No. 13-1433

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

REPLY BRIEF FOR PETITIONER

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Petitioner was sentenced to death prior to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). After *Atkins* was decided, the state habeas court denied Petitioner's *Atkins* claim based exclusively on its conclusion that the *pre-Atkins* trial record contained insufficient evidence of mental retardation. The state court refused even to allow Petitioner a hearing on his *Atkins* claim, reasoning that Petitioner "hadn't carried his burden placing the claim of mental retardation at issue" at his penalty phase – a burden that Petitioner could not possibly have known would exist at the time of his trial. Pet. App. 171a-172a. After a federal district court granted habeas relief on Petitioner's *Atkins* claim, the Fifth Circuit reversed, on the ground that the state habeas court's resolution of the *Atkins* issue constituted a reasonable determination of the facts under 28 U.S.C. § 2254(d)(2).

The petition explained that the Fifth Circuit's opinion was both incorrect on the merits and conflicted with authority from the Seventh and Eleventh Circuits. In response, the State has little to say. On the merits, the State relies on *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), which held that a federal habeas court must apply 28 U.S.C. § 2254(d) based on the state court record. But far from being inconsistent with Petitioner's position, *Pinholster* is actually one of the premises of Petitioner's position. The issue presented in this case – whether a state court violates § 2254(d) by treating a petitioner's pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* –

presupposes that the inquiry under § 2254(d) is limited to the state court record. The State attempts to minimize the circuit conflict by citing irrelevant factual differences between the decision below and the out-of-circuit authority, but it fails to reconcile the *legal* standard applied by those circuits with the legal standard applied by the Fifth Circuit below. Those standards are starkly at odds. The Court should grant certiorari to resolve the split in authority, or, at a minimum, grant, vacate, and remand for further consideration in light of *Hall v. Florida*, 134 S. Ct. 1986 (2014).

I. The Fifth Circuit Was Wrong And *Pinholster* Does Not Dictate Otherwise.

The petition presented a multitude of reasons why treating a pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* amounted to an unreasonable determination of the facts, and the State disputes none of them. The State does not dispute, for instance, that the relevance of mental retardation in mitigation and mental retardation for the purposes of *Atkins* are distinct inquiries. It does not dispute that Petitioner had no reason to try to meet the clinical standard for mental retardation at his penalty phase and that, to the contrary, Petitioner had the strategic incentive *not* to use his limited resources to develop evidence of mental retardation at the penalty phase.[1] The State does not

[1] As this Court explained in *Atkins*, defendants may be hesitant to present mental retardation evidence during the penalty phase

dispute that relying solely on the penalty phase record is particularly egregious where, as here, the penalty phase proceeding took place before *Atkins* (or the corresponding state law standard for mental retardation) had been decided.

Instead, the State focuses on this Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) – a case which is simply beside the point. *Pinholster* held that a federal court's analysis of whether a state court violated 28 U.S.C. § 2254(d) must be based on the record that was before the state court. Petitioner accepts that holding, Pet. at 8, as did the district court when it granted habeas relief, Pet. App. 24a ("In all inquiries under § 2254(d), federal review is confined to the record before the state court" (citing *Pinholster*, 131 S. Ct. 1388)). No one contends that the § 2254(d) analysis should take into account evidence that was adduced for the first time in federal court. Indeed, *Pinholster* forms the premise of Petitioner's argument here. The issue presented in this case – whether a state court violates § 2254(d) by treating a petitioner's pre-*Atkins* penalty phase record as determinative of mental retardation under *Atkins* – *presupposes* that the inquiry under § 2254(d) is limited to the state court

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because that evidence "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; *see also Bobby v. Bies*, 556 U.S. 825, 836 (2009).

record. Accordingly, *Pinholster* is in no way inconsistent with Petitioner's contention here.[2]

II. The Circuits Are In Conflict.

The State also makes a weak attempt to argue that there is no split among the circuits. First, the State contends, there can be no split because "*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." Resp. Br. at 44-45. Petitioner does not contest that the States have some discretion to implement *Atkins*. But that discretion is not unlimited, and the extent of that discretion is precisely the issue that has divided the circuits. The Seventh and Eleventh Circuits held that denying *Atkins* relief based solely on the trial record warranted habeas relief under § 2254(d); in contrast, the Fifth Circuit concluded that this procedure was permissible and denied relief. The State's contention that Louisiana had the discretionary power to use this procedure is an argument on the merits; it does not

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[2] The State makes much of the magistrate judge's statement that "[b]ased solely upon the evidence presented at [Petitioner's] sentencing hearing," Petitioner failed to put his mental retardation at issue, and the district court's subsequent adoption of the magistrate judge's conclusions. Resp. Br. at 11, 31-32 (quoting Pet. App. 127a). The magistrate judge's statement, however, is not inconsistent with the district court's ultimate conclusion that the trial court should have never based its decision "solely upon the evidence presented at [Petitioner's] sentencing hearing," Pet. App. 127a, in the first place. *See* Pet. App. 36a-38a. Furthermore, even if there were some inconsistency, it is plainly the district court's final opinion and conclusions which control.

rebut Petitioner's contention that the circuits are in conflict.

Second, the State asserts there is no split because *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013), and *Allen v. Buss*, 558 F.3d 657 (7th Cir. 2009), arose on their own "unique facts." Resp. Br. at 45, 51. Of course, this is true: Burgess and Allen were different defendants from Petitioner, who were sentenced for different crimes than Petitioner. Critically, however, the State does not identify a single factual difference that is relevant to whether the legal reasoning in these cases conflicts with that of the Fifth Circuit here. From a legal perspective, the procedural posture of *Burgess* and *Allen* was materially identical to the procedural posture of the decision below, and yet the Fifth Circuit reached a diametrically opposite conclusion.

In *Burgess*, the Eleventh Circuit expressly 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." 723 F.3d at 1318. The State attempts to distinguish that case on the basis that the petitioner there was sentenced to death by a judge, not a jury, "a procedural fact which could not have occurred under Louisiana law." Resp. Br. at 45. That is a non-sequitur: the identity of the trier of fact at the penalty phase is irrelevant to the reasonableness of relying on the penalty phase record as being determinative of a petitioner's mental retardation.

The State also attempts to distinguish *Burgess* by pointing out that more evidence related to mental retardation was presented at Burgess' penalty phase than at Petitioner's penalty phase. Respondent explains, for instance, that evidence presented at the penalty phase included the history of mental illness in Burgess' family and Burgess' academic problems through to the ninth grade. Resp. Br. at 46-47. Burgess's penalty phase record also included evidence that he had maintained employment and was a caring child. 723 F.3d at 1316-17. Meanwhile, the State argues, Petitioner's penalty phase contained no evidence that Petitioner had "failed a grade in school," and virtually no evidence relevant to mental retardation. Resp. Br. at 49-50.

Petitioner agrees that the penalty phase record in *Burgess* contained more extensive evidence related to mental retardation than this case. But that actually *strengthens* Petitioner's argument that the circuits are in conflict. If the Eleventh Circuit found the penalty phase record in *Burgess* too "inadequate to reasonably support the state court's findings," 723 F.3d at 1318, then it would certainly conclude the same based on the dearth of mental retardation evidence presented at Petitioner's penalty phase.

The State's purported distinction of *Allen* is likewise unpersuasive. In *Allen*, the Seventh Circuit held that a state court acts unreasonably under § 2254(d)(1) by failing to appreciate the distinction between the relevance of mental retardation evidence in mitigation at a pre-*Atkins* penalty phase and mental

retardation for the purposes of *Atkins*. According to the State, *Allen* is distinguishable because, there, the state post-conviction court "denied relitigation" of the petitioner's mental retardation claim based on the sentencing judge's conclusion that "'the possibility of the mitigating circumstance of [Allen's] mental retardation' did not outweigh the aggravating circumstance of his crime." Resp. Br. at 52 (quoting *Allen*, 558 F.3d at 660). Here, on the other hand, "[t]he state trial court judge referred to both IQ testing and adaptive skills before concluding that Brumfield was not mentally retarded." Resp. Br. at 53.

The State's distinction is again a red herring. Here, the state post-conviction court denied Petitioner the opportunity to litigate his mental retardation claim because he "hadn't carried his burden placing the claim of mental retardation at issue" *at his penalty phase*. Pet. App. 171a-172a. As a result, as in *Allen*, 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*. *Allen*, 558 F.3d at 663.

The State does not dispute that the posture of this case makes it a uniquely strong opportunity to resolve the issue presented. *See* Pet. at 25-26. The district court – the only court to fully review Petitioner's *Atkins* claim – concluded that Petitioner is mentally retarded. And the Fifth Circuit did not reverse that aspect of the district court's decision. This case thus

provides the Court with an opportunity to correct the Fifth Circuit's erroneous application of AEDPA without the complication of any alternative grounds, such as whether Petitioner was in fact mentally retarded.

III. At a Minimum, The Court Should Grant, Vacate, and Remand in Light of *Hall v. Florida*.

In the event this Court does not grant certiorari to resolve the circuit split described above, it remains incumbent upon the Court to remand for reconsideration in light of *Hall*, 134 S. Ct. 1986. The State argues to the contrary, pointing out that Louisiana lacks the same *per se* IQ cut-off that was ruled unconstitutional in *Hall*. That argument is wholly unresponsive to any of the serious concerns raised by Petitioner in his opening brief. Petitioner has never contended that Louisiana's definition of mental retardation is unconstitutional. Petitioner's argument is simply that, given the specific facts of this case, there is reason to believe the Fifth Circuit would have reached a different conclusion if it had had the benefit of this Court's decision in *Hall*. The State completely ignores this risk.

The state court relied on three aspects of Dr. Bolter's testimony at Petitioner's penalty phase proceedings in finding that Petitioner was not mentally retarded: (1) Dr. Bolter's testimony that Petitioner had an IQ of 75; (2) his testimony that Petitioner had an antisocial or sociopathic personality; and (3) his

testimony that Petitioner had "no conscience." Pet. App. 171a-172a. The latter two aspects may be relevant to the determination of an appropriate sentence. They have no relevance, however, as to whether Petitioner is also mentally retarded. As a result, as Petitioner explained in his petition, the single, unexplained IQ score of 75 was the only evidence relevant to mental retardation that the state court relied upon in denying Petitioner's *Atkins* claim. *See* Pet. at 35-36. *Hall* shows that a record of this sort is insufficient to determine whether a petitioner is mentally retarded under *Atkins*. The Court was clear 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." 134 S. Ct. at 1996; *see also id.* at 2000 (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" (citation omitted)).[3]

Given the importance of this single IQ score to both the state court's and the Fifth Circuit's determinations, *see* Pet. App. 14a, the prudent course is to remand to

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[3] Louisiana itself recognizes that an IQ score of 75 is consistent with mental retardation and thus requires consideration of adaptive skills. *See State v. Dunn*, 41 So. 3d 454, 470 (La. 2010) ("The ranges associated with the two scores of 75 brush the threshold score for a mental retardation diagnosis. . . Because of the defendant's borderline I.Q. scores, his diagnosis is heavily dependent on his adaptive functioning.").

give the Fifth Circuit the opportunity to consider the effect of *Hall* in the first instance.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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