No. 13-1433

In The
Supreme Court of the United States

KEVAN BRUMFIELD,
Petitioner,

vs.

BURL CAIN, WARDEN,
Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Statement of the Facts

On January 7, 1993, Kevan Brumfield, Henri Broadway, and West Paul went to Citizens Bank and Trust on Jefferson Highway in Baton Rouge to commit an armed robbery at the bank's night depository box. West Paul drove the car and remained in the vehicle. Brumfield, armed with a .380 caliber handgun, and Broadway, armed with a .25 caliber pistol, lay in wait in bushes immediately adjacent to the night depository box.

A marked police vehicle driven by Corporal Betty Smothers approached the night depository box. Smothers was working in an off-duty capacity to escort Piggly Wiggly Manager Kimen Lee to the bank. Brumfield and Broadway simultaneously ambushed the two women. Brumfield fired six

shots into the driver's window. Five of the shots struck Smothers. At least one of the shots was fired as close as eighteen inches to three feet from the officer. Two of Brumfield's shots also hit Lee. Broadway fired five shots from the rear passenger side of the vehicle. Two rounds were recovered in the unit. At least two rounds struck Lee. Lee managed to drive the vehicle from the passenger side. The bank deposit bag was untouched. Lee survived the attack with eleven bullet holes in her body. She identified Broadway as having looked into the unit after the attack. Brumfield was arrested, and he gave an initial videotaped statement claiming to be the getaway car driver. He later admitted to being Corporal Smothers' shooter.

Petitioner did not take the stand at either phase of the trial. He alleged the defense of alibi even though an eyewitness saw him and Broadway in the store where Smothers was working in uniform some ninety minutes prior to the murder.

Brumfield had a criminal history including felony convictions: (1) an armed robbery conviction of Anthony Miller on December 25, 1992, (2) an armed robbery of Edna Perry on January 2, 1993, (3) an October 13, 1992, conviction for attempted possession of cocaine, and (4) an October 13, 1992, conviction for felony gun theft.

When petitioner murdered Corporal Smothers, he had already pled guilty to attempted possession of cocaine and felony gun theft and was awaiting sentencing. Before the killing, Brumfield told girlfriend Cassandra Holmes he was going to

be sentenced on January 13, 1993, and he wanted to leave her money to live on while he was incarcerated.

During trial penalty phase, Anthony Miller testified that Brumfield armed robbed him on December 25, 1992, shortly after the two met in a bar in Clinton, Louisiana. Petitioner promised to give Miller a ride to Baton Rouge. Instead, petitioner robbed Miller at gunpoint on the side of the road. Miller testified Brumfield took a gold chain, a jacket, and eighty dollars in cash, put a gun to his head, and clicked the trigger. Fortunately, the gun misfired. Clinton Police Chief Eddie Stewart testified Brumfield had been convicted of armed robbery in that case. Edna Perry and her daughter Trina Perkins also testified during the penalty phase. On the evening of

January 2, 1993, the two were walking on a street in the vicinity of Baton Rouge General Hospital when Brumfield drove up beside Ms. Perry, put a sawed-off shotgun in her face, and robbed her of her purse and its contents. When Ms. Perry asked petitioner for her deceased son's pictures inside the purse, Brumfield retorted, "Bitch you dead," as he drove away. Ms. Perry stated she next saw petitioner's face on television, when petitioner had been arrested for murder. She then called police about what Brumfield had done to her only days before the murder. Ms. Perkins was also able to identify Brumfield as her mother's armed robber. Brumfield's armed robberies of Miller and Perry all occurred within two weeks of the murder. Evidence showed Brumfield had the mental ability to plan his criminal activities, and he used crime to get

whatever he wanted. A psychologist testified Brumfield is a sociopath.

II. Procedural History

Petitioner Kevan Brumfield was indicted with the January 7, 1993, first degree murder of Baton Rouge Police Corporal Betty Smothers. Trial began on June 12, 1995. The jury found petitioner guilty of first degree murder on July 2, 1995, and returned a death sentence on July 3, 1995. The jury found three aggravating circumstances applicable: (1) petitioner was engaged in the perpetration or attempted perpetration of armed robbery; (2) the victim was a peace officer engaged in her lawful duties; and (3) the offender knowingly created a risk of death or great bodily harm to more

than one person. Petitioner was sentenced to death on September 18, 1995.

Petitioner subsequently appealed to the Louisiana Supreme Court, which affirmed petitioner's conviction and sentence. *State v. Brumfield*, 96-2667 (La. 10/20/98), 737 So.2d 660. The United States Supreme Court denied review. *Brumfield v. Louisiana*, 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999).

Petitioner filed a state application for post-conviction relief on March 16, 2000. On June 16, 2003, petitioner filed a First Amended Petition for Post-conviction Relief designed to incorporate and replace the original petition. In it, he presented the following issues for review: (1) petitioner should be declared mentally retarded under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d

335 (2002); (2) cumulative error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) petitioner's conviction should be overturned due to juror misconduct and impartiality; and (5) other listed claims constituted error.

The trial court ruled as follows on October 23, 2003: (1) petitioner did not carry his burden placing the claim of mental retardation at issue, and petitioner was not entitled to an *Atkins* hearing; (2) petitioner's cumulative error claim was dismissed; (3) petitioner's ineffective assistance of counsel claims were either procedurally barred or without merit; (4) petitioner's juror misconduct and juror impartiality issues were denied for procedural reasons; and (5) petitioner's enumerated claims

were dismissed because they were not proper grounds for post-conviction relief, the claims were not alleged with sufficient particularity, or the claims were already raised on appeal.

On January 8, 2004, petitioner filed a writ, which the Louisiana Supreme Court denied. *Brumfield v. State*, 04-0081 (La. 10/29/04), 885 So.2d 580.

Petitioner filed an application for federal habeas corpus relief on November 4, 2004, alleging: (1) the state court erred in failing to grant relief and in refusing to hold an evidentiary hearing on petitioner's claim of mental retardation; (2) cumulation of error rendered the conviction constitutionally unreliable; (3) petitioner received ineffective assistance of counsel for enumerated reasons; (4) juror misconduct and impartiality due

to pretrial publicity required reversal of the conviction and sentence; and (5) other listed claims, including lack of funding, constituted error. The state contended the petition should be dismissed because adequate and independent state procedural bars precluded relief on some of the claims and on the others, the state court rulings were entitled to a presumption of correctness.

Petitioner filed an amended petition on October 1, 2007, alleging: (1) petitioner is mentally retarded and cannot be executed; (2) lethal injection violates petitioner's right against cruel and unusual punishment; and (3) petitioner's confession was not voluntarily or intelligently made. The state countered that the additional claims were not properly exhausted in state court because the facts and evidence were greatly

expanded and did not "relate back" to petitioner's original petition. Evidence in the amended *Atkins* claim in federal court had never before even been mentioned in state courts.

The magistrate's report recommended dismissal of all claims, except for the *Atkins* claim based on allegations in the amended petition. The report specifically stated:

> Based solely upon the evidence presented at Brumfield's sentencing hearing (and referenced in his amended post-conviction relief application), the Court agrees with the trial judge's conclusion that Brumfield failed to meet his burden of presenting objective factors that put at issue the fact of mental retardation and that he therefore was not entitled to an *Atkins* hearing.

(Petitioner's Appendix D, p. 127a.) Furthermore, it stated:

> Thus, when 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 *Adkins* [sic] hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law.

(Petitioner's Appendix D, p. 129a.)

Petitioner's amended claim five in state post-conviction proceedings included a generalized lack of funding claim. The magistrate's report found the claim nonreviewable. (Petitioner's Appendix D, p. 116a.) Although the magistrate's report discusses funding also under the *Atkins* claim, no reversible error was found under the funding claim itself. Thereafter, Judge Brady specifically adopted the magistrate judge's report, ruled that petitioner was entitled to an *Atkins* hearing based solely on the amended, expanded petition, and dismissed all

other claims with prejudice. (Petitioner's Appendix C, pp. 99a-100a.)

The *Atkins* hearings were held in federal court during seven days in 2010. After the United States Supreme Court decided *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), the state filed its post-hearing brief on September 15, 2011, again alleging no hearing should have been held on the amended and expanded *Atkins* claim. On February 22, 2012, Judge Brady issued a ruling, in which the judge found that—based on the expanded and amended *Atkins* claim and the federal hearings—petitioner was mentally retarded and could not be executed. The lower federal court found that the state judge on post-conviction relief unreasonably applied clearly established United States Supreme Court

law when the state court judge denied petitioner an *Atkins* hearing in state court. This finding by the federal district court judge is entirely contrary to the magistrate's report, which was specifically adopted by the federal district court judge as his own opinion. The federal magistrate's recommendation found that the state trial court's conclusion in October 2003 was "reasonable and in accordance with clearly established federal law," when the state court record alone was reviewed. (Petitioner's Appendix D, p. 129a.)

The state timely appealed to the United States Court of Appeals, Fifth Circuit. On February 28, 2014, the federal appellate court filed an opinion reversing the federal district court's grant of habeas corpus relief. *Brumfield v. Cain*, 744 F.3d 918, 926-27 (5th Cir. 2014). Petitioner's

application for rehearing was denied on February 28, 2014.

Petitioner filed the present application for certiorari with this Honorable Court, wherein petitioner contends (a) a split in the appellate courts exists because of a disagreement as to what is required under *Atkins* for an evidentiary hearing to be ordered, (b) the federal Fifth Circuit erred in applying this court's holdings in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), and *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (c) this Honorable Court should vacate the Fifth Circuit opinion and remand the case in light of *Hall v. Florida,* ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014). The state submits the decision

of the federal Fifth Circuit was correct and should be affirmed.

SUMMARY OF THE ARGUMENT

The federal Fifth Circuit court properly followed *Cullen v. Pinholster*, ___ U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), and gave proper deference to the state court's post-conviction relief ruling on the merits that petitioner Brumfield failed to carry his burden of proving he was entitled to an *Atkins* mental retardation hearing. No federal evidentiary hearing should have been held. The federal Fifth Circuit correctly reversed the federal district court's decision. No split in the federal circuit courts of appeals exists in the interpretation as to how *Atkins* should be implemented. The outcome of each of the cases cited by petitioner rests on the unique facts of those

individual cases. The federal Fifth Circuit correctly applied *Pinholster* and gave proper deference under 28 U.S.C. § 2254 (d) (1) and (2) to the state court decision. This court's decision in *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), is not applicable to the present case. Louisiana's law regarding mental retardation hearings for capital defendants is completely different from Florida's rigid rule that foreclosed further evidence of intellectual disability, including adaptive deficit testimony, when that capital defendant's IQ score was 70 or above. No remand is necessary. The opinion of the federal Fifth Circuit should be affirmed, and relief to petitioner Brumfield should be denied.

ARGUMENT

The Antiterrorism and Effective Death Penalty Act is applicable. According to statutory requirements, an application shall not be granted unless the adjudication of the claim "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 "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)(1) and (2).

Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011), clarified the deference federal courts reviewing state court decisions must apply. The Court noted:

> We first consider the scope of the record for a § 2254(d)(1) inquiry. The State argues that review is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster contends that evidence presented to the federal habeas court may also be considered. We agree with the State. . . .
>
> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows 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.

Pinholster noted that it did not matter whether the state court decided the matter on

summary disposition or following an evidentiary hearing. In either event, a state court decision on the merits of an issue is entitled to deference under the AEDPA. *Pinholster*, 131 S.Ct. at 1402-03, and *Harrington v. Richter*, ___ U.S.___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011).

The federal Fifth Circuit has correctly determined a state court decision is "contrary to clearly established Federal law, as determined by the Supreme Court" if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." A state court decision is an unreasonable application of such

precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." The "unreasonableness" inquiry is objective. A state court's incorrect application of clearly established Supreme Court precedent is not enough to warrant federal relief; such an application must be unreasonable. The state court's factual findings are presumed correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). *Coble v. Quarterman,* 496 F3d. 430, 435 (5th Cir. 2007), *appeal after remand* 330 S.W. 3d 253 (Tex.Crim.App. 2010), *cert. denied* ___ U.S. ___ , 131 S.Ct. 3030, 180 L.Ed.2d 846 (2011).

The federal district court's decision to hold federal *Atkins* hearings ignored the import of the

state courts' rulings. Judicial efficiency, comity, and the AEDPA require that some sense of finality attach to state court rulings.

Louisiana's post-conviction relief procedure addresses judicial concerns with "repetitive applications, unnecessary hearings, and administrative difficulties surrounding [the] production of prisoners."[1] Not every post-conviction relief application deserves a hearing. The Louisiana Supreme Court has noted that the post-conviction relief statutes provide for dismissal upon the pleadings, La. Code Crim. P. art. 928, summary disposition, La. Code Crim. P. art. 929, disposition based upon an evidentiary hearing, La. Code Crim. P. art. 930, and dismissal based on repetitiveness,

[1] *Postconviction Procedure*, 41 La. L. Rev. 625, 632 (1981).

La. Code Crim. P. art. 930.4. *State v. Veal*, 559 So.2d 1383, 1384 (La. 1990).

Here, the state courts determined that petitioner's mental retardation claim could be summarily denied as occurred in *Pinholster* and *Harrington*. The judgment of the state court dismissing petitioner's claims on the merits is entitled to AEDPA deference, which should have resulted in the dismissal of all of petitioner's federal habeas claims.

In *Schriro v. Landrigan*, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), this Court noted that when deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas

relief. However, because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards. If the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold a hearing.

Applying *Pinholster,* federal courts should not exercise the simple expedient of allowing additional testimony at a new evidentiary hearing as a basis for reversal: "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." *Pinholster*, 131 S.Ct. at 1400.

A petitioner cannot request an evidentiary hearing and substitute "new" evidence for the

federal court to consider as part of its habeas consideration. Once a state court has ruled on the merits, the federal district court must decide whether the state court's determination based on the state court record alone was unreasonable. Admission of new evidence in federal district courts should be limited to those instances where the petitioner's claim was never reviewed by the state court initially. No federal court evidentiary hearing was appropriate where, as here, the state district court issued a ruling on the claim's merits.

In *Hearn v. Thaler*, 669 F.3d 265 (5th Cir. 2012), *cert. denied* ___ U.S. ___, 133 S.Ct. 73, ___ L.Ed.2d ___ (2012), Hearn was allowed to bring a successive habeas corpus petition alleging he was mentally retarded under *Atkins*. The state courts denied relief on the merits. The state courts had

refused to allow the petitioner to use clinical assessments as a replacement for full-scale IQ scores in measuring intellectual functioning. The Fifth Circuit correctly said the state court's decision was not an unreasonable application of clearly established federal law under 28 U.S.C. §2254 (d)(1), and "under this standard, a federal court may not issue a habeas writ simply because the court concludes the state court incorrectly applied federal law; instead, the state court's application of the law must be 'objectively unreasonable.' *Id.* 'AEDPA thus imposes a highly deferential standard for evaluating state-court rulings, and demands that state-court decisions be given the benefit of the doubt.'" *Hearn,* 669 F.3d at 271. *Hearn* stated that the state court's decision could not have been an unreasonable application of the *Atkins* decision

"because the Supreme Court has not clearly established the precise boundaries of determining mental retardation. When the Supreme Court refuses to provide a specific rule, 'it 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.'" *Hearn*, 669 F.3d at 272. *Hearn* reasoned that when the *Atkins* court left it up to the states as to how to measure mental retardation, then "it would be wholly inappropriate for this court, by judicial fiat, to tell the States how to conduct an inquiry into a defendant's mental retardation." *Id.* Relief was properly denied in *Hearn*.

Here, the trial court correctly concluded no evidentiary hearing on the *Atkins* claims was proper. The state trial court reasoned:

> All right. And the state has already filed a response, and there 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 and 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. Guinn's [*sic*] 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.

(Petitioner's Appendix F, pp. 171a-172a.) The trial court's denial on the merits of the *Atkins* claim was entirely reasonable. Federal District Court Judge Brady's conclusion that "the state habeas court in this instance clearly pinned its decision on the adaptive skills prong" clearly ignored the fact that the state judge considered petitioner's IQ scores and the doctors' reports. (Petitioner's Appendix B, p. 37a.)

Petitioner's profane, disruptive outburst during this ruling further evidences the fact Brumfield is not mentally retarded but has an impulsivity disorder as diagnosed in petitioner's school records and by the defense trial experts. Petitioner understood the ruling immediately without any explanation from others. Petitioner understood the trial court was ruling against him, and he contemporaneously compared his case to another death penalty case he knew Judge Anderson was presiding over as follows:

> The Defendant: Excuse me. May I say something? If you're going to deny all of this here, I don't even need to be here. You know.
>
> The Court: Well, you need to be there, and you need to be quiet or we are going to put you in the tank—
>
> The Defendant: I don't need to do nothing.

> The Court: --and you can listen to this.
>
> The Defendant: I don't need to do nothing. You're prejudiced against me. I know this. You ain't going to change your damn mind. I ain't going to sit here and let you deny all of this bullshit.
>
> The Court: You know what, you're right. You're not going to sit here.
>
> The Defendant: This is bullshit. That's right.
>
> The Court: We need to take him to the tank right now.
>
> The Defendant: This is bullshit. You know it, mother fucker. You're prejudiced. I know this. That's why you are doing all this against Todd Lee. You think I don't know? I know what kind of judge you is. You're a fucking house judge. That's right.

(Petitioner's Appendix F, pp. 175a-176a.)

The magistrate's report, agreed with the trial court's findings concerning the mental retardation claim:

Based solely upon the evidence presented at Brumfield's sentencing hearing (and referenced in his amended post-conviction relief application), the Court agrees with the trial judge's conclusion that Brumfield failed to meet his burden of presenting objective factors that put at issue the fact of mental retardation and that he therefore was not entitled to an *Atkins* hearing. As noted above, the first objective factor that the defendant must sufficiently put at issue is sub-average intelligence, as measured by standardized IQ tests. As noted above, according to the IQ levels accepted by the U.S. and Louisiana Supreme Courts, sub-average intelligence is 70 or below using the Wechsler scale, and 68 or below using the Stanford-Binet Scale. The IQ score testified to be Dr. Bolter was 75, which is not low enough to be placed in either of those categories of sub-average intelligence.

Furthermore, as to the second objective factor, significant impairment in several areas of adaptive skills, the testimony presented did not 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. Dr. Bolter, Dr. Guin, and Brumfield's teacher, Karen Cross, in fact, indicated that a significant part of Brumfield's difficulties actually stem from his attention deficit disorder, for which he does not take medications, and which, while it results in an inability to focus, is not equivalent to mental retardation.

Finally, as to the third objective factor (manifestations of neuropsychological disorder prior to the age of eighteen), none of the defense experts at the sentencing hearing testified that Brumfield was mentally handicapped but rather agreed with Dr. Jordan's assessment that he had an antisocial or sociopathic personality disorder with associated attention and learning difficulties. Brumfield's related attention and learning difficulties were noted to cause him to have a decreased ability to focus and process information; however, Brumfield's experts did not indicate that such difficulties resulted in an inability to function in society and perform the daily tasks of living. Thus, when 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 *A[t]kins* hearing on the issue of mental retardation was reasonable and in accordance with clearly established federal law.

(Petitioner's Appendix D, pp. 127a-129a.) A separately alleged funding issue was found by the magistrate to have been properly barred in state court and petitioner had not proved any cause and prejudice. The magistrate thus found the funding issue could not be reviewed. (Petitioner's Appendix D, pp. 116a.) Federal District Court Judge Brady agreed, indicating he considered all pertinent materials and "approves the report and recommendation of the magistrate judge and adopts it as the court's opinion herein." (Petitioner's Appendix C, pp. 99a-100a.)

In his brief to this court, petitioner alleges the state trial court denied Brumfield's "petition in its entirety without acknowledging or ruling on any of his requests for funding." (Petitioner's brief, p. 7.) Petitioner also claims to this court that petitioner "repeatedly requested funding to develop his claims, but these requests were ignored by the state habeas court." (Petitioner's brief, p. 28.) The state submits that these factual allegations are not entirely correct. The state trial court made the following ruling about the funding issue:

> In the defendant's reply to the state's response to the amended petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under [La. Code Crim. P. art.] 930.3, and it's not

> set out with enough particularity. Therefore, it will be dismissed.

(Petitioner's Appendix F, p. 181a.)

The state trial court's ruling was correct. Petitioner failed to carry his burden of proof on the merits of his mental retardation claim in state court on post-conviction relief. Due deference should have been given to the state trial court's decision on the merits of this issue. The federal Fifth Circuit's decision to reverse the federal district court and give proper deference to the state court decision was correct. The federal district court should not have granted any additional expanded hearings and should have denied relief summarily.

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002), a case decided after

petitioner's conviction and sentence, held that executing mentally retarded offenders is excessive. The Louisiana Supreme Court subsequently acknowledged in *State v. Williams*, 01-1650 (La. 11/1/02), 831 So.2d 835, that it is bound by *Atkins*. *Atkins* left the task of developing appropriate ways to enforce the constitutional restriction against the execution of mentally retarded defendants to the states. As a result, *Williams* held that—until legislative action on the subject—the proper procedure to be used to follow *Atkins* is for the trial courts to treat the issue procedurally as they would pretrial competency hearings. *Williams,* 831 So.2d at 852-58.

The court specifically stated that "not everyone faced with the 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." *Williams*, 831 So.2d at 857. *Williams* found universal agreement that mental retardation has three distinct components: (1) sub-average intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuropsychological disorder in the developmental stage.

In 2003, La. Code Crim. P. art. 905.5.1 was enacted. The statute states the defendant in a capital case shall prove his allegation of mental retardation by a preponderance of the evidence. Mental retardation is defined as a "disability

characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills," and onset of mental retardation "must occur before the age of eighteen years."

I. *Bobby v. Bies*, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), is inapposite to the present case; no split in the federal courts exists.

Petitioner in this case has misapplied this court's decision in *Bobby v. Bies,* 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009), to allege that the state district court was wrong in not granting an evidentiary hearing on the mental retardation issue. *Bies* did not require state courts to hold mental retardation evidentiary hearings in death penalty cases post-*Atkins*. In *Bies*, the defendant was convicted pre-*Atkins* for the aggravated murder, kidnapping, and attempted rape of a ten-

year-old boy. There, the jury recommended a death sentence. The Ohio state supreme court on direct review stated that Bies' "mild to borderline mental retardation merit[ed] some weight in mitigation," but found that "the aggravating circumstances outweigh[ed] the mitigating factors beyond a reasonable doubt." *Bies*, 120 S.Ct. at 2148-49, citing the state court decision therein. The Ohio state court then ordered a mental retardation hearing after this court decided *Atkins*, but the federal courts intervened and vacated Bies' death sentence, finding that the Ohio Supreme Court had definitively determined pre-*Atkins* that Bies was mentally retarded and that he was legally entitled to a life sentence. This Honorable Court reversed the federal courts in Bies' case and stated that the lower federal courts had "fundamentally

misperceived the application of the Double Jeopardy Clause and its issue preclusion (collateral estoppel) component." In stating that mental retardation as a mitigating factor and mental retardation for purposes of *Atkins* are "discrete issues," this Court stated:

> Most grave among the Sixth Circuit's misunderstandings, issue preclusion is a plea available to prevailing parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding. The Ohio courts' recognition of Bies' mental state as a mitigating factor was hardly essential to the death sentence he received. On the contrary, the retardation evidence cut against the final judgment. Issue preclusion, in short, does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties.

Bies, 556 U.S. at 829, 129 S.Ct. at 2149. Furthermore, *Bies* reiterated that in *Atkins* "[w]e

'le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'" *Bies*, 556 U.S. at 831, 129 S.Ct. at 2150. This Court in *Bies* stated that "it is not clear from the spare statements of the Ohio appellate courts that the issue of Bies' mental retardation under the *Lott* [Ohio state] test was actually determined at trial or during Bies' direct appeal," and the prosecutor in the Ohio state courts had not conceded that Bies was mentally retarded by *Atkins* or by the standard implemented in Ohio. *Bies*, 556 U.S. at 834-35, 129 S.Ct. at 2152. In noting that Bies had not been acquitted in state court and that at the time of Bies' trial a determination of his mental capacity was "not necessary to the ultimate imposition of the death penalty," this Court concluded:

> The federal courts' intervention in this case derailed a state trial court proceeding "designed to determine whether Bies ha[s] a successful *Atkins* claim." 535 F.3d, at 534 (Sutton, J., dissenting from denial of rehearing en banc). Recourse first to Ohio's courts is just what this Court envisioned in remitting to the States responsibility for implementing the *Atkins* decision. The State acknowledges that Bies is entitled to such recourse, but it rightly seeks a full and fair opportunity to contest his plea under the postsentencing precedents set in *Atkins* and *Lott*.

Bies, 556 U.S. at 837, 129 S.Ct. at 2153-54.

Here, double jeopardy and issue preclusion are not issues. In the present case, the federal district court did intervene, however, to derail the state's judgment and wrongfully substitute its opinion for the reasonable state court decision on the merits regarding Brumfield's mental capacity. The federal Fifth Circuit correctly analyzed the case under *Atkins* and *Pinholster* and found that

the federal "district court erred when it failed to give the proper AEDPA deference to the state court's decision [and found] [b]ecause the state court's judgment was entitled to AEDPA deference, 'there was no reason for the district court to conduct an evidentiary hearing.'" *Brumfield*, 744 F.3d 918, 926 (5th Cir. 2014), citing reference omitted.

Federal courts are not split as to how *Atkins* is to be implemented. Petitioner alleges that federal circuits hold differing opinions as to when state courts should hold mental retardation evidentiary hearings, and this Court should grant certiorari to review a split in the federal circuits. The state submits that *Atkins* left it to the individual states to determine how the constitutional restriction against employing the

death penalty to mentally retarded defendants is carried out. *Bies* reiterated this standard, and a grant of certiorari is unnecessary. The facts of each case, along with the state's law, determine when evidentiary hearings need to be held.

Burgess v. Commissioner, Alabama Department of Corrections, 723 F.3d 308 (11th Cir. 2013), cited by petitioner, is factually dissimilar to the present case. In 1994, Burgess was convicted of capital murder for the killings of his girlfriend and two of her children. The jury recommended a life sentence by a vote of eight to four, but the Alabama trial judge rejected that recommendation and sentenced Burgess to death, which is a procedural fact which could not have occurred under Louisiana law. Burgess' conviction and death sentence were affirmed on direct appeal. Burgess subsequently

applied for state post-conviction relief. After this Court decided *Atkins*, Burgess asked for state funds and alleged he should not be executed because he was mentally retarded. Alabama denied relief to Burgess without a hearing, and the state trial court specifically found that Burgess had procedurally defaulted on these claims, and "[t]hus the state trial court never considered the substance of Burgess's Eighth Amendment *Atkins* claim." *Burgess*, 723 F.3d at 1311.

In Burgess' case, the sole defense witness during the penalty phase of trial was a neuropsychologist who gave only an "estimate" of that defendant's IQ without administering any intelligence testing personally. Other facts in Burgess' case were that he had a retarded brother and a mentally ill mother, that he failed first grade,

and that he finished ninth grade with all failing grades with the exception of one D. *Burgess*, 723 F.3d at 1312. Alabama denied Burgess "the opportunity not only to have additional experts but also for any expert access to him while in prison." *Burgess*, 723 F.3d at 1319. The Eleventh Circuit reversed the lower court's decision and remanded the case for an evidentiary hearing on mental retardation and a decision on the merits of the *Atkins* claim. In doing so, the Eleventh Circuit acknowledged that an evidentiary hearing on a mental retardation claim was not always required and that "[e]ven though the state would not have been required to provide Burgess with funds for an expert," access for testing should have been allowed. *Burgess*, 723 F.3d at 1321.

Brumfield was sentenced to death after the unanimous twelve-person jury recommended a death sentence. On state post-conviction relief, the trial court issued a ruling on the merits of Brumfield's mental retardation claim after it considered not only the trial testimony but also the allegations presented in petitioner's voluminous application, together with amendments, for post-conviction relief. Trial evidence includes a videotaped post-arrest statement by Brumfield, wherein he initially denied involvement in the case and then stated he was only the getaway driver before he admitted to being one of the shooters.

During Brumfield's trial penalty phase, his mother, father, and older brother testified on defendant's behalf; and Dr. Cecile Guin, a social worker, testified as to Brumfield's social history.

She wrote a twenty-six page detailed report to document Brumfield's background. Ms. Karen Cross, Brumfield's fourth-grade teacher, testified about his aptitude and behavioral problems in elementary school. Dr. John Bolter, a clinical neuropsychologist, explained that Brumfield as a child had an attention deficit disorder and educational problems associated with his bad behavior. As an adult, defendant had an antisocial personality, a borderline general level of intelligence, and, according to the neuropsychologist, Brumfield also had organic amnesia. Dr. Bolter did not give more mental retardation testimony at trial because Dr. Bolter told the defense trial attorneys pretrial that he could not "help" Brumfield's case in this regard. Dr. Bolter could not testify that petitioner was

mentally retarded when the findings, based upon thorough testing, did not lead to that conclusion.

Brumfield never failed a grade in school. In spite of extensive testing during his educational years, Brumfield was never diagnosed with mental retardation, but the evidence did reveal he had behavioral problems. Brumfield, unlike Burgess, was never denied access to any mental health experts for interviews or testing.

On state post-conviction relief, the trial court explained it looked at all the intelligence testing by Drs. Bolter and Jordan. Additionally the trial court stated: "I do not think that the defendant has demonstrated impairment based on the record in adaptive skills." (Petitioner's Appendix F, p. 171a.) From the record, the trial court knew that petitioner owned a car, rented a getaway car in this

case, rented a motel room after the murder, procured the weapons, and was intending to give his girlfriend proceeds from this armed robbery that he had planned. The trial court also knew that petitioner by himself committed two other armed robberies within the two weeks leading up to the murder of Corporal Smothers. Unlike the case in *Burgess*, the state trial judge denied relief on the merits after reviewing all the evidence presented.

The case of *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), is also distinguishable from the present case. In 1988 in Indiana, Allen was sentenced to death in accordance with the jury's recommendation after he was convicted of the murder, felony murder, and armed robbery of Ernestine Griffin. Allen appealed, and during that process the case was remanded for the trial court to

consider evidence of Allen's mental retardation as a mitigating factor. The trial court stated that "'the possibility of the mitigating circumstance of [Allen's] mental retardation' did not outweigh the aggravating circumstance of his crime." *Allen*, 558 F.3d at 660. Indiana banned execution of mentally retarded persons in 1994. Allen's conviction and sentence were affirmed on appeal in 1997. Allen's post-conviction claims were also denied. In March 2002, Allen claimed on federal habeas corpus that he was mentally retarded and should not be executed. Allen subsequently asked the state court for permission to file a successive post-conviction relief petition because *Atkins* prohibited his death sentence. The Indiana court denied relitigation of the claim, and the federal district court denied habeas corpus relief. The Seventh Circuit ruled

that under the circumstances of Allen's case, he was entitled to a hearing on the merits of his *Atkins* mental retardation claim. The Seventh Circuit noted that there had never been a determination as to whether or not Allen was mentally retarded under Indiana law. The case was remanded for a determination on the merits, using Indiana's standard for mental retardation, whether Allen was entitled to relief under *Atkins*.

In the present case, the state district court judge reviewed Brumfield's *Atkins* mental retardation claim using the standard developed in Louisiana. *See* La. Code Crim. P. art. 905.5.1. The state trial court judge referred to both IQ testing and adaptive skills before concluding that Brumfield was not mentally retarded. This was a

decision on the merits, and it was objectively reasonable under the facts of this case.

The federal Fifth Circuit was correct in giving due deference to the state courts' decision. Petitioner's allegation that a split in the federal circuits justifies a grant of certiorari in this case is incorrect.

II. The Fifth Circuit's decision was correct.

The federal Fifth Circuit was correct in reversing the federal district court's decision and in upholding the opinion of the state courts. The state court decision involved a reasonable application of clearly established federal law as determined by this Honorable Court and resulted in a decision based on a reasonable determination of the facts in light of the evidence presented the state court

proceedings, all in accordance with 28 U.S.C. § 2254 (d).

First, the Fifth Circuit's decision as to funding was proper. The Fifth Circuit analyzed relevant cases from this Court to conclude that petitioner never made a threshold showing in state court that any additional funding was necessary. The court reasoned:

> The district court erred in its determination that the state court decision was not entitled to AEDPA deference. In the district court's view, the state court was required to provide Brumfield with the funds necessary to develop his claims. However, 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. Rather than present cases holding that Brumfield was entitled to funding to develop his prima facie case, the district court faulted the state court for failing to extend the due process precepts in *Atkins, Ford,* and *Panetti*

to encompass this aspect of due process. *See Chester*, 666 F.3d at 344 (holding that a state court's decision is not entitled to AEDPA deference under 2254 (d) (1) where the court "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply").

The district court's holding was an unwarranted extension of Supreme Court jurisprudence. *See id.* at 345 ("The first step in determining whether a state court unreasonably applied clearly established federal law is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Under *Panetti v. Quarterman,* 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986), a court is explicitly required to provide an "opportunity to be heard" once the prisoner has made a "substantial threshold showing of insanity." *Panetti*, 551 U.S. at 949 (internal quotation marks and citation omitted). This includes the opportunity to submit expert evidence. *Id.* at 951. However, nowhere does the Supreme Court hold that this opportunity requires the court or the state to provide the prisoner with funds to

obtain this expert evidence. Nor has this circuit recognized that such an established federal right exists. *See Morris v. Dretke*, 413 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J., concurring) ("[T]he State was within its rights to deny [the petitioner] assistance in obtaining intellectual testing [in order to make out a prima facie case of retardation].").

We have explained the due process rights due "under *Ford*[:] [o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (second alteration in original) (quotation omitted). Similarly, "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation . . . the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Id.* Thus, the strictures of procedural due process associated with *Ford* and *Panetti* attach only *after* a prisoner has made a "substantial threshold showing."

> Accordingly, we hold that the state court did not violate § 2254 (d) (1).

Brumfield, 744 F.3d 918, 925-26 (5th Cir. 2014). (Emphasis original.)

In addition, the Eleventh Circuit in *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308, 1321 (11th Cir. 2013), citied by petitioner in his brief to this Court, found that the state was not responsible for providing funds for a mental health expert even though the state should have provided access to that petitioner for testing. Accordingly, the Eleventh Circuit agrees with the Fifth Circuit on this funding issue.

The Fifth Circuit decision should be upheld by this Court. The state trial judge ruled on the funding issue as follows:

> In the defendant's reply to the state's response to the amended

> petition for post-conviction relief, the defendant also asserted that the above claims have not been fully investigated and therefore may not properly be presented for post-conviction relief due to lack of funds. I'm not exactly sure whether that's another claim for post-conviction relief. If it is, it's not one that fits within the grounds under 930.3, and it's not set out with enough particularity. Therefore, it will be dismissed.

(Petitioner's Appendix F, p. 181a.) Because petitioner did not set forth a particularized need for additional funding, he did not make out a prima facie case or meet his burden of proof for obtaining more money.

Moreover, petitioner completely ignores the fact that the test results relied on by the state trial court are test results from defense experts employed for trial. Petitioner, as an indigent defendant, used public funds to hire his choice of

mental experts. Ironically, when petitioner's own selected experts did not reach the result that petitioner desired, he attempted to have Dr. John Bolter's testimony excluded during the federal hearings. The federal district court judge even partially granted petitioner's request by curtailing the scope of the defense trial expert's testimony when the state called Dr. Bolter to testify at the federal hearings.

The federal Fifth Circuit furthermore correctly found that the state trial courts' rulings involved a reasonable determination of the facts on the merits of the mental retardation claim. The federal appellate court referred to the applicable Louisiana law and determined that the state trial court on post-conviction relief adhered to state cases pertaining to the proper procedure and

standard for reviewing an *Atkins* claim post-trial. *See State v. Dunn* (*Dunn I*), 831 So.2d 862, 884 (La. 2002), *State v. Dunn* (*Dunn II*), 974 So.2d 658 (La. 2008), *State v. Dunn* (*Dunn III*), 41 So.3d 454 (La. 2010), and *State v. Williams*, 831 So.2d 835 (La. 2002). The Fifth Circuit ruled as follows:

> Similarly, the state court's judgment did not violate § 2254 (d) (2). Our review of the record persuades us that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing. The district court erroneously found that the state court rested its ruling on Brumfield's adaptive skills and faulted the state court for failing to provide Brumfield with the requisite funding. The district court also chided the state court for relying on evidence presented for mitigation purposes and deciding Brumfield's claim based on a record which failed to discuss all of the necessary elements. In addition, the district court concluded that the state court wrongly used competency evidence to determine Brumfield's *Atkins* claim.

Contrary to the district court's ruling, the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation. The state court noted that of the two I.Q. tests, one returned a score of 75 and the other returned "a little bit higher I.Q." The state court then properly considered the evidence of adaptive functioning that Brumfield presented. The state court concluded that Brumfield had not "demonstrated impairment in adaptive skills." The district court criticized the state court for not analyzing each sub-factor of the adaptive skills prong, but there is no requirement that the state court articulate all of its reasons. Notably, 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. 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. *See State v.*

Tate, 851 So.2d 921, 942 (La. 2003) (holding that the defendant failed "to establish reasonable grounds that [he] may be mentally retarded"). Thus, the state court's decision does not fall under the exceptions in § 2254 (d) and was entitled to AEDPA deference.

In sum, the district court erred when it failed to give the proper AEDPA deference to the state court's decision. Because the state court's judgment was entitled to AEDPA deference, "there was no reason for the district court to conduct an evidentiary hearing." *Blue v. Thaler*, 665 F.3d 647, 661 (5th Cir. 2011). Accordingly, it was error for the district court to conduct such a hearing, and we therefore disregard the evidence adduced for the first time before the district court for purposes of our analysis under § 2254 (d) (1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Blue*, 665 F.3d at 655-56 ("*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254 (d).").

Brumfield, 744 F.3d at 926-27. This conclusion is correct. Petitioner complained that the Fifth Circuit "fail[ed] to confront the district court's reasoning." (Petitioner's brief, p. 11, note 3.) Petitioner's allegation, however, fails to acknowledge the Fifth Circuit's opinion, including its observation that "[e]ven if we were to consider the new evidence presented to the district court, we likely would hold that Brumfield failed to establish an *Atkins* claim." *Brumfield*, 744 F.3d at 927, note 8.

III. *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), does not necessitate remand in the present case.

In *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, ___ L.Ed.2d ___ (2014), this Court struck down Florida's *per se* rule that a death row inmate could not present any further evidence of

intellectual disability unless he first presented an IQ score of 70 or below. The Court explained that

> Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.

Hall, 134 S.Ct. at 1990. The Court in *Hall* studied other states' laws concerning the definition of mental retardation. The *Hall* court even identified the applicable law in Louisiana, La. Code Crim. Proc. Ann., Art. 905.5.1, and commented that Louisiana has "no IQ cutoff." *Hall,* 134 S.Ct. at 1998. In fact, this court noted that "every state legislature to have considered the issue after

Atkins—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida." *Hall*, 134 S.Ct. at 1998. Louisiana's law has no unconstitutional mandatory cutoff rule pertaining to IQ scores. Florida's unconstitutional law is dissimilar to Louisiana's law on the issue of mental retardation.

The state trial court took into account petitioner's IQ tests, as well as his adaptive functioning, in making its decision that Brumfield is not mentally retarded. The federal Fifth Circuit correctly upheld that state courts' decision on the merits.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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