intellectual disability if they believed it was warranted. Given the extensive and reliable evidence regarding Brumfield's intellectual status in the record, the state court reasonably denied Brumfield's *Atkins* claim without further expert testimony or other supplemental evidence.

It should come as no surprise, then, that *every federal judge* to review Brumfield's claim has come to the same conclusion: the state court's factual determination must

be upheld if AEDPA deference applies. Pet.App. 127a-29a (magistrate judge) ("[W]hen only the evidence presented for the trial court's review at the October 2003 post-conviction relief hearing is considered, the Court finds that the trial judge's conclusion with respect to the need for an *Atkins* hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law."); *id.* 42a (district court) ("The record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation[.]"); *id.* 15a (Fifth Circuit) ("Based on the evidence in the record, we conclude that the state court did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue.").

That is perhaps why Brumfield focuses on process issues instead of vigorously contesting the state court's determination based on the actual record. Arguing that "[n]othing in his pre-*Atkins* sentencing record was dispositive of whether Brumfield was or was not intellectually disabled," Pet. Br. 27, will not overcome the substantial deference the state court is owed under AEDPA. The factual determination of Brumfield's *Atkins* claim was reasonable under Section 2254(d)(2) and should be upheld.

B. Brumfield's Claim That The State Court Violated Section 2254(d)(2) By Limiting Its Decision To The Existing Record Fails As A Matter Of Law.

Brumfield alternatively argues that the denial of his *Atkins* claim at the threshold stage was not a "reasonable

factual determination as a matter of law." Pet. Br. 18. Brumfield argues it was *per se* unreasonable for the state court to "definitively reject [his] claim of intellectual disability without a hearing and based solely on the pre-*Atkins* penalty phase record in this case." Pet. Br. 28. This argument is not cognizable under Section 2254(d)(2).

Section 2254(d)(2), as noted above, provides a basis for federal habeas relief when the adjudication "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)(2). The statute therefore is directed at the "evidence" that was "presented in State court." *Id.* It is not a vehicle for a claim, like Brumfield's, that the court should have allowed a more robust evidentiary process before denying the application. Section 2254(d)(2) is not amenable to a claim that additional evidence should have been considered. That claim, if cognizable at all on federal habeas review, must stem from the Constitution or another source of federal rights that might attach to state post-conviction review. *Infra* 39-54. Section 2254(d)(2)'s text is unambiguous.

Pinholster forecloses the argument in any event. The Court explained that "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of §2254(d)(1) on the record that was before that state court." *Pinholster*, 131 S. Ct. at 1400. In dissent, Justice Sotomayor contrasted Sections 2254(d)(1) and (d)(2), concluding that "[a]s between the two provisions §2254(d)(2)—which requires review of the state court's 'determination of the facts'—more logically depends on the facts presented to the state court." *Id.* at 1416 (Sotomayor, J., dissenting). The majority responded

that "[t]he additional clarity of §2254(d)(2) … does not detract from our view that §2254(d)(1) *also* is plainly limited to the state-court record." *Pinholster*, 131 S. Ct. at 1400 n.7 (emphasis added). The point of agreement between the majority and dissent was that Section 2254(d)(2) claims are limited to facts admitted in the state-court proceeding.

But even if the Section 2254(d)(2) issue is beyond the holding of *Pinholster*, the opinion's reasoning dictates that outcome. Like Section 2254(d)(1), the provision uses "backward-looking language," *id.* at 1398, including "resulted in a decision," "was based on an unreasonable determination," and "presented in State court," 28 U.S.C. §2254(d)(1)-(2). It "follows" from such past-tense language "that the record under review is limited to the record in existence at that same time, *i.e.,* the record before the state court." *Pinholster*, 131 S. Ct. at 1398. Like Section 2254(d)(1), then, review under Section 2254(d)(2) "is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* A claim cannot be based on the court's failure to take into consideration additional facts never made part of the record. *Id.* Under *Pinholster*, these sibling provisions cannot be given different scopes.

The two cases Brumfield relies on do not support his novel interpretation of Section 2254(d)(2). Pet. Br. 28 (relying on *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003)). Brumfield is correct, for example, that *Wiggins* held that the "state court acted unreasonably under §2254(d)(2) when it made a finding that was unsupported by the record." *Id.* But that conclusion in no way rested on a determination that

the state court had violated Section 2254(d)(2) in failing to admit additional evidence. Rather, the state court made a "clear factual error" in determining that "social service records ... recorded incidences of ... sexual abuse." *Wiggins*, 539 U.S. at 528. Unlike here, that is the kind of clear factual error that Section 2254(d) is designed to catch.

Similarly, Brumfield correctly interprets *Miller-El* to note that "§2254(d)(2) does not bar federal court review where [the] state court's determination is 'objectively unreasonable in light of the evidence presented in the state-court proceeding.'" Pet. Br. 28 (quoting *Miller-El*, 537 U.S. at 340). Again, however, that does nothing to advance his claim, as Brumfield does not attempt to overturn the state court's judgment based on "evidence presented in the state-court proceeding." *Id.* He seeks to overturn the judgment because the state court failed to provide him funding and instead rejected his claim "based solely on the … record in this case." *Id*. Neither *Miller-El* nor any other decision of this Court supports Brumfield's argument that this claim is cognizable under Section 2254(d)(2).[9]

II. The Court Should Deny Brumfield's Collateral Challenge To The State Court's Ruling Under Section 2254(d)(1).

Brumfield also argues that the state court is not entitled to deference under AEDPA because its "decision

9. *Miller-El* did not even explore the issue Brumfield raises. The issue there was whether Section 2254(d)(2)'s high bar applied at the Certificate of Appealability ("COA") stage. *Miller-El*, 537 U.S. at 341-42. That issue is not implicated here.

… involved an unreasonable application of[] clearly established Federal law[] as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). Brumfield's argument fails for two independent reasons. First, he did not exhaust in state court the constitutional claims pressed here. Second, the due process rights that Brumfield relies upon to support his argument are not "clearly established" by any decision of this Court.

A. Brumfield Failed To Exhaust Either Due Process Claim.

AEDPA provides that "[a]n application for a writ of habeas corpus … shall not be granted unless it appears that … the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b)(1)(A). "Under the exhaustion requirement," then, "a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." *Richter*, 131 S. Ct. at 787. Simply filing an application for post-conviction review in state court will not satisfy AEDPA. The issue for purposes of exhaustion is "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies." *Woodford v. Ngo*, 548 U.S. 81, 92 (2006).

To properly exhaust his state remedies, Brumfield needed to "fairly present [his] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of [his] federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam). To that end, the state court must "be alerted to the fact that the prisoners are asserting claims under the United States Constitution." *Id*. at 365-66; *see Baldwin v. Reese*,

541 U.S. 27, 32 (2004) ("A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'"). Raising an analogous state-law claim will not suffice. *See e.g.*, *Duncan*, 513 U.S. at 366.

Brumfield did not exhaust either of the due process claims he presses on federal habeas review. In this forum, Brumfield argues that the refusal to provide him a State-funded expert violates his constitutional rights under *Atkins*, *Ford*, and *Panetti*. *See infra* 44-49. But he never raised this federal claim in state court. In state court, Brumfield only argued that, "[u]nder La. R.S. 15:149.1 and otherwise," the state post-conviction proceeding should be delayed so that he could "seek funding from [] this Court and request additional time to amend this petition once funding issues have been resolved." JA 207a; JA 254a, 259a-60a, 300a (repeating the claim verbatim in Brumfield's petition to the Louisiana Supreme Court).

Brumfield's funding claim was clearly made under state law. The "and otherwise" tagline did not put the state court on notice that Brumfield was raising a federal claim under the Due Process Clause. The petition does not label the funding claim as "federal," reference the United States Constitution, or rely on any federal cases. He did not even use the words "due process." Brumfield's failure to exhaust his claim that he had a due process right to supplement the record with expert testimony at the threshold stage is even clearer. Unlike the funding claim, he did not even raise this claim under state law—*he did*

not raise it all. The claim was not raised until deep into the federal-court habeas proceedings when Brumfield was searching for a way around *Pinholster* and *Richter*. *See supra* 21 Accordingly, this constitutional claim also is not exhausted.

The second question presumes Brumfield's Section 2254(d)(1) claim is properly raised. But it is not given Brumfield's failure to exhaust state remedies. It would be appropriate therefore for the Court to decline to reach the issue. *See, e.g.*, *Walter v. United States*, 447 U.S. 649, 652 n.4 (1980). The Court also can deny Brumfield's Section 2254(d)(1) claim on the merits. 28 U.S.C. §2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). The Court cannot, however, grant Brumfield's federal habeas petition on claims that have not been exhausted. [10]

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10. The State did not expressly waive exhaustion. 28 U.S.C. §2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."). Stating that "it appears that petitioner has exhausted his state judicial remedies with respect to all claims he has presented in the instant petition," Doc. 11 at 8 (opposition to original petition for habeas corpus), does not meet Section 2254(b)(3)'s stringent standard for the "intentional relinquishment of a known right." *Carvajal v. Artus*, 633 F.3d 95, 105 (2d Cir. 2011); *Woodfox v. Cain*, 609 F.3d 774, 792 (5th Cir. 2010) (requiring "a clear and unambiguous intent to waive exhaustion"); *see, e.g.*, *id.* ("no 'express waiver' where the State indicated that it merely 'believed' the prisoner had exhausted his claims"). Nor does the district court's finding of "cause" and "prejudice" have relevance. *Supra* 17. The district court excused Brumfield's procedural default of his fundamentally altered *Atkins* claim due to the lack

B. The Due Process Rights That Brumfield Asserts Are Not "Clearly Established."

Following the district court's lead, Brumfield argues that the state court's adjudication of his *Atkins* claim is not entitled to deference under Section 2254(d)(1) because the ruling "is dependent on an antecedent unreasonable application of federal law." *Panetti*, 551 U.S. at 953. He argues that the state court violated his due process rights by: (1) not granting him State-funded expert assistance; and (2) not giving him the opportunity to supplement the record with his own expert testimony at the threshold stage. Neither argument has merit.

The constitutional claims fail at the outset because the due process rights Brumfield presses are not clearly established. By "clearly established," Section 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "Therefore, federal habeas relief may be granted here" only if the Louisiana court's "decision was contrary to or involved an unreasonable application of this Court's applicable holdings." *Carey v. Musladin*, 549 U.S. 70, 74 (2006). No decision of this Court clearly holds that Brumfield had a due process right to expert assistance on post-conviction review or a right to supplement the record at the threshold stage of his *Atkins* claim.

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of expert funding. But the funding problem could not excuse Brumfield's failure to argue that the lack of funding violated his due process rights. And Brumfield would need to exhaust any ineffective assistance of counsel claim he might assert as a justification for excusing default here. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000).

1. Brumfield did not have a "clearly established" constitutional right to State-appointed expert assistance on post-conviction review.

Brumfield's principal claim under Section 2254(d)(1) is that the state court's failure to furnish him with "expert assistance in order to develop evidence for his claim of intellectual disability violated clearly established law determined by this Court." Pet. Br. 41. Brumfield argues, in particular, that this Court's decisions in *Atkins*, *Ake*, and *Ford* clearly establish a constitutional right to State-funded expert assistance as part of his post-conviction effort to establish intellectual disability. Pet. Br. 41-56. Brumfield's arguments all miss the mark.

Atkins certainly did not clearly establish this right. *Atkins* held that the Eighth Amendment prohibits a State from executing someone who is intellectually disabled. 536 U.S. at 321. But the Court left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford*, 477 U.S. at 416-17). *Atkins* thus "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within *Atkins*' compass.'" *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quoting *Atkins*, 536 U.S. at 317); *Schriro v. Smith*, 546 U.S. 6, 7 (2005) (per curiam) ("The Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim.").

Brumfield's reliance on *Ake* is similarly misplaced. *Ake* 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." 470 U.S. at 83 (emphasis added); *Medina v. California*, 505 U.S. 437, 444 (1992) (explaining that *Ake* held that "when an indigent capital defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the defendant be provided access to the assistance of a psychiatrist"); *Coleman v. Thompson*, 501 U.S. 722, 741 (1991) ("*Ake* was a direct review case."). No decision of this Court has ever extended *Ake* to the post-conviction setting.

For good reason. The defendant's right to a state-appointed psychiatrist at trial is derivative of the right to appointed counsel. "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Ake*, 470 U.S. at 76. "[A]n indigent defendant" therefore "is entitled to the assistance of counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963), and on his first direct appeal as of right, *Douglas v. California,* 372 U.S. 353 (1963)." *Id. Ake* held that these "basic tools of an adequate defense or appeal" further require "the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Id.* at 77.

But the Court has been equally clear that the right to appointed counsel underlying *Ake* does not extend to state post-conviction review. *Pennsylvania v. Finley*, 481 U.S.

551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, and we decline to so hold today."); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion) ("*Finley* should apply no differently in capital cases than in noncapital cases."). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Id.*[11] Brumfield could not have had a clearly established right to state-appointed "expert assistance" in state post-conviction review of his *Atkins* claim when he did not have a right to appointed counsel.

Finally, Brumfield's reliance on *Ford* is unavailing. It is not clearly established that *Ford* applies in the *Atkins* context. The Court easily could have held that any right available under *Ford* applies to *Atkins* claims. But it did not. The Court instead allowed States to design rules for reviewing *Atkins* claims "[a]s was [its] approach in *Ford* …." *Atkins*, 536 U.S. at 317. That is why "the substantive federal baseline for competency set down in *Ford*," *Panetti*, 551 U.S. at 935, is not the measure of whether an *Atkins* claim has merit, *Hall v. Florida*, 134 S. Ct. 1986, 1999-2000 (2014). *Ford* is no more established when it comes to *Atkins* claims from a procedural perspective than it is from a substantive perspective. With respect to either half of the equation, the States lack "definitive" guidance from this Court. *Bies*, 556 U.S. at 831.

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11. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), did not alter the rule. Under *Martinez*, ineffective assistance of state post-conviction counsel can in some cases excuse exhaustion. *Id.* at 1318-19. But that was an "equitable ruling," and not a "constitutional ruling that would require appointment of counsel in initial-review collateral proceedings." *Id.* at 1319.

But whether *Ford* applies to *Atkins* claims is not even the question here. The issue is whether it is an "open question," *Musladin*, 549 U.S. at 76, or whether a decision of this Court "squarely addresses the issue," *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam). Whatever differences of opinion there may be on this score, there is no "clear answer," *id.* at 126, as to whether a state rule for processing *Atkins* claims is *per se* unconstitutional if it would violate *Ford* or whether these are independent legal regimes. Nothing more is required to reject Brumfield's argument.

But even if *Ford* applies per force to *Atkins* claims, Brumfield's reliance on it is still misplaced. Whatever due process rights *Ford* might afford Brumfield are triggered only *after* the petitioner has "made 'a substantial threshold showing of insanity.'" *Panetti*, 551 U.S. at 949 (quoting *Ford,* 477 U.S. at 426 (Powell, J., concurring in part and concurring in judgment)). *Ford* does not extend any such right to a petitioner, like Brumfield, who is still at the threshold stage. Pet. Br. 51-52. Brumfield therefore does not seek to apply *Ford* to the facts of his case. Indeed, the district court was clear that Brumfield should have been appointed expert assistance based on a "rudimentary, preliminary showing of a colorable mental retardation claim" because "no *prima facie* showing is likely possible" without it. Pet.App. 36a. Brumfield echoes this point in his opening brief. Pet. Br. 48.

Whatever the merits of this argument, it proves that Brumfield is asserting that *Atkins* petitioners are entitled to specific due process protections earlier in the proceeding than *Ford* petitioners. What Brumfield genuinely seeks is for the state court decision to be declared "unreasonable

in refusing to extend the governing legal principle to a context in which the principle should have controlled." *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014). But that is not a ground for relief under AEDPA. "Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Id.* at 1706.

More fundamentally, *Ford* does not clearly establish a right to State-appointed expert assistance at all. Justice Powell's controlling opinion did not so hold. *Ford*, 477 U.S. at 418-27 (Powell, J., concurring in part and concurring in the judgment). Nor did *Panetti*. The issue in *Panetti* was the state court's delayed response to a funding request made under state law and its impact on Panetti at a stage in the proceeding where he was entitled to submit evidence (*i.e.*, after he had made the threshold showing). 551 U.S. at 951; *id.* at 974-75 (Thomas, J., dissenting). As the Fifth Circuit held on remand, "*Ford* and *Panetti* merely establish that Panetti was entitled to an *opportunity* to present his own expert testimony before a neutral decisionmaker; after all, the critical issue in both cases was that the relevant state's procedure for determining competency permitted only the government to submit evidence." *Panetti v. Stephens*, 727 F.3d 398, 408 (5th Cir. 2013), *cert. denied*, 135 S. Ct. 47 (2014).

Even if "Justice Powell's opinion constitutes 'clearly established' law for purposes" of *Atkins*, then, it would not aid Brumfield's cause. *Panetti*, 551 U.S. at 949. Neither *Ford* nor any of this Court's decisions applying it clearly establish a due process right to a State-appointed expert

at the threshold stage. *Atkins* does not clearly establish that petitioners claiming intellectual disability somehow have *Ford* rights superior to those claiming incompetency under *Ford* itself. That is not possible.

2. Brumfield did not have a "clearly established" constitutional right to supplement the record with expert testimony at the threshold stage.

Brumfield also claims that, aside from funding, the state court violated his due process rights under *Ford* when it denied him "the opportunity to obtain an expert by any other means, including possible *pro bono* sources…." Pet. Br. 41. The state court denied him this chance, Brumfield argues, by rejecting his *Atkins* claim "*before* addressing his request for assistance." *Id.* According to Brumfield, his claim therefore follows from *Panetti* in which the same due process violation occurred. *Id.* 51-54. The district court agreed. Pet.App. 30a-32a. The argument is baseless for several reasons.

As an initial matter, Brumfield never followed through and actually "submitt[ed] a separate motion for funding in this matter" "prior to the hearing on procedural bars," JA 244a, as he stated he intended to do. His claim thus fails at the outset, as it was inconceivable that Brumfield was "reasonably waiting to obtain a ruling on funding from the court." Pet. Br. 54. It is not fair to blame the state court for the manner in which it resolved a state-law funding claim that was never really made in the first place. *Cf. Boyer v. Louisiana*, 133 S. Ct. 1702, 1702-05 (2013) (Alito, J., concurring).

Regardless, *Ford* and *Panetti* (which applied *Ford* on federal habeas review) are not clearly established in the *Atkins* setting. *Supra* 46-47. And even if they are, Brumfield's claim still fails. Brumfield necessarily asks the Court to hold that, funding aside, he had a due process right to supplement the record with expert testimony at the threshold stage. Absent a due process right to submit expert testimony at that stage, after all, Brumfield has suffered no harm from the state court's simultaneous denial of the *Atkins* claim and funding request. Pet. Br. 53 (arguing that, "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").

But Brumfield once again sidesteps precisely what *Ford* held and how *Panetti* applied it. Under *Ford,* "[o]nce a prisoner seeking a stay of execution has made 'a substantial threshold showing of insanity,' the protections afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 (quoting *Ford*, 447 U.S. at 424, 426). *Panetti* applied *Ford* and held that the habeas petitioner had "made this showing," which was "disputed by no party, confirmed by the trial court's appointment of mental health experts …. and verified by our independent review of the record." *Id.* at 950.

That is not the case here. *Supra* 29-36. Thus, squarely in the middle of his argument that he has a due process right to submit expert testimony at the threshold stage, Brumfield is awkwardly forced to change direction and reassert that the state court "violated the clearly

established law of *Ford*" because "there can be no doubt that [he] made 'a substantial threshold showing' of intellectual disability." Pet. Br. 52. That is the definition of a circular argument; Brumfield's claim that *Ford* and *Panetti* clearly establish a due process right to supplement the record at the threshold stage, so long as the Court accepts that he has already made that threshold showing, falls of its own weight.

No other decision clearly establishes this novel due process right. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. Louisiana understood that it would need to establish a regime where the state court can make a threshold determination before devoting substantial time and resources to those *Atkins* claims that are potentially meritorious. *Williams*, 831 So. 2d at 853-58. Nothing in *Atkins* remotely suggests that petitioners would have a due process right to supplement the record at the threshold stage if the state court found that unwarranted given the case's circumstances. Even Brumfield recognizes that not all individuals bringing *Atkins* claims are entitled to the due process protections he asserts that the state court owed to him. Pet. Br. 35-36. What Brumfield seeks then is not a ruling from the Court that it violates due process to deny *Atkins* claims at the threshold stage without allowing for submission of expert reports. He seeks a ruling that doing so violated due process based on the facts of *his* case.

But that is precisely the kind of claim that Section 2254(d)(1) bars. The state court quite reasonably failed to extrapolate from *Atkins* a due process right to an expert

(state-funded or otherwise) at the threshold stage based on factors peculiar to this case. As this Court has explained, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Richter*, 131 S. Ct. at 786. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

It is difficult to imagine a rule more general than one reliant on a decision (*Atkins*) that declines to establish any procedural requirements and two others (*Ford* and *Panetti*) that expressly hold that the due process right invoked does not apply to the stage of the proceeding at issue. To conclude that Brumfield had a clearly established right to submit expert testimony at the threshold stage of his *Atkins* claim would be nothing more than "habeas-by-sandbagging." *Pinholster*, 131 S. Ct. at 1398.

Brumfield's Section 2254(d)(1) argument has more to do with his disagreement with the constraints AEDPA imposes on federal habeas review than anything else. He protests that it should be "immaterial that [his] *Atkins* claim was litigated at postconviction, as opposed to at trial or sentencing." Pet. Br. 49. But the posture of the case makes all the difference. "Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 131 S. Ct. at 787. AEDPA furthers the

"principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

Brumfield additionally argues that "the adequacy of Louisiana's procedures in theory" is of no moment because "their application in this case cannot be squared with *Atkins*' most fundamental principle that the Constitution prohibits the execution of intellectually disabled persons." Pet. Br. 56. But if the base Eighth Amendment conclusion of *Atkins* were sufficient to establish a due process right to intricate procedures at the threshold stage, any limits on federal habeas review would be illusory. AEDPA limits relief to clearly established constitutional rights because state courts have no responsibility to predict where the law may lead. *White*, 134 S. Ct. at 1706 ("AEDPA's carefully constructed framework would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law.").

Brumfield's frustration with AEDPA is misdirected. He had an avenue for judicial review he declined to pursue. He could have sought certiorari review directly from state post-conviction review. "Perhaps the logical next step from" *Atkins*, *Ford*, and *Panetti* "would be to hold" that the Due Process Clause requires the appointment of an expert or other protections at the threshold stage when state post-conviction review is the first opportunity to raise the *Atkins* claim; or "perhaps not." *White*, 134 S. Ct. at 1707. But "[t]he appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by §2254(d)(1)." *Id.*

That is what happened in *Hall*. As is the case here, "[w]hen Hall was first sentenced, this Court had not yet

ruled that the Eighth Amendment prohibits States from imposing the death penalty on persons with intellectual disability." *Hall*, 134 S. Ct. at 1990. Like Brumfield, Hall thus first raised his *Atkins* claim in a state post-conviction proceeding. *Id.* at 1991. Hall's claim was likewise rejected by the state courts. *Id.* Yet unlike Brumfield, Hall sought certiorari directly from the Florida Supreme Court's denial of post-conviction relief. *Id.* That was a wise choice; the Court favorably resolved his *Atkins* claim unencumbered by AEDPA's deferential standard. Indeed, it is likely that the posture of the case was decisive as it would have been difficult to argue that *Atkins* clearly established the rule the Court ultimately adopted in that case. *Id.* at 1994 ("On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in *Atkins*.").

Having failed to seek certiorari after the Louisiana Supreme Court denied discretionary review, which was his right, Brumfield cannot be heard to object to the difficult standard that he must meet to secure federal habeas relief. "If this standard is difficult to meet, that is because it was meant to be …. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 131 S. Ct. at 786. Because he declined to seek direct review, Brumfield "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. He does not even come close to meeting this standard.

III. If Brumfield Prevails, The Proper Remedy Is To Vacate The Decision Below And Remand To The Fifth Circuit.

If Brumfield prevails on one of his Section 2254(d) claims, and the Court further holds that the identified error warrants *de novo* review incorporating the evidence adduced at the federal hearing, that does not end the case. The Fifth Circuit still has not issued a decision as to whether the district court correctly granted the writ. The case should be remanded so that the Fifth Circuit may address the issue in the first instance. That is the Court's usual practice, *see, e.g. United States v. Apel*, 134 S. Ct. 1144, 1153 (2014), and it should be followed here.

Remanding the case to the Fifth Circuit for initial review of the district court's *de novo* ruling is particularly appropriate given that the issue is fact-intensive and the Fifth Circuit has already devoted substantial resources to examining it. Although the Fifth Circuit ultimately did not need to reach the issue, it has already reviewed briefing and closely studied the record. In fact, the Fifth Circuit indicated it likely will reverse the district court's *de novo* ruling that Brumfield is intellectually disabled based on the evidence adduced in federal court. Pet.App. 16a n.8. There is a good reason why the Fifth Circuit, after closely examining the record, expressed doubt that the district court's ruling can be upheld: Brumfield is *not* intellectually disabled.

Even reviewing the question *de novo* and taking the additional evidence into consideration, Brumfield will not be able to meet the standard for intellectual disability. The complete record shows that Brumfield was subjected

to no fewer than *six* intellectual assessments before the age of 18 and "not one assessment … diagnosed mental retardation or an IQ below 70." Blanche Report 6. In these assessments there was "not even a hint of [mental retardation], not even a rule-out or a question …. Nothing." Vol. IV, pg. 53. Instead, these assessments consistently demonstrated that Brumfield had an IQ in the 70-85 range, which is in the borderline range of general intelligence. Blanche Report 4-7; Hoppe Report 7-9. And, even after Brumfield turned 18, none of the four doctors who administered an IQ test found an IQ below 70. Hoppe Report 5; Jordan Report 4; Bolter Report 6; Report of Dr. Ricardo Weinstein ("Weinstein Report") 13. This is strong evidence that Brumfield cannot satisfy the "intellectual disability" prong of Louisiana's test for intellectual disability.

Given his borderline IQ range, Brumfield would need to show adaptive skills that were "substantially impaired" to be classified as intellectually disabled. *Dunn*, 41 So.3d at 470. Brumfield cannot meet this standard. Brumfield had adequate social skills, as he could communicate clearly with others, cooperatively play sports, and maintain personal relationships on some level, as demonstrated by his five children with three women. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where the defendant "lived with a girlfriend for some time" and was "described as a self-starter who worked well with others and on his own"). Brumfield also had adequate practical skills; he could drive a car, maintain a job, and had no trouble feeding, dressing, and caring for himself. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where "the defendant was capable

of filling out a job application and obtaining a job" and did not have poor personal hygiene).

Last, Brumfield had adequate conceptual skills; he could sign consent forms, write letters, read books, and earn substantial sums as a drug dealer. Blanche Report 7-10; Hoppe Report 11; *Dunn*, 41 So.3d at 470 (finding no intellectual disability where the defendant "was capable of dealing with all necessary paperwork and negotiation to purchase a car on his own"). In particular, Brumfield's adaptive skills in planning the robbery (*e.g.*, scoping out the bank days in advance, renting a car off the street, and purchasing the handguns) and then attempting to escape punishment (*e.g.*, fleeing the scene, asking others to create alibis, disposing of the handguns and the car, and repeatedly lying to the police) are strong evidence of satisfactory adaptive skills. *Supra* 1-4; *Dunn*, 41 So.3d at 472; *Brown*, 907 So.2d at 32. Moreover, Brumfield's chief witness, Dr. Weinstein, can be discounted because numerous courts have found his analysis not credible. Vol. I, pg. 227-34; Vol. III, pg 58-65; *see also United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 363 n.2, 374 (D.P.R. 2013) (highlighting his "checkered history" and finding his work "substantially biased and dishonest").

Again, the Court need not and should not consider these issues. If the Fifth Circuit erred, which it did not, the Court should follow its usual practice and remand the case so the Fifth Circuit can assess the *Atkins* claim *de novo*. But if the Court nonetheless reaches this question, the evidence supports only one conclusion: Brumfield is not intellectually disabled. Pet.App. 16a n.8 (citing *Dunn*, 41 So. 3d 454). He orchestrated and committed a premeditated, cold-blooded murder of a police officer.

Brumfield "act[ed] with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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