No. _____

IN THE
# Supreme Court of the United States

KEVAN BRUMFIELD,

*Petitioner*,

v.

BURL CAIN, Warden,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## CAPITAL CASE

## QUESTIONS PRESENTED

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 mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), has based its decision on an unreasonable determination of 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 mental retardation 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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Petitioner Kevan Brumfield respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

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

## JURISDICTION

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

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

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

28 U.S.C. § 2254(d).

## INTRODUCTION

This case presents the extraordinary circumstance in which Petitioner faces imminent execution, despite the fact that the sole court to conduct a hearing on his *Atkins* claim concluded that he was in fact mentally retarded.

Petitioner was sentenced to death before this Court's decision in *Atkins v. Virginia*, 536 U.S. 304

(2002). Promptly after *Atkins* was decided, Petitioner presented his mental retardation claim to the state courts. His request was denied without a hearing, however, on the ground that Petitioner's mental retardation was not apparent from his pre-*Atkins* trial transcripts – at which Petitioner did not even attempt to, and had no reason to, establish that he was mentally retarded.

Petitioner then sought habeas relief. The federal district court recognized the grave error in denying Petitioner a hearing on his *Atkins* claim, holding that the state court's conclusion was an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2), because the state court mistakenly – and unreasonably – considered the record from Petitioner's pre-*Atkins* penalty phase as determinative of Petitioner's mental retardation claim under *Atkins*. The court conducted a seven-day trial, at which several experts testified regarding Petitioner's severe mental deficiencies. Based on the evidence presented, the court concluded that Petitioner was mentally retarded.

In a decision that contravenes this Court's jurisprudence and creates a split with both the Seventh and Eleventh Circuits, the Fifth Circuit reversed. Without engaging with the district court's reasoning or acknowledging any of the relevant case law, the Fifth Circuit concluded that the state court acted reasonably in denying Petitioner a hearing. As a result of this decision, the compelling evidence presented to the district court will be ignored, and a person who was found to be mentally retarded will be executed.

## STATEMENT OF THE CASE

### A. Petitioner's Capital Trial

In 1995, Petitioner was convicted of first-degree murder and sentenced to death in Louisiana state court.

At the penalty phase of Petitioner's trial, defense counsel's mitigation presentation focused on Petitioner's difficult and abusive childhood. Defense counsel did not attempt to argue that Petitioner should be spared the death penalty because he was mentally retarded.[1,2] Defense counsel did call a clinical neuropsychologist (Dr. John Bolter) and a social worker (Dr. Cecile Guin). Neither Dr. Bolter nor Dr. Guin presented any expert opinions regarding whether Petitioner was or was not mentally retarded. Rather,

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[1] As discussed in more detail below, this is because defense counsel had no reason to argue mental retardation, particularly given that the trial took place before *Atkins*, and in fact had strategic incentive *not* to present evidence of mental retardation. During the sentencing hearing, which spanned 184 pages of transcript, only once did anyone use any variation of the phrase "mental retardation": the state's attorney mentioned in his closing that Petitioner "is not someone who is retarded."

[2] This Court has recently observed that medical experts have approved and adopted the term "intellectual disability" to describe the same phenomenon that was previously been described as "mental retardation." *Hall v. Florida*, No. 12-10882, ___ S. Ct. __, 2014 WL 2178332, at *3 (U.S. May 27, 2014). Because the term "mental retardation" has been used by the lower courts and the parties throughout this proceeding, however, that term has been used in this brief.

Dr. Bolter concluded that, as a child, Petitioner appeared to have a conduct disorder, educational problems, and attention deficit disorder, and, as an adult, had more of an antisocial or sociopathic personality, continued attention difficulty, and a rapid rate of forgetting. *See* Pet. App. 122a-23a. Dr. Guin concluded that Brumfield's childhood was "very chaotic, [and] very complicated" and he had a non-supportive environment at home. *See* Pet. App. 124a.

In reaching these conclusions, Dr. Bolter and Dr. Guin made some ancillary statements related to Petitioner's intelligence. For instance, Dr. Bolster testified that he gave Petitioner the "Webster Adult Intelligence Test" which returned an IQ score of 75, without explaining any details of how the test was conducted or controlled. *See* Pet. App. 123a. He also mentioned a "screening test" administered by another doctor that "rated [Petitioner's] intelligence just a little higher." Dr. Guin testified that Petitioner's extremely low weight at birth put him at risk of neurological problems, and that Petitioner began having difficulties at school in the third grade, which led to his placement in many different schools and a mental health facility. *See* Pet. App. 124a.

The trial judge instructed the jury to consider whether the mitigating circumstances outweighed the aggravating circumstances of Petitioner's crime. As mentioned above, the jury returned with a capital sentence.

### B. State Post-Conviction Petition

On March 16, 2000, Petitioner sought post-conviction relief in state court. In his petition for relief and again in a subsequent motion, Petitioner sought funding for various experts to develop his claims.

Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Petitioner amended his state petition, asserting that his execution would violate the Eighth Amendment because he was mentally retarded. Petitioner also reiterated his request for funding to develop his claims.

At a motions hearing, the state court determined that Petitioner was not entitled to a hearing and denied his *Atkins* claim. The court concluded that the ancillary, passing statements of Petitioner's expert witnesses at the penalty phase of his trial, which pre-dated *Atkins* and at which Petitioner did not even raise the issue of mental retardation, established definitively that Petitioner had not "demonstrated impairment based on the record in adaptive skills." Pet. App. 171a. Because Petitioner "hadn't carried his burden placing the claim of mental retardation at issue" at the penalty phase, he was "not entitled to" a hearing on post-conviction. Pet. App. 171a-72a. The court's explanation, in full, was as follows:

> I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and

> based on those, since this issue – there was a lot of testimony by all on those in Dr. Jordan's report.
>
> Dr. Bolter in particular found he had an IQ of over – or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Pet. App. 171a-72a. The court ultimately denied Petitioner's petition in its entirety without acknowledging or ruling on any of his requests for funding.

The Louisiana Supreme Court denied Petitioner's application for a writ to review the state trial court's denial of his petition without explanation. *See Brumfield v. State*, 885 So. 2d 580 (La. 2004).

### C. Federal Habeas Petition

On November 4, 2004, Petitioner filed a federal petition for a writ of habeas corpus. Petitioner argued, among other things, that the state court's denial of his *Atkins* claim and its refusal to provide him with funding violated 28 U.S.C. § 2254(d)(1) and (d)(2).

The district court agreed. Consistent with *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), the court began by analyzing, based solely on the state court record, whether the state court's ruling was based on an unreasonable determination of the facts under AEDPA. The Court concluded that it was. It held that the state court, in denying Petitioner an *Atkins* hearing, based its decision on an unreasonable determination of facts by considering the record from Petitioner's pre-*Atkins* penalty phase hearing to be determinative of the mental retardation issue. Pet. App. 36a-48a. It also held that the state court acted contrary to this Court's decisions in *Ford v. Wainright* and *Atkins* by refusing to provide Petitioner with funding despite the fact that he had no other means to develop his claim. Pet. App. 30a-36a, 48a. Having surpassed that threshold determination, the court considered the merits of Petitioner's *Atkins* claim. Based on a seven-day trial and testimony from seven experts on psychology and mental retardation, the court found that Petitioner was, in fact, mentally retarded under Louisiana law. Pet. App. 98a.

The district court explained in detail the evidence from the evidentiary hearing that supported its finding. With respect to Petitioner's intellectual functioning, the State's psychologist concluded that Petitioner's IQ was 70 and Petitioner's psychologist came up with scores of 70 and 72. Pet. App. 60a-61a. Every expert who testified, including the State's experts, agreed that these IQ scores demonstrated intellectual functioning consistent with mental retardation, as that term is defined by Louisiana law. Pet. App. 62a. In fact, the

State did not even argue that Petitioner failed to meet that aspect of the test for mental retardation. Pet. App. 62a.

Experts also provided testimony regarding Petitioner's deficiency in adaptive skills. Substantial testimony indicated that Petitioner suffers from severe limitations in his ability to read and write. Due to a limitation in motor skills, for instance, Petitioner is unable to write freehand. Rather, he must use a piece of cardboard to write in a straight line and takes "an inordinate amount of time to write a simple, one-page letter." Pet. App. 75a. Furthermore, experts testified that Petitioner has the ability to read at only a fourth grade level, and that his adult reading habits are consistent with someone who is mental retarded. Pet. App. 76a.

Experts also testified regarding Petitioner's "dismal record of academic accomplishments in the classroom," stating that his "[s]chool testing records show lack of competence in virtually every area." Pet. App. 76a. Petitioner "reached a plateau somewhere between the fourth and sixth grade," which is consistent with someone who is mentally retarded. Pet. App. 76a. The testimony also demonstrated that from ages 11 to 16 alone, Petitioner was in special education and placed in at least 10 different schools. In total, Petitioner attended 14-15 schools before he dropped out at age 16. Pet. App. 76a-77a.

Experts further testified that etiological factors signaled that Petitioner is mentally retarded. They

testified that Petitioner's mother had psychiatric problems during her prenatal period and took psychotropic medication during pregnancy. Pet. App. 94a. Furthermore, Petitioner suffered from fetal stress and was only three-and-a-half pounds at birth. Pet. App. 94a. Experts also testified that several of Petitioner's family members also suffer from mental retardation, including at least one cousin with severe to moderate retardation. Pet. App. 94a.

Based on all of the evidence presented, the district court found Petitioner to be mentally retarded and granted his petition for a writ of habeas corpus.

On appeal before the Fifth Circuit, the primary focus of Petitioner's briefing was that the district court's decision to hold an evidentiary hearing was correct because the state court's decision violated § 2254(d). Petitioner specifically argued that "[t]he district court correctly found that the state court's decision 'suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceedings in violation of § 2254(d)(2)'" because "[t]he state court's reliance on penalty phase evidence to establish adaptive skills deficits was unreasonable." Brief of Petitioner-Appellee at 50-51, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713226. Petitioner further argued that "[w]hen a Louisiana state court relies on record evidence from a pre-Atkins sentencing that, on its own terms, does not even relate to mental retardation, it cannot be deemed to have made a reasonable factual determination as a matter of law." *Id.* at 51-52.

The State, in response, *never* disputed the district court's § 2254(d)(2) analysis. Rather, the State asserted (incorrectly) that under *Pinholster*, 131 S. Ct. 1388, a district court is necessarily barred from holding an evidentiary hearing whenever the state court has adjudicated the petitioner's claim on the merits. According to the State, "where, as here, the state district court issued a ruling on the claim's merits" it necessarily followed that "[n]o federal court evidentiary hearing was appropriate." Brief of Respondent-Appellant at 15, *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014), 2012 WL 10713227. The State thus found no occasion to address § 2254(d)(1) or (2).

The Fifth Circuit nonetheless reversed, holding that the state court had not violated § 2254(d)(1) or (d)(2). In its opinion, the Fifth Circuit expressly acknowledged that the district court had granted the petition based on the state court's treatment of penalty phase evidence as determinative of Petitioner's mental retardation claim. *See* Pet. App. 14a (stating that the district court "chided the state court for relying on evidence presented for mitigation purposes"). Inexplicably, however, the Fifth Circuit reversed the district court without even considering that dispositive analysis.[3] Instead, the Fifth Circuit held in conclusory

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

fashion that "the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing" because "the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation." Pet. App. 14a. In doing so, the Fifth Circuit itself turned to the record at Petitioner's pre-*Atkins* penalty phase proceeding, explaining that

> no one testified that Brumfield was mentally retarded. Indeed, the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality. There was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships.

Pet. App. at 15a.

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

## REASONS FOR GRANTING THE PETITION

### I. By Holding that the State Court's Rejection of Petitioner's *Atkins* Claim was Not Based on an Unreasonable Determination of the Facts, the Fifth Circuit Contravened this Court's Jurisprudence and Created a Split Among Circuits.

In *Atkins*, the Supreme Court held that inmates who are mentally retarded cannot be executed. In doing so, the Court made clear that mental retardation for purposes of mitigation at the penalty phase and mental retardation for *Atkins* purposes are distinct inquiries that should not be conflated. Since then, however, numerous state courts have resolved *Atkins* claims solely by reviewing the record from an inmate's penalty phase trial. In turn, an irreconcilable conflict among the circuits has emerged regarding the reasonableness under AEDPA of a state court's reliance on the penalty phase record to resolve a claim of mental retardation under *Atkins*. whether state court decisions treating a penalty phase record as determinative of an *Atkins* claim may be considered reasonable under AEDPA. This case presents a strong vehicle to resolve that conflict.

1. In justifying the need for a categorical rule making offenders ineligible for the death penalty in *Atkins*, this Court specifically recognized that the ability to introduce evidence related to mental retardation in penalty phase proceedings is insufficient

to provide the requisite Constitutional protection. The Court explained:

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," *Lockett v. Ohio*, 438 U.S. 586, 605 (1978), is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

*Atkins*, 536 U.S. at 320-21 (footnote omitted); *see also Hall v. Florida*, No. 12-10882, __ S. Ct. __, 2014 WL 2178332, at *6 (U.S. May 27, 2014) ("A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel." (quoting *Atkins*, 536 U.S. at 320-21)).

*Atkins* also specifically recognized that defendants may be reluctant to present evidence of mental retardation at the penalty phase of their proceedings because "reliance on mental retardation as a mitigating

factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. at 321. For these reasons – even though the state court in *Atkins* had already considered evidence of mental retardation as a mitigating factor at the penalty phase – this Court held that a hearing as to mental retardation was required under the Eighth Amendment. *Id.* at 308-09.

More recently, the Court in *Bobby v. Bies*, 556 U.S. 825 (2009), confirmed this understanding of *Atkins*, explaining that "mental retardation for purposes of *Atkins*, and mental retardation as one mitigator to be weighed against aggravators, are discrete issues." *Id.* at 829. There, the Court again observed that mental retardation evidence was a "two-edged sword" when offered at penalty phase proceedings – so much so that "prosecutors, pre-*Atkins*, had little incentive vigorously to contest evidence of retardation." *Id.* at 836; *see also Wood v. Allen*, 558 U.S. 290, 303 n.3 (2010) (observing that counsel commonly and reasonably forgo presenting evidence of mental deficiency at the penalty phase because such evidence often has the potential to "undercut" other mitigating evidence or lead to even more damaging rebuttal testimony).

In light of *Atkins* and *Bies*, two Courts of Appeals have held that death row inmates are entitled to federal habeas relief when a state court denies an *Atkins* claim based solely on the penalty phase record, without fulfilling its independent constitutional obligation to give the inmate a hearing on mental retardation. First,

in *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013), the Eleventh Circuit held that a state court violates § 2254(d)(2) when it concludes that a petitioner is not mentally retarded under *Atkins* based on a "pre-*Atkins* record [that] was inadequate to reasonably support the state court's findings." *Id.* at 1318. In *Burgess*, as here, the petitioner was sentenced to death prior to this Court's decision in *Atkins*. In his state post-conviction proceedings, which took place after *Atkins* was decided, the petitioner asserted a claim of mental retardation. However, the claim was rejected based on a finding that the petitioner had an IQ between 70 and 80, and that petitioner had "failed to demonstrate significant deficits in adaptive behavior." The state court relied on evidence that was presented in mitigation at the penalty phase of the trial, including the fact that the petitioner had attended school through the ninth grade, had maintained some employment, and was a caring child. *Id.* at 1316-17.

On federal habeas, the Eleventh Circuit held that the state court based its decision on an unreasonable determination of the facts by relying exclusively on the petitioner's penalty phase transcript to find that he lacked adaptive deficits. The court explained that that evidence "was presented in an entirely different context and without the benefit of any explanation of how it would or would not be consistent with mental retardation, and therefore does not indicate anything substantive about Burgess's adaptive abilities as that term is used clinically." *Id.* at 1316. Relying on this Court's reasoning in *Atkins* and *Bies*, the Eleventh

Circuit further explained that "evidence presented pre-*Atkins*, may not in every case be conducive to an *Atkins* inquiry and may not enable a court to make reasonable factual determinations relating to mental retardation for the purposes of the Eighth Amendment." *Id.* at 1317. Although the court acknowledged that a pre-*Atkins* record could support a finding that the petitioner is not mentally retarded where it contained "extensive evidence relating to [the petitioner's] mental health, including the testimony of numerous experts directly addressing whether [the petitioner] was mentally retarded," such a record could not do so where it "was inadequate to reasonably support the state court's findings." *Id.* at 1318.

Notably, with respect to the petitioner's intellectual functioning, the court held that the state court could not simply rely on the testimony of an expert who "'estimated' Burgess's IQ to fall in the 70 to 80 range" and a record "indicat[ing] that Burgess had an IQ of 73." *Id.* at 1316. The court explained: "there was no explanation of how the score was obtained, of who had obtained and recorded the score, or why." *Id.*

Here, the record from Petitioner's penalty phase trial was even weaker than in *Burgess*. The only testimony potentially related to Petitioner's adaptive skills was that he had educational problems, attention deficits, and a low weight at birth that put him at risk of neurological problems – by no means the sort of "extensive evidence relating to his mental health, including the testimony of numerous experts directly addressing whether [Petitioner] was mentally

retarded" that, according to the Eleventh Circuit, might permit a state court to reasonably rely on a penalty phase record. *Id.* at 1318. In fact, unlike the evidence in *Burgess* regarding the petitioner's academic success and successful employment, the evidence here, if anything, indicates that Petitioner actually *had* adaptive deficiencies. Furthermore, as in *Burgess*, here the state court relied on a single IQ score and vague testimony that another doctor "rated [Petitioner's] intelligence just a little higher," without any explanation of specifically how or why those scores were obtained. *See* Pet. App. 123a, 171a.

The Seventh Circuit has likewise held that a state court acts unreasonably by failing to appreciate the distinction between mental retardation evidence at the penalty phase and mental retardation for the purposes of *Atkins*. Adding an additional layer to the split among the circuits, however, the Seventh Circuit has held that such an error is "contrary to, or involved an unreasonable application of" this Court's precedent, in violation of § 2254(d)(1). In *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), the petitioner was convicted and sentenced to death prior to *Atkins*. *Id.* at 659. In sentencing the petitioner to death, the trial court concluded that "'the possibility of the mitigating circumstance of [the petitioner's] mental retardation' did not outweigh the aggravating circumstance of his crime." *Id.* at 660.

After this Court's decision in *Atkins*, the petitioner sought post-conviction relief in state court on the basis that he was mentally retarded. The state court

rejected the claim on the basis that he had failed to establish mental retardation at his penalty phase. It reasoned that, although

> the issue of [the petitioner's] mental capacity was presented to the trial court in the context of whether [his] mental retardation was a mitigating circumstance sufficient to outweigh the aggravating circumstance . . . the factual inquiry required by this balancing test is the same as the one required by *Atkins*: "is the person mentally retarded?"

*Id.* at 662 (citation omitted).

The Seventh Circuit held that this decision "[was] contrary to the Supreme Court's holding in *Atkins*, which recognized that there is a difference between using mental retardation as a mitigating factor and categorically excluding mentally retarded persons from the death penalty altogether." *Id.* at 662. The court observed that the sentencing judge "engaged in a substantively different inquiry from that mandated by *Atkins*." *Id.* at 663. Namely, "the trial court did not determine whether Allen is mentally retarded under Indiana's test for mental retardation," which "would have required consideration of whether Allen 'manifest[ed] ... significantly subaverage intellectual functioning' and 'substantial impairment of adaptive behavior' before becoming twenty-two years of age." *Id.* (citation omitted). Rather, the sentencing judge determined "mental retardation was not sufficiently mitigating to overcome an aggravating circumstance" –

"a balancing test, not a binary inquiry." *Id.* The Seventh Circuit concluded that in light of "the entirely different standard utilized by the trial court in reaching its conclusion," the state court's determination that the petitioner was not mentally retarded under *Atkins* was "objectively unreasonable." *Id.* at 664.

The circumstances of this case are materially indistinguishable from *Allen*. Here, as there, the state post-conviction court conflated the trier of fact's "pre-*Atkins* determination that [the petitioner's] mental retardation was not sufficiently mitigating to overcome an aggravating circumstance" with the mental retardation determination mandated by *Atkins*. *Id.* at 663; *see* Pet. App. 171a-72a (rejecting Petitioner's *Atkins* claim on the basis that he "hadn't carried his burden [of] placing the claim of mental retardation at issue" during sentencing). And it did so even though the trier of fact at sentencing did not actually determine, or even have the facts to consider, whether Petitioner was mentally retarded.

Petitioner's penalty phase record also contained substantially less evidence related to mental retardation than in *Allen*. In *Allen*, the penalty phase record contained affidavits from experts opining as to whether the petitioner was mentally retarded. It also contained affidavits from experts regarding the petitioner's adaptive skills, including his ability to process language as a child and understand the consequences of his conduct; and evidence of at least three IQ tests taken throughout the petitioner's life, indicating scores as high as 104. *Allen*, 558 F.3d at 661-

62. Here, aside from the single IQ test score of 75, there was essentially nothing in the state court record specifically directed at Petitioner's intellectual functioning.

There is thus a split in authority among the circuits as to whether a state court acts unreasonably when it treats the evidence presented at a petitioner's pre-*Atkins* penalty phase hearing as dispositive of his *Atkins* claim. If Petitioner were sentenced to death in Alabama, Florida, Georgia, Illinois, Indiana or Wisconsin, he would be constitutionally exempt from the death penalty. Because he was sentenced within the Fifth Circuit, however, his execution remains imminent.

2. In addition to creating a split with these other circuits, the Fifth Circuit's decision was simply wrong. Under 28 U.S.C. § 2254(d)(2), a federal court may grant a state prisoner habeas relief if his claim was adjudicated on the merits in state court and "resulted in a decision . . . based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Wood*, 558 U.S. at 293. Here, the state court's decision was based on an unreasonable determination of the facts because it based its findings on a factual record that was entirely irrelevant to the determination of whether Petitioner was mentally retarded.

It was error to determine that Petitioner was not mentally retarded simply because he "hadn't carried his burden placing the claim of mental retardation at issue"

or had not demonstrated a deficiency in adaptive skills at the penalty phase of his trial. Pet. App. 171a-72a. There was no reason for Petitioner to try to meet the clinical standard of mental retardation at his penalty phase, which involves a completely different factual determination.

This is especially true given that Petitioner had a strategic incentive *not* to use his limited resources at the penalty phase to develop evidence of mental retardation. *See Atkins*, 536 U.S. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword"); *Bies*, 556 U.S. at 829; *Wood*, 558 U.S. at 303 n.3. Indeed, defense counsel, at the penalty phase proceeding never sought to develop a record of mental retardation. Specifically, defense counsel did not ask Dr. Bolter to elaborate on his testimony regarding Petitioner's IQ or on Dr. Guin to expand on her testimony that Petitioner may have been susceptible to neurological problems due to his birth weight and, to the contrary, quickly changed the subject.

Furthermore, the state court's reliance on the penalty phase record was particularly unreasonable given that Petitioner was sentenced before *Atkins* was decided and before Louisiana had first articulated its standard for mental retardation in *State v. Williams*, 831 So. 2d 835 (La. 2002). In *Williams* the Louisiana Supreme Court held that mental retardation has "three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological

disorder in the developmental stage."[4] It strains sensibility to assume that Petitioner's penalty phase determined whether Petitioner was mentally retarded, according to a fact-intensive, clinical standard that had not yet been articulated. *See State v. Dunn*, 41 So. 3d 454, 469 (La. 2010) (explaining that Louisiana's standard for mental retardation "may require a fact finder to make exceedingly fine distinctions between those persons who are exempt from capital punishment and those who are not because mildly mentally retarded persons are capable of working and living on their own just as persons of borderline intelligence"); *State v. Williams*, 22 So. 3d 867, 887 (La. 2009) ("the determination of whether a defendant is mentally retarded is inherently an intensively factual inquiry").[5] As the district court observed, had Petitioner "had the benefit of the *Atkins* decision" at the time of his penalty phase, he "may have altered the strategic choices of the defense in deciding not to present mitigating evidence that [he] was mentally retarded." Pet. App 40a.

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[4] Louisiana subsequently adopted a statutory definition of mental retardation, which is, in relevant part, the same as the standard articulated in *Williams*. *See* La. C. Crim. P. art. 905.5.1(H).

[5] *Cf. also Bies*, 556 U.S. at 834-35 (rejecting the argument that state courts had determined the issue of mental retardation on direct appeal where "it [was] not clear from the spare statements of the [courts] that the issue of . . . mental retardation under [Ohio's] test was actually determined at trial or during Bies' direct appeal" because "[n]o court found, for example, that Bies suffered 'significant limitations in two or more adaptive skills'" and the issue had not been conceded under "*Atkins* and [Ohio's test], which had not then been decided").

The state court record in this case confirms that no evidence was presented at the penalty phase regarding whether Petitioner was mentally retarded. *See* Pet. App. 44a ("even assuming for the sake of argument that it was not clear legal error to extrapolate *Atkins* evidence on mental retardation from pre-*Atkins* mitigating evidence . . . the actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts use to assess mental retardation"). No expert at the penalty phase opined whether Petitioner was mentally retarded. As the district court noted, much of the evidence that would have been necessary to assess Petitioner's adaptive skills – "including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naive, and (4) whether he has any practical skills" – was "simply lacking in discussion or even mention." Pet. App. 45a.

Nor does the evidence on which the state court purported to rely support a finding of mental retardation. The ancillary evidence that the court cited to in finding that Petitioner had not demonstrated an impairment in adaptive skills – Dr. Bolter's testimony that Petitioner may have had "an anti-social personality or sociopath [disorder]" and "no conscience" – was simply irrelevant to his adaptive functioning. Furthermore, Dr. Bolter's testimony that Petitioner received an IQ score of 75 (without any details about the test he employed or how he administered it) cannot itself be dispositive of mental retardation. Louisiana itself recognizes that an IQ score of 75 is consistent

with mental retardation and thus requires consideration of adaptive skills. *See Dunn*, 41 So. 3d at 470 ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive functioning is substantially impaired."). Indeed, as discussed further below, this Court very recently held that the Eighth Amendment requires states to consider adaptive functioning, "includ[ing] evidence of past performance, environment, and upbringing" when an individual's IQ is 75 or below. *Hall*, 2014 WL 2178332, at *9, 14-15; *id.* at *22 (Alito, J., dissenting) ("as I understand the Court's opinion, it . . . holds that when IQ tests reveal an IQ between 71 and 75, defendants must be allowed to present evidence of deficits in adaptive behavior"). It was unreasonable for the state court to determine that Petitioner had not "demonstrated impairment based on the record in adaptive skills," based on evidence irrelevant to that inquiry and effectively determine that Petitioner was not mentally retarded based on a single, unexplained IQ score that is in fact consistent with mental retardation. Pet. App. 171a-72a.

3. This case is a uniquely strong candidate for resolving this critical question. In most cases, when a habeas petitioner contends that the state court unfairly denied him an *Atkins* hearing, the State will simply say that any error is harmless because the petitioner cannot point to any evidence that he did not raise in state court, or because the prisoner is not actually mentally retarded. But this case arrives at the Court

with an unusual procedural history: The District court actually conducted the *Atkins* hearing, took additional evidence, and found the defendant to be mentally retarded. The Fifth Circuit then reversed on the ground that the state court reasonably denied Petitioner's *Atkins* claim, despite treating the penalty phase record as determinative, without resolving whether Petitioner was mentally retarded. The case thus gives the Court the opportunity to correct the Fifth Circuit's erroneous application of AEDPA without the complication of an alternative ground that might prevent the Court from reaching the disputed issue.

## II. The Fifth Circuit Erred by Concluding That the State Habeas Court's Decisions Did Not Unreasonably Apply This Court's Holdings in *Atkins*, *Ford*, and *Ake*.

In addition to its fundamental misunderstanding of § 2254(d)(2), the Fifth Circuit committed a separate but related error in its application of § 2254(d)(1). The Fifth Circuit held that the state court could reasonably deny Petitioner funding even where doing so effectively deprived him of the ability to make out his *Atkins* claim. Pet. App. 12a-13a. It erred in doing so.

Under AEDPA, a decision by a state court is not entitled to deference if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A decision is contrary to clearly established federal law "if the

state court arrives at a conclusion opposite to that reached by [this Court] on a question of law." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [this Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

In *Ford v. Wainwright*, 477 U.S. 399 (1986), this Court held that "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard'" on his claim that he is ineligible for the death penalty due to mental infirmity. *Id.* at 424 (Powell, J., concurring) (quotation marks omitted) (alteration in original).[6] In that case, Florida had determined the defendant's mental status "solely on the basis of the examinations performed by state-appointed psychiatrists." *Id.* This method was found to violate due process because "[s]uch a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Id.* As such, *Ford*'s holding is that a defendant facing execution must be permitted a

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[6] Justice Powell's concurring opinion contains the narrowest holding agreed upon by a majority of the Justices and therefore has long been recognized as the holding of the Court in *Ford*. *See Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) ("Justice Powell's opinion constitutes 'clearly established' law for purposes of § 2254 . . . ."); *Murray v. Giarratano*, 492 U.S. 1, 9-10 (1989) (recognizing that the reasoning in Justice Powell's concurrence carried five votes).

meaningful opportunity to be heard and to offer evidence of his mental condition in his own defense.[7]

While *Ford* dealt with the issue of insanity, this Court made clear in *Atkins* that the constitutional requirements laid out in *Ford* also apply to the determination of mental retardation. *See Atkins*, 536 U.S. at 317. Under *Ford* and *Atkins*, Petitioner was entitled to a meaningful opportunity to be heard and to submit evidence on his claims of mental retardation.

However, due to Petitioner's indigence, he was unable to even *attempt* to develop such evidence. He repeatedly requested funding to develop his claims, but these requests were ignored by the state habeas court. Pet. App. 19a-20a.

Where a prisoner is indigent, he cannot afford to obtain mental testing that would be relevant to making out a prima facie case under *Atkins*.[8] And as discussed above, Petitioner could not merely rely on evidence from his sentencing hearing to create a prima facie case under *Atkins*, because the question of whether he was mentally retarded was simply not a discrete issue

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[7] In *Panetti*, this Court again held that the "basic requirements [of due process in *Ford* competency hearings] include an opportunity to submit evidence and argument from the prisoner's counsel." 551 U.S. at 950 (internal quotation marks omitted).

[8] As then-Chief-Judge Cardozo noted, "a defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929) (Cardozo, C.J.).

during his sentencing hearing. In fact, as *Atkins* itself noted, Petitioner actually had reason *not* to pursue evidence of mental retardation at the penalty phase of his trial. *Atkins*, 536 U.S. at 320-21.

Where a prisoner is indigent (and he thus cannot afford testing) and where mental retardation was not a discrete issue at the penalty phase (and he therefore is unlikely to have developed extensive pre-existing evidence of retardation), the refusal by a state court to give any funding whatsoever amounts to a flat-out denial of the opportunity to be heard. As the district court observed in this case, these prisoners are subjected to a cruel Catch-22: "without expert funding, no prima facie showing is likely possible, yet without a prima facie showing, no expert funding is forthcoming." Pet. App. 35a. By denying Petitioner any opportunity to collect and present additional evidence related to his mental condition, the state habeas court's decision "invites arbitrariness and error by preventing the affected parties from offering . . . evidence" in support of mental retardation. *Ford*, 477 U.S. at 424 (Powell, J., concurring).

The Fifth Circuit compounded this error by looking only to whether there is a "Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case," Pet. App. 12a, rather than considering the necessary implications of *Ford* and *Atkins* as applied to Petitioner's case. By rigidly looking for a Supreme Court case with this exact holding, the Fifth Circuit failed to follow the example set by its sister circuits in

the context of *Atkins*. *See White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (§ 2254(d)(1) does not "require[] an identical factual pattern before a legal rule must be applied" (citation omitted) (internal quotation marks omitted)). In *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012), for example, the Tenth Circuit concluded that there is a clearly established right to counsel during an *Atkins* hearing, even though "the Supreme Court has never said that defendants have a right to counsel in *Atkins* proceedings, nor has it ever identified such a proceeding as one of the 'critical stages' to which the right attaches." *Id.* at 1184. This was because "the right to counsel flows directly from, and is a *necessary* corollary to, the clearly established law of *Atkins*." *Id.* (emphasis in original). The same is true here. The requirement to provide Petitioner with funding was a necessary corollary to this Court's holdings in *Ford* and *Atkins* that every person sentenced to death must be permitted to meaningfully present evidence of his mental infirmities. The Fifth Circuit erred by concluding otherwise.

The Fifth Circuit's reasoning was erroneous for another reason: Petitioner was entitled to funding because the determination of whether he is mentally retarded is a critical part of his defense case. This Court "has often reaffirmed that fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system. To implement this principle, [the Court has] focused on identifying the basic tools of an adequate defense or appeal, and [has] required that such tools be provided to those defendants who cannot afford to pay

for them." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quotation marks omitted); *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted [the Due Process Clause] to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed what might loosely be called the area of constitutionally guaranteed access to evidence." (quotation marks omitted)).

In *Ake*, this Court required the state to appoint a psychiatrist where the defendant intended to present a defense of insanity: "when the State has made the defendant's mental condition relevant to his criminal culpability and *to the punishment he might suffer*, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake*, 470 U.S. at 80 (emphasis added). Like the issue of insanity during a trial, an *Atkins* hearing is "part of the criminal proceeding itself" and not "civil in nature." *Murray v. Giarratano*, 492 U.S. 1, 8 (1989) (quotation marks omitted). This is because an *Atkins* hearing is inextricably intertwined with sentencing, *see Atkins*, 536 U.S. at 321 ("[The Eighth Amendment] 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citation omitted)), and there is no doubt that sentencing is part of the criminal defense proceedings, *see Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (recognizing the "critical nature of sentencing in a criminal case"); *see also Hooks*, 689 F.3d at 1184-85. As the Tenth Circuit explained on almost identical facts, an *Atkins* hearing is

"'postconviction' only in the strict chronological sense: *Atkins* was handed down in 2002, after [Petitioner] had been convicted . . . . Of far greater importance is that his *Atkins* [hearing] was 'the first designated proceeding' at which he could raise a claim of mental retardation." *Hooks*, 689 F.3d at 1183. An *Atkins* hearing is therefore a part of Petitioner's criminal defense proceedings, and *Ake* established that indigent defendants are entitled to access to the "basic tools" for their own criminal defense, especially where their mental status is "likely to be a significant factor." *Ake*, 470 U.S. at 74 (holding that where "sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one").

Accordingly, Petitioner was entitled to funding to develop his claims of mental retardation because (1) his *Atkins* hearing was a central part of his criminal defense (despite the unavoidable fact that his hearing occurred years after he was sentenced), (2) his mental status necessarily would be a "significant factor" at his *Atkins* hearing, and (3) his indigency meant he could not otherwise obtain mental testing. The state habeas court's refusal to give such funding amounted to the effective denial of Petitioner's right to the basic tools necessary to mount a defense premised on his mental status, in violation of *Atkins* and *Ake*.

Under the Fifth Circuit's holding, indigent, mentally retarded defendants like Petitioner will be executed because of what amounts to a procedural

technicality, where a defendant's financial inability to collect and proffer evidence showing mental retardation is mistakenly interpreted by state courts as conclusively showing that the defendant *could not* show mental retardation. This deprives defendants like Petitioner of an "opportunity to be heard" as required by *Ford* and *Atkins*, and deprives them of an opportunity to present a defense premised upon their mental status, in violation of *Atkins* and *Ake*.

Because the state habeas court unreasonably applied clearly established federal law, Petitioner was entitled to an evidentiary hearing on the disputed issue of whether he is mentally retarded. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-6 (1992). The district court here held such an evidentiary hearing and concluded that Petitioner is indeed mentally retarded under Louisiana law – and therefore ineligible for execution. Pet. App. 98a. The Fifth Circuit erred by concluding that this evidence must be disregarded. If this Court lets the Fifth Circuit's decision stand, Petitioner will be executed despite the fact that the only court to fully review the evidence concluded that he is indeed mentally retarded under Louisiana law. Pet. App. 98a.

## III. Alternatively, the Court Should Grant, Vacate, and Remand this Petition in Light of the Decision in *Hall v. Florida*.

This Court should grant this petition to resolve the circuit split and correct the errors by the Fifth Circuit

described above. If the Court chooses not to do so, however, it is nonetheless necessary to vacate the Fifth Circuit's judgment and remand in light of the Court's recent decision in *Hall v. Florida*, 2014 WL 2178332, at *6.

In *Hall*, this Court considered the constitutionality of Florida's *per se* rule that a defendant with an IQ over 70 was not mentally retarded. *Id.* at *3. In doing so, the Court considered "how [mental retardation] must be defined in order to implement [the] principles and the holding of *Atkins*." *Id.* at *7. The Court explained that IQ tests suffer from an "inherent imprecision," because "[a]n individual's IQ test score on any given exam may fluctuate for a variety of reasons. *Id.* at *9. It cast particular doubt on the practice of relying on a single IQ test, but acknowledged that even "multiple examinations" resulting in "repeated similar scores . . . is not conclusive evidence of intellectual functioning." *Id.* After thorough consideration of the medical evidence, the Court held that when "the individual's IQ score is 75 or below," the mental retardation inquiry must "consider factors indicating whether the person had deficits in adaptive functioning," which "include evidence of past performance, environment, and upbringing." *Id.*; *see also id.* at *14 (holding that "an individual with an IQ test score 'between 70 and 75 or lower,' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning"). Accordingly, the Court held unconstitutional Florida's *per se* rule. *Id.* at *16.

*Hall*'s analysis of the relevance of IQ tests to the *Atkins* inquiry has a direct impact on Petitioner's habeas claim. The single IQ test mentioned at Petitioner's penalty phase proceeding was essential to the state court's rejection of his *Atkins* claim. In particular, in denying Petitioner a hearing, the state court relied on Dr. Bolter's testimony that Petitioner "had an IQ of . . . 75." Pet. App. 171a. The court relied on this IQ score to conclude that Petitioner had the requisite intellectual functioning even though Dr. Bolter himself never explained how the IQ test was administered or controlled.[9]

More significantly, the single IQ score offered by Dr. Bolter was the *only* evidence considered by the state court that was actually relevant to Petitioner's claim of mental retardation. As described above, although the state court purported to consider Petitioner's adaptive functioning, the evidence it considered in doing so – Dr. Bolter's testimony that Petitioner may have had "an anti-social personality or sociopath [disorder]" and "no conscience" – was wholly irrelevant and therefore insufficient to satisfy that inquiry. *See Hall*, 2014 WL 2178332, at *9 (where an "individual's IQ score is 75 or below the inquiry would

[9] The court also referred to Dr. Bolter's testimony that a report by another doctor mentioned a screening test which had "came up with a little bit higher IQ." Pet. App. 171a. As mentioned previously, the score of that IQ test, let alone the means by which it was obtained, was never mentioned at the penalty phase proceeding, and the report itself was never introduced into evidence at any point during the state proceedings. Pet. App. 39a n.13.

consider factors indicating whether the person had deficits in adaptive functioning," which "include *evidence of past performance, environment, and upbringing*"); *id.* at *16 ("It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment."); *see also* La. C. Crim. P. art 905.5.1(H) (requiring consideration of "adaptive behavior *as expressed in conceptual, social, and practical adaptive skills*" (emphasis added)).

Not only was that single, unexplained IQ score of 75 essential to the state court's decision – which is the subject of Petitioner's habeas review – but it was relied upon by the Fifth Circuit in upholding that decision as reasonable. *See* Pet. App. at 14a.

*Hall* provides strong support to Petitioner's *Atkins* claim. The state court concluded that Petitioner was not mentally retarded based almost exclusively on a single IQ test in which Petitioner earned a score of 75. Neither the State nor Petitioner introduced any other evidence pertaining to mental retardation – which is hardly surprising, given that Petitioner's trial took place before *Atkins* was decided. This is the exact type of adjudication of mental retardation that this Court held unconstitutional in *Hall*.

The Fifth Circuit may well have upheld the state court's assessment based on its view that a single IQ score of 75 was sufficient to establish that Petitioner is not mentally retarded – a view that, in light of *Hall*, is clearly incorrect. Accordingly, if the Court does not grant plenary review, it should vacate the judgment

and remand for the Fifth Circuit to consider the effect of *Hall* in the first instance.[10]

[10] Even though *Hall* was decided after Petitioner's trial, *Hall* applies to Petitioner's federal habeas petition. *Teague v. Lane*, 489 U.S. 288 (1989), poses no barrier to the retroactive application of *Hall*, because *Hall* did not announce a "new rule" for *Teague* purposes; rather, it merely was an explication of *Atkins*. *E.g.*, *Hall*, 2014 WL 2178332, at *13. Moreover, even if *Hall* did announce a "new rule" for *Teague* purposes, that "new rule" would apply retroactively because it is a substantive rule addressing eligibility for the death penalty – indeed, courts have universally acknowledged that *Atkins* itself applies retroactively. *E.g. In re Campbell*, No. 14-20293, __ F.3d __, 2014 WL 1911444, at *5 (5th Cir. May 13, 2014) ("There is no question that *Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court."). In any event, any question as to whether, or to what extent, *Hall* applies retroactively to prisoners pursuing federal habeas petitions is a question that the Fifth Circuit could address on remand.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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