No. 13-1433

IN THE
Supreme Court of the United States

KEVAN BRUMFIELD,

Petitioner,

v.

BURL CAIN, Warden,

Respondent.

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

REPLY BRIEF OF PETITIONER

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INTRODUCTION

There is no mistaking the stakes of this case. The only court to give Petitioner a hearing on his intellectual disability heard seven days of testimony from eleven witnesses, considered hundreds of pages of expert reports and exhibits, and found that Kevan Brumfield is intellectually disabled.

The evidence of his intellectual disability was overwhelming and uncontroversial. The testimony was unanimous that Brumfield's IQ scores—which fell between 65 and 70—were consistent with intellectual disability. And the district court credited the wealth of expert testimony regarding Brumfield's deficits in adaptive skills. The evidence included, but was not limited to, Brumfield's severely limited ability to write—requiring an inordinate amount of time, and requiring assistance, to write a simple letter; a lack of motor skills that renders him unable to write without a piece of cardboard to guide him; his severe developmental delay compared to his peers; his fourth-grade reading level and lack of competence in virtually every academic area; his consistent and repeated placement in special education and mental health facilities; and the prevalence of intellectual disability among his blood relatives.

The district court discredited both of the State's experts, Drs. Blanche and Hoppe (from whom the State now selectively quotes in its brief)—one a prison physician who had never heard of the AAMR/AAIDD at the time of his involvement in this case and had "no formal training in administering psychological testing," *see* Pet. App. 56a-57a & n.22, and the other who

recognized that the clinical standards required him to interview Brumfield's family, friends, and peers, but was prevented from doing so by the State's counsel, *see* Pet. App. 55a-56a & n.21.[1]

The State's hope now is that the district court's finding of intellectual disability will be disregarded out of deference to the state postconviction court, which denied Brumfield any hearing at all. The State's brief, however, only underscores the unreasonableness of the state postconviction court's determination. The State does not dispute, for example, that the sole ground articulated by the state court was that Brumfield had been diagnosed during sentencing with an antisocial personality. Yet it ignores the fact that the unanimous consensus of the medical and clinical communities is that antisocial personality disorders are positive indicators of, not inconsistent with, intellectual disability. Instead, the State offers post-hoc rationalizations *not* offered by the state court, each of which imagines the court digging through the pre-*Atkins* trial record and rendering its own lay diagnosis, without identifying a single fact that is disqualifying of intellectual disability. Nothing in the State's brief provides a basis for setting aside the district court's determination that Brumfield is intellectually disabled and thus ineligible for execution.

[1] The State is wrong that it will be entitled to *de novo* review of the district court's findings on remand. Resp. Br. 57. Intellectual disability is a factual determination reviewed for clear error. *See, e.g.*, *State v. Turner*, 936 So. 2d 89, 98 (La. 2006); *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011).

ARGUMENT

I. The State Court's Rejection Of Brumfield's Claim Of Intellectual Disability Based On The Pre-*Atkins* Record Was Unreasonable.

The State does not dispute that, at the time of Brumfield's trial, Louisiana did not prohibit the execution of intellectually disabled persons and had no relevant definition of intellectual disability. Pet. Br. 25-26, 30. It does not dispute that Brumfield never attempted to mitigate based on his intellectual disability, Pet. Br. 30-32, and, in fact, had good reason not to do so, Pet. Br. 32-33.

Nor does the State dispute that, notwithstanding the fundamental differences between Brumfield's pre-*Atkins* sentencing hearing and an *Atkins* hearing, the record before the state court contained many red flags signaling Brumfield's intellectual disability. The State does not dispute that the evidence before the state court established that Brumfield had scored 75 on an IQ test, had at best a fourth-grade reading level, spent much of his schooling in special education classes, needed someone to "help him function" both at school and at home, and had the "basic problem" that he "could not process information." Pet. Br. 1, 36-37. It does not dispute—because it cannot—that all of these facts are core objective indicia of intellectual disability. Pet. Br. 1, 37.

Instead of engaging with any of these facts, the State argues around the issues presented in ways that have nothing to do with the state court's factual

determination and, if anything, underscore its unreasonableness.

A. The IQ Score Of 75 Was Not "Above The Threshold For Intellectual Disability In Louisiana."

For the first time in these proceedings, the State claims that testimony from Brumfield's penalty phase that he scored a 75 on one doctor's IQ test and "just a little higher" from another doctor who "only did a screening test," JA 133a, put Brumfield "above the threshold for intellectual disability in Louisiana." Resp. Br. 31 (citing *State v. Dunn*, 41 So. 3d 454, 472 (La. 2010)).[2]

This argument conflicts with the State's prior representation to this Court that Louisiana has no IQ threshold. *See* Cert. Opp. 64-66. It also conflicts with the state court's decision, which did not purport to find Brumfield's scores in excess of any relevant threshold. Pet. App. 171a-172a. Indeed, Louisiana courts recognize that an IQ of 75 indicates the possibility of intellectual disability. The very case on which the State relies, *State v. Dunn*, makes this clear. There, the defendant received two IQ scores of 75. Specifically addressing those scores, the court explained:

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[2] The IQ score that was "just a little bit higher" was mentioned exclusively in Dr. Bolter's explanation that the score was not reliable because it was based on "a screening test" and not "a standardized measure of intellectual functioning." JA 133a. *See also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("Invalid scores may result from the use of brief intelligence screening tests.").

> 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. Because of the defendant's borderline I.Q. scores, his diagnosis is heavily dependent on his adaptive functioning.

41 So. 3d 454, 470 (La. 2010). In fact, in *Dunn* itself the defendant had been sentenced to death prior to *Atkins*. The Louisiana Supreme Court held that it was necessary to afford him a hearing on his intellectual disability in light of testimony that his "IQ is very close to that which would indicate mental retardation." *State v. Dunn*, 831 So. 2d 862, 886 (La. 2002). The court explained that it would have been "patently unjust" to rely on the pre-*Atkins* record because intellectual disability was only "marginally relevant when th[e] case was tried" and thus "[t]he defense was not called upon to exert time, energy, and effort in marshaling proof of mental retardation at the trial." *Id.*

This Court and all relevant clinical authorities have likewise recognized that an IQ score of 75 indicates the possibility of intellectual disability. Pet. Br. 28-29. The score thus provided no reasonable basis to rule out Brumfield's intellectual disability without a hearing.

B. It Was Unreasonable To Determine That Brumfield Lacked Impairment In Adaptive Skills Based On His Pre-*Atkins* Record.

1. The State Does Not Dispute That The Sole Factual Basis Relied On By The State Court Was Unreasonable.

The State wholly ignores the postconviction court's only rationale for determining that Brumfield lacked impairment in adaptive skills: that he instead had an antisocial personality. Pet. App. 171a-72a. It does not dispute that there was no support in the record for the inference that antisocial conduct disorders somehow exclude intellectual disability. Pet. Br. 38. And it does not dispute that there is unanimous scientific consensus in the medical community that antisocial conduct disorders coexist with, and even *affirmatively indicate the presence of*, intellectual disability. Pet. Br. 38-39; *see also* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 158 (11th ed. 2010) ("AAIDD 11th") ("Boys with ID and higher IQ scores have been reported to exhibit antisocial and delinquent behaviors more frequently than do their male peers without ID."); *see also Hall v. Florida*, 134 S. Ct. 1986, 1994, 2000 (2014) ("[S]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability and thus the factual determination of intellectual disability should be "informed by the medical community's diagnostic framework.").

In other words, the State does not and cannot dispute that the only factual basis articulated by the state court was unreasonable. This Court thus need

not reach the State's hypothetical, post-hoc rationalizations of the state court's decision, which, as explained below, fail on their own accord. *See Wiggins v. Smith*, 539 U.S. 510, 527-32 (2003) (reviewing petitioner's constitutional claim *de novo* where the reasons articulated by the state court were unreasonable without considering other hypothetical bases for the state court's decision); *Lafler v. Cooper*, 132 S. Ct. 1376, 1390-91 (2012) (same); *Harrington v. Richter*, 562 U.S. 86, 98-100 (2011) (explaining that § 2254(d) may require consideration of possible reasonable bases where "the "state court's decision is unaccompanied by an explanation," but acknowledging that federal courts must respect when state courts provide explanations or "elaborate more fully" (citing *Evans v. Chavis*, 546 U.S. 189, 197, 199 (2006))).

2. The State's Post-Hoc Hypothetical Justifications Would Not Have Been Reasonable Bases To Rule Out Brumfield's Intellectual Disability Without A Hearing.

The State's three post-hoc justifications for the postconviction court's determination—none of which was articulated by the court itself—confirm the unreasonableness of the determination.

First, the State contends that Brumfield's observation that there was no discussion of adaptive skills at his penalty phase proceeding, Pet. Br. 30, confirms that he "failed to put at issue" his intellectual disability. Resp. Br. at 32. The State misses the point. That Brumfield's penalty phase record was devoid of any discussion of adaptive skills underscores the irrationality of treating that record as adequate to

resolve whether he had a clinical deficiency in adaptive skills. Brumfield never attempted to prove his intellectual disability or his impairment in adaptive skills at his penalty phase. His sentencing pre-dated *Atkins*, at a time when mitigation based on "mental retardation" was seen as a "two-edged sword." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The absence of expert discussion of "adaptive skills" in a pre-*Atkins* record is indicative of nothing.

Second, the State argues that if Brumfield were intellectually disabled, surely a diagnosis would have been found in his pre-*Atkins* sentencing record. Resp. Br. 32-36. As a preliminary matter, the State relies chiefly on the reports of Drs. Jordan (Resp. Br. 3, 30, 32, 33, 34-35), Guin (Resp. Br. 3, 5, 30, 32, 33, 35), and Bolter (Resp. Br. 3, 6, 7-8, 9, 30, 32, 34, 35). The State conceded, however, that Dr. Jordan's report was "never submitted into evidence at any stage of the state court proceedings." *See* Pet. App. 39a n.13.[3] The Guin and Bolter reports similarly were never in evidence. The first time any of these reports was admitted into evidence was at Brumfield's federal habeas proceeding. Dkt. No. 110. The State's reliance on these reports violates § 2254(d)(2) (limiting consideration to "the evidence presented in the State court proceeding"), and is ironic given the State's repeated citation of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

[3] Limited aspects of Dr. Jordan's report were raised in cross-examination. JA 108a, 114a-15a, 132a-33a.

Furthermore, the clinical guidelines are clear that, for several reasons, no inference can be drawn from "the lack of an earlier, official diagnosis of mental retardation," including that persons are frequently given "no diagnosis or a different diagnosis for 'political purposes' such as protection from stigma" and a "school's concern about over-representation . . . of specific diagnostic groups." AAIDD, *User's Guide: Mental Retardation: Definition, Classification and Systems of Supports* 18 (10th ed. 2007) ("AAIDD 10th User's Guide").[4]

In any case, the State mischaracterizes those reports and the expert testimony in the record. The state court's determination was not based on "the testimony of *three* experts, all of whom conducted exhaustive reviews and comprehensive intellectual testing." Resp. Br. 25-26 (emphasis in original). The record contained the testimony of *two* experts—Drs. Guin and Bolter—*neither* of whom conducted reviews or testing designed or intended to reveal whether Brumfield was intellectually disabled.[5]

Dr. Guin was a social worker. JA 51a. She did not conduct—nor is there any indication that she would have been qualified to conduct—"comprehensive intellectual testing." Resp. Br. 26. Rather, she

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[4] Indeed, as the district court found, Brumfield's education system had a policy of *deliberately* avoiding the label of "mentally retarded" for African American students like him if another, less stigmatizing diagnosis was available. Pet. App. 77a-78a, 93a.

[5] Contrary to the State's misrepresentation, Dr. Jordan never testified at any point.

completed a social history of Brumfield and testified to his abusive family and difficulties in school. The State's assertion, without citation, that Dr. Guin "found no evidence that anyone who came into contact with Brumfield suspected he might be intellectually disabled," Resp. Br. 34, mischaracterizes the record.

Neither Dr. Guin's report nor her testimony provided a reasonable basis to rule out Brumfield's intellectual disability. Quite the opposite. Her report stated that the "factors that affected Kevan's development" were "an outgrowth of the intellectual disabilities that he was born with." JA 395a. It explained that Kevan's teachers repeatedly sought evaluations that were not completed and "felt that he had 'fallen through the cracks.'" JA 372a. He was ultimately diagnosed as "behaviorally disordered," but the accuracy of that diagnosis was "questionable" because "a great deal less was known about intellectual deficiencies" at the time, and "the diagnosis and treatment did not consider the fact that Kevan had some intellectual deficits that affected his ability to perform." JA 387a, 396a. Nonetheless, the records demonstrated that Brumfield "was born with some type of decreased or lowered responses"; maintained a "slowness in perceptual motor development" throughout his development; and, notwithstanding special education, could only "recognize words" and not "understand their meaning." JA 374a-75a, 384a. Dr. Guin concluded both that Brumfield was simply "unable to process and retain information in a comparable manner with other children." JA 395a. The State's belief that this history provided a reasonable basis to

reject Brumfield's claim of intellectual disability without a hearing defies explanation.

Dr. Bolter was qualified to testify about "the effects of brain injury or insult to somebody's central nervous system on their behavior," JA 124a, and he examined Brumfield for organic (*i.e.*, physical) brain damage. The State nevertheless points to Dr. Bolter's statement that he administered a "battery of comprehensive tests" and suggests, without support, that this provided a reasonable basis to infer the absence of any deficiency in adaptive skills. *See, e.g.*, Resp. Br. 30-31. That is unsupported by the record and wrong as a matter of clinical fact.

It is widely recognized that "a background in neuropsychology does not assure expertise or experience with people with mental retardation, and most of the customary neuropsychological tests do not provide the information needed for a diagnosis of mental retardation."[6] Dr. Bolter was never asked to, nor did he, inquire whether Brumfield was or was not intellectually disabled. Rather, he specified that the tests he performed were designed to determine whether Brumfield was "manifesting neurocognitive deficits associated with organic brain impairment." JA 407a. Dr. Bolter did not perform *any* of the tests recognized by the relevant clinical manuals for evaluating adaptive skills in the context of intellectual disability. *See* AAMR, *Mental Retardation: Definition,*

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[6] J. Gregory Olley, *Knowledge and Experience Required for Experts in* Atkins *Cases*, 16 Applied Neuropsychology 135, 135 (2009).

Classification, and Systems of Support 87-90 (10th ed. 2002) ("AAIDD 10th") (describing Vineland Adaptive Behavior Scales; AAMR Adaptive Behavior Scales; Scales of Independent Behavior-Revised; Comprehensive Test of Adaptive Behavior; and Adaptive Behavior Assessment System, and explaining the importance of assessing adaptive skills using the correct measures); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000) ("DSM-IV-TR") (identifying Vineland Adaptive Behavior Scales and AAMR Adaptive Behavior Scales); *see also* Marc J. Tassé, *The Construct of Adaptive Behavior: Its Conceptualization, Measurement, and Use in the Field of Intellectual Disability*, 117 Am. J. Intell. & Developmental Disabilities 291, 293 (2012) (identifying "four comprehensive individualized, standardized, and psychometrically sound adaptive behavior scales" that "have been developed specifically for the purpose of ruling in or out a diagnosis of ID"); Pet. App. 58a n.23 (Dr. Bolter's assessment "does not shed much light" because it "was not an *Atkins*-tailored inquiry").

Moreover, Dr. Bolter could not possibly have performed the comprehensive retrospective analysis required by the clinical guidelines, *see* AAIDD 11th at 94-96, as he explained that he had only a "cursory understanding . . . of [Brumfield's] history" and only limited time to interview him. JA 131a. Thus, even pretending that the state court considered Dr. Bolter's

report, it would have been unreasonable to infer that it somehow ruled out intellectual disability.[7]

The State further asserts that there is no reason to think that the evidence at Brumfield's pre-*Atkins* sentencing would have been different had he retained and instructed experts to evaluate whether he was intellectually disabled. That assertion defies the relevant case law, the medical literature, and common sense. *See Dunn*, 41 So. 3d at 469 (providing a "cautionary note for clinical practitioners and diagnosticians" that a diagnosis of mental retardation requires "exceedingly fine distinctions" and "careful consideration of all available information" that "applies far more forcefully in a forensic context for Eighth Amendment purposes" (quoting DSM-IV-TR at 43, 45)). When the right questions were asked at Brumfield's federal hearing, they, in fact, revealed a far more complete history, including, for instance, more comprehensive records related to his low intellectual functioning as a child and the history of intellectual disability among his family members. When the right tests and retrospective analysis were performed, it was found, for instance, that Brumfield takes inordinately long to write a simple letter; cannot write in a straight line without a piece of cardboard to guide him; and lacks competence in virtually every academic area. The State's unsupported musing that a proper *Atkins*

[7] Dr. Bolter's report also states that Brumfield's performance on the WAIS-R test included scores in the range of "mentally defective." JA 416a.

hearing would have developed no additional evidence is demonstrably absurd.[8]

Finally, the State's third post-hoc defense is that the facts of the underlying crime demonstrate "adaptive skills inconsistent with intellectual disability." Resp. Br. 25, 32-33. Again, the state court itself never said any such thing, and had it, the conclusion would have been objectively unreasonable. It is uncontroverted that

> [m]aking a diagnosis of mental retardation is often challenging and should only be conducted by qualified professionals. Most individuals with mental retardation will have strengths and areas of ability. . . . [L]aypersons may erroneously interpret these pockets of strengths and skills as inconsistent with mental retardation because of their misconceptions regarding what someone with mental retardation can or cannot do. . . . Mental retardation is a clinical diagnosis that should be made or ruled out based on a rigorous and comprehensive professional evaluation of the individual's intellectual functioning and adaptive behavior.[9]

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[8] Dr. Swanson's testimony, credited by the district court, also confirmed that Dr. Bolter's neuropsychology battery did not include any assessment of Brumfield's adaptive skills. Fed. Tr. Vol. VI at 183.

[9] Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 121 (2009) (citations omitted).

Similarly, "within an individual, limitations often coexist with strengths. Individuals may have capabilities and strengths that are independent of ID such as strengths in social or physical capabilities, some adaptive-skill areas, or in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAIDD, *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Support* 25 (11th ed. 2012) ("AAIDD 11th User's Guide"). Thus, it is simply an error of clinical logic to look at an arbitrary subset of things that an individual with a qualifying IQ score *can* do, without evaluating whether he has limitations in any of the areas of adaptive skills. That error is compounded when the exercise is undertaken by someone who is not specifically trained in evaluating impairments in adaptive skills.

Furthermore, the clinical standards relied on in *Atkins*, and thereafter adopted in Louisiana, uniformly caution against drawing lay inferences from a person's prior criminal behavior. *See* AAIDD 10th User's Guide, ("Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior"); AAIDD 10th at 79 ("Adaptive behavior is considered to be conceptually different from maladaptive or problem behavior[.]").

The State argues that under *State v. Dunn*, 41 So. 3d 454 (La. 2010), it would have been reasonable to determine the question of Brumfield's intellectual disability based on a lay inference from criminal behavior. *Dunn*, however, stands for just the opposite. In *Dunn*, the defendant was sentenced to death prior to *Atkins*. Notwithstanding the "firmly established facts"

at trial that the "defendant engaged in the leadership and planning of a major bank robbery," the court held that it was necessary to remand for a full hearing on the defendant's intellectual disability. *Id.* at 458, 471; *see also Dunn*, 831 So. 2d at 885-86 (rejecting the argument that "anecdotal evidence" regarding defendant's criminal and other behavior "established the defendant is not mentally retarded because of his adaptive skills" and remanding for an *Atkins* hearing).

In any case, the statements that the State cherrypicks from Brumfield's confession do not support its assertion that he demonstrated leadership that is somehow inconsistent with intellectual disability. Resp. Br. 32-33. The State's gloss has no basis in the record. Pet. App. 84a-85a ("[N]othing in Brumfield's confession makes clear that Brumfield, rather than another one of his confederates, 'led' this terrible scheme," and more likely "Brumfield was gullibly convinced to join in the crime instead of actively planning out its details."); *see also Atkins*, 536 U.S. at 320 (recognizing that confessions are inherently less reliable in cases of intellectual disability).

Virtually all *Atkins* cases involve a premeditated murder from which some base level of competence can be inferred. Pet. App 83a. There is nothing about the facts of this case—that an individual borrowed a gun and a car, participated in a crude and bumbled ambush, and subsequently claimed his innocence—that would have allowed the state court to reasonably conclude that the crime was inconsistent with intellectual disability. *See* AAIDD 11th User's Guide at 26 (cautioning against lay misconceptions that

intellectually disabled persons are incapable of "complex tasks," cannot "get driver's licenses, buy cars or drive cars," "support their families," or "acquire vocational and social skills necessary for independent living"); *Dunn*, 41 So. 3d at 469 (explaining that *Atkins* requires "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" (citing DSM-IV-TR at 43)).

C. The State's Arguments Regarding The Scope Of This Court's Review Under § 2254(d)(2) Are Meritless.

The State argues that § 2254(e)(1) "likely" affords the state court's unreasonable determination a presumption of correctness that can be overcome only by clear and convincing evidence. Resp. Br. 30. The relationship between § 2254(d)(2) and (e)(1)—an issue on which the circuits are divided and which the State never raised in its opposition to certiorari—is not before the Court. Even if it were, however, it would be immaterial. The prevailing view is that § 2254(e)(1) has no application to the threshold inquiry under § 2254(d)(2). *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2[c], at 1044-60 (6th ed. 2011); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (Kozinski, J.).

In any case, even under the alternative interpretation applied in some circuits, "[t]he clear-and-convincing evidence standard of § 2254(e)(1) . . . pertains only to a state court's determinations of

particular factual issues, while § 2254(d)(2) pertains to the state court's decision as a whole." *Blue*, 665 F.3d at 654. Here, the state court based its "decision as a whole" on two "determinations of particular factual issues" to which § 2254(e)(1) could apply: (i) that Brumfield had an IQ score of 75; and (ii) that he was diagnosed with antisocial personality. Brumfield does not challenge either fact. He argues that neither provided a reasonable basis for ruling out intellectual disability.

The State separately contends that Brumfield's argument conflicts with § 2254(d)(2) and the rule of *Pinholster*, which limit the permissible inquiry to evidence in the state court record. Resp. Br. 36-39. That is nonsense. Brumfield's argument is premised only on the evidence that was before the state postconviction court. After Brumfield made a proffer of objective facts in support of his intellectual disability, the state court unreasonably determined that his intellectual disability could be ruled out without a hearing, based on a record that was created for an unrelated purpose, under a different legal regime, and without the relevant expert analysis. No part of the argument relies on evidence that was not before the state court.

The Court need not go further in this case and articulate the boundaries of § 2254(d)(2)'s more "procedural" contours. In any event, however, the vast weight of authority in the circuits and relevant scholarship recognizes that the plain text of § 2254(d)(2) mandates consideration of not only the substance of the state court's determination, but also the process

employed by the state court. *See, e.g.*, *Taylor*, 366 F.3d at 999-1001 (Section 2254(d)(2) requires consideration of whether "the process employed by the state court is defective"); 1 Hertz & Liebman, *supra*, § 20.2[c] at 1051-55 & n.87 (the word "determination" mandates consideration of whether the state court's finding was both procedurally and substantively reasonable (quoting *Webster's Ninth New Collegiate Dictionary* 346 (1983), and collecting cases); 7 Wayne R. LaFave et al., *Criminal Procedure* § 28.7(a), at 265 (3d ed. 2007) ("lower courts have concluded that the fact finding process" is "relevant in determining whether or not a petitioner has met his burden of demonstrating that the state finding was unreasonable"); Brian R. Means, *Federal Habeas Manual* § 3:83 (2014) (circuits consider "(a) the adequacy of the process used by the state court in reaching its finding, and (b) the substantive reasonableness of the factual finding").

II. The State Court's Failure To Assure Access To A Mental Health Expert Violated Clearly Established Federal Law.

A. The State's Exhaustion Argument Is Meritless.

The State argues—for the first time—that Brumfield failed to exhaust his claim that the Constitution guaranteed him access to a mental health expert. Resp. Br. 40-41. That argument has been expressly waived and, even if it were not, Brumfield plainly exhausted his claim.

1. *The State's Express Waiver.* The State failed even to mention exhaustion at the Fifth Circuit or in its opposition to certiorari. And for good reason.

A claim is exhausted when "it appears that . . . the applicant has exhausted" his remedies in state court. 28 U.S.C. § 2254(b)(1)(A). In its Answer to Brumfield's initial federal habeas petition, the State expressly acknowledged Brumfield's claim based on the denial of funding and represented: "It appears that petitioner has exhausted his state judicial remedies with respect to all claims he has presented in the instant petition." JA 269a-70a. It is difficult to imagine a more explicit waiver. The State's language tracked the statutory exhaustion requirement verbatim.

Moreover, throughout these proceedings, the State has consistently argued that the state court adjudicated Brumfield's claim "on the merits," *see, e.g.*, State's Post-Hearing Memorandum 12, 18 (M.D. La.) (ECF No. 118); State's Br. 13, 15 (5th Cir.); Cert. Opp. 35-36 (stating that there was a "decision on the merits of this issue"), and both of the lower courts so held, *see* Pet. App. 36a; Pet. App. 11a n.6. The State's newfound position that Brumfield's expert funding claim was not fairly presented is irreconcilable with these representations. *See, e.g.*, *Johnson v. Williams*, 133 S. Ct. 1088, 1097 (2013) ("A judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court . . . heard and *evaluated* the evidence and the parties' substantive arguments.'" (citation omitted) (emphasis and ellipsis in original)).

2. *Brumfield Has Exhausted.* In any event, Brumfield exhausted his federal constitutional claim

that he was entitled to a mental health expert. Again, this necessarily follows from the fact that both courts below found Brumfield's claim to be adjudicated on the merits.

Moreover, as the State acknowledges, a petitioner exhausts his federal constitutional claim "by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds." Resp. Br. 40-41 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). Brumfield did both. He expressly framed his claim as arising under the federal Constitution *and* state law. JA 189a, 193a. And he premised his numerous requests for expert assistance on *State ex rel. Deboue v. Whitley*, 592 So. 2d 1287 (La. 1992)—the case which effectuates the federal right to funding recognized in *Ake v. Oklahoma*, 470 U.S. 68 (1985), in Louisiana postconviction proceedings, and which relies exclusively on *Ake*, *see* JA 177a-78a & nn.1&2, 181a-82a & nn.1&2, 184a-85a & nn.1&2, 187a-88a nn.1&2. There is no question that Brumfield adequately "indicate[d] the federal law basis for his claim." *Baldwin*, 541 U.S. at 32; *see also Johnson v. Cain*, 712 F.3d 227, 232 n.4 (5th Cir. 2013).[10]

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[10] If the Court concludes that the State has not waived exhaustion and Brumfield did not exhaust, it must remand to the district court to consider whether the claim has been procedurally defaulted and, if so, whether there exists cause and prejudice. *See Cone v. Bell*, 556 U.S. 449, 475 (2009) (remanding to district court where it had no opportunity to consider the issue in the first instance).

B. The State Court's Denial Of Access To Expert Assistance Violated This Court's Clearly Established Precedent.

1. *The State Court Violated* Ake. The State does not dispute that this Court's analysis in *Ake* compels the conclusion that denial of access to an expert to prove one's intellectual disability under *Atkins* violates the Due Process Clause. Pet. Br. 45-49. And the State does not dispute that *Atkins* is retroactively applicable to inmates, such as Brumfield, whose convictions were already final. Pet. Br. 49 & n.12. It does not even attempt to argue that Brumfield received the requisite due process for proving intellectual disability. Instead, it argues—for the first time—that *Ake* is not "clearly established" because Brumfield raised his claim at postconviction, not trial. *See* Resp. Br. 44-45. This argument fails for several reasons.

First, though the distinction between trial and postconviction may be meaningful in other instances, here it is not. Brumfield's *Atkins* claim was "collateral" or "postconviction" in only the most superficial sense. Following *Atkins*, it was Brumfield's *very first opportunity* to prove that he was intellectual disabled. *See Hooks v. Workman*, 689 F.3d 1148, 1183 & n.18 (10th Cir. 2012) (where petitioner raises intellectual disability at "the 'first designated proceeding' at which he could," his claim is "'postconviction' only in the strict chronological sense"); *cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the

equivalent of a prisoner's direct appeal as to the ineffective-assistance claim.").

For the same reasons, the State's argument that there is no general right to counsel for collateral attacks, *see* Resp. Br. 45-46, is beside the point. Brumfield does not argue that petitioners have a general constitutional right to expert assistance (or counsel) "when mounting collateral attacks." *Id.* (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Rather, in this rare circumstance, where Brumfield sought his first opportunity to prove that he is ineligible for execution by virtue of his intellectual disability, no meaningful distinction arises by labeling the posture "postconviction." *See Hooks*, 689 F.3d at 1183 (describing the analogy between an *Atkins* claim at first opportunity and a general right to counsel for collateral attacks as "merely superficial"); *Martinez*, 132 S. Ct. at 1317.

The State's argument that post-*Atkins* and pre-*Atkins* defendants should be treated differently is contrary to the very definition of retroactivity. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates the principle of treating similarly situated defendants the same."). According to the State, an intellectually disabled person who seeks his first opportunity to effectuate this Court's retroactive ruling in *Atkins* may be forced to prove his intellectual disability without counsel and without an expert. And the resultant decision would merit AEDPA deference. To accept that argument is to render *Atkins*'s retroactivity a

nullity, and to virtually guarantee an intellectually disabled person's execution.

2. *The State Court Violated* Ford. In his opening brief, Brumfield argued that the state court's decision violated *Ford v. Wainwright*, 477 U.S. 399 (1986), because—notwithstanding Brumfield's threshold showing of intellectual disability—the state court denied him an adequate opportunity to submit expert evidence by rejecting his intellectual disability claim before ruling on his funding requests. Pet. Br. 52-55. Instead of engaging with the substance of this argument, the State contends—again, for the first time—that Brumfield's request for funding was not made with sufficient specificity. Resp. Br. 49. This argument, aside from being waived below and never raised in the State's opposition to certiorari, is belied by the State's insistence at every stage of these proceedings, and the findings of the courts below, that Brumfield's funding claim was adjudicated on the merits. *See supra* at 20.

Next, the State argues that the rule of *Ford* does not apply here because Brumfield was still at only a "threshold stage" of the proceedings. Resp. Br. 47-51. This improperly conflates the threshold showing required for due process to attach under *Ford* with the threshold showing of "objective factors" required to obtain a hearing under *State v. Williams*, 831 So. 2d 835, 857 (La. 2002). The two standards have nothing to do with one another.

Under *Ford*, where, as here, a defendant's execution "depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances,'"

Ford, 477 U.S. at 426 (citation omitted) (Powell, J., concurring), upon making a threshold showing regarding his mental condition, he is entitled to "an adequate opportunity to submit expert evidence," *Panetti v. Quarterman*, 551 U.S. 930, 951-52 (2007). Brumfield's proffer satisfied that showing. Pet. Br. 36-37, 52. The state court then violated *Ford* when it denied Brumfield's substantive claim *before* ruling on his request for funding, thereby depriving him of an opportunity to present expert evidence. *Panetti*, 551 U.S. at 951-52. It is of no moment that this violation of due process took place without Brumfield having first been provided with a hearing under *Williams*. Brumfield's constitutional right to an opportunity to submit expert evidence was independent of his right to a hearing.

The State's remaining contention—that *Ford* is too "general" to be "clearly established" beyond its specific facts, Resp. Br. 46-47, 52—has been firmly rejected by this Court in the past. *See Panetti*, 551 U.S. at 953 (that "the standard [in *Ford*] is stated in general terms does not mean the application was reasonable. . . . [E]ven a general standard may be applied in an unreasonable manner."). By unreasonably applying *Ford*, the state court violated § 2254(d)(1).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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