CAPITAL CASE

No. __-____

In the Supreme Court of the United States

EUGENE MILTON CLEMONS II, PETITIONER,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Petitioner's request for state post-conviction review was deemed filed three days late because of a series of errors by the court clerk, who:

- incorrectly instructed Petitioner's counsel that no filing fee was required;
- stamped the submission "RECEIVED AND FILED," thus representing to counsel that the petition was filed when it instead was neither filed nor even docketed;
- immediately lost the petition; and
- failed to comply with internal procedures that required notifying Petitioner of any filing deficiency.

In a departure from the analysis employed by four other circuits—all of which review the totality of the circumstances—the Eleventh Circuit considered only a single fact (that counsel wrongly relied on filing fee information from the court clerk) and therefore declined to consider any of the clerk's subsequent serial errors that prevented Petitioner from discovering the alleged filing error. As a result, the court refused to entertain any of Petitioner's claims for relief (other than the claim under *Atkins* v. *Virginia*). This case thus presents the following question:

Whether the availability of equitable tolling requires consideration of the totality of the circumstances, as held by the First, Third, Sixth and Ninth Circuits, or whether the Court of Appeals below is correct that it can disregard altogether and not consider otherwise material facts simply because Petitioner was represented by counsel.

2. Whether the Court of Appeals erred under 28 U.S.C. § 2254 and contravened the principles articulated in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), when it deferred to the state court's factual determination that Petitioner was not intellectually disabled, notwithstanding the state court's failure to apply the very clinical standards that it found governed the analysis (and that this Court has since confirmed apply), where:

- Petitioner was first diagnosed as "educable[] mentally retarded" at age six;
- the state court found that Petitioner's IQ is as low as 70; and
- the "gold standard" test measuring adaptive functioning demonstrated statistically significant limitations in six of ten adaptive functioning areas, and neither the test nor its results were ever challenged by the State of Alabama.

PARTIES TO THE PROCEEDINGS

Petitioner-appellant below was Eugene Milton Clemons II, an Alabama state prisoner.

Respondent-appellee below was Jefferson S. Dunn, in his official capacity as Commissioner of the Alabama Department of Corrections, and Walter Myers, Warden of Holman Correctional Facility, where Mr. Clemons is currently incarcerated. Dunn's predecessor respondent-appellees include Kim T. Thomas, Richard F. Allen, William G. Sharp. Myers' predecessor respondent-appellee includes Grantt Culliver.

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INTRODUCTION

This capital case reflects a particularly egregious confluence of errors that will soon result in the execution of a man with serious intellectual disabilities, without any meaningful constitutional review. The Eleventh Circuit not only refused to take these errors seriously but created a conflict of authority relating to the analysis to be applied in deciding whether the deadline for a petition should be equitably tolled. Recognizing that "the whole may be greater than the sum of the parts," the First, Third, Sixth, and Ninth Circuits all require courts to consider *all* the facts and circumstances giving rise to a late filing. The Eleventh Circuit has found that exercise unnecessary because of a single fact: the involvement of counsel. This Court's intervention is most urgently required.

After a federal court conviction and sentence of life without parole for a botched carjacking and murder in Shelby, Alabama, Mr. Clemons was tried for the same offense in state court. The State of Alabama pursued the state trial for the sole purpose of obtaining a death sentence that the federal court jury chose not to impose. Mr. Clemons' attorneys failed to pursue mitigation evidence to present to the jury at the sentencing stage. They failed to investigate—much less offer evidence—regarding Mr. Clemons' well-documented history of mental and cognitive disabilities, including his mental retardation diagnosis at the age of six and his long history of academic failures. And they likewise failed to investigate—much less offer any evidence of—the horrific abuse Mr. Clemons suffered as a child. Indeed, Mr. Clemons' counsel presented *no* mitigation evidence whatsoever.

Mr. Clemons' habeas petition included an ineffective assistance of counsel claim, but no federal court has ever reviewed that claim, or 30 others, on the merits. The courts below instead dismissed his claims (save his *Atkins* claim) because the state court petition in which the claims were raised was deemed "filed" by state court personnel three days after the lapse of the one-year limitations period under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

In fact, counsel submitted the petition to the county court clerk 29 days *before* the AEDPA deadline had lapsed. But the court did not then "file" the petition—due to a tragic series of administrative errors by the court clerk who received the petition.

On appeal, the Court of Appeals declined to equitably toll the limitations period, articulating a rule that equitable tolling is not justified when a party relies on misinformation supplied by a State actor. The Court of Appeals did not consider the role the court clerk played in the alleged filing error. Even more problematic, the Court of Appeals found it unnecessary to consider or evaluate the impact of the clerk's (undisputed) subsequent errors that made it virtually impossible for counsel to discover any filing deficiency, thereby creating an analytical conflict with at least four of its sister circuits. In so doing, the Court of Appeals disregarded this Court's admonition in *Holland* v. *Florida*, 560 U.S. 631, 649–650 (2010), that the equitable tolling doctrine must be flexible, while simultaneously creating a material conflict among the courts of appeals as to the proper standard to be applied under *Holland* in evaluating an equitable tolling claim.

The Court of Appeals separately affirmed the district court's dismissal of Mr. Clemons' *Atkins* claim. It

did so notwithstanding its acknowledgement that Mr. Clemons might very well be intellectually disabled under more recent decisions of this Court, finding that the state court decision was not contrary to clearly established federal law at the time it was issued. Yet the Court failed to address the fact that: (i) the state court had adopted the appropriate clinical standards at the time yet failed to apply them, and (ii) the state court's de facto adoption of a standard different than the standard it found governed necessarily yielded an unreasonable determination of ultimate fact.

Under the governing statutes and this Court's cases, the Court of Appeals was required to find that the state court "unreasonably applie[d]" the governing standard "to the facts of the particular state prisoner's case," contrary to § 2254(d)(1). *See Williams* v. *Taylor*, 529 U.S. 362, 407–408, 413 (2000). Relatedly, the Court of Appeals was required to find that the state court made an objectively "unreasonable determination" of fact under § 2254(d)(2).

Absent relief, Mr. Clemons will be executed even though he is intellectually disabled and ineligible for the death penalty, and despite the fact that no federal court has reviewed his federal constitutional challenges to his death sentence because of a series of errors by an arm of the State. This Court should grant review.

OPINIONS BELOW

The opinion of the U.S. District Court for the Northern District of Alabama dismissing the petition for habeas corpus, the final judgment denying the claim under *Atkins* v. *Virginia*, and the order granting in part and denying in part the motion to alter or amend the judgment are attached. Pet. App. 40a–

153a. The order of the Court of Appeals granting a Certificate of Appealability and its opinion denying habeas relief are also attached. Pet. App. 1a–39a. The Eleventh Circuit's decision is published as *Clemons* v. *Comm'r, Alabama Dep't of Corr.*, 967 F.3d 1231 (11th Cir. 2020).

JURISDICTION

The Court of Appeals issued its order denying the petition for rehearing and rehearing *en banc* on September 28, 2020. Pet. App. 36a–37a. The Court's March 19, 2020 Order regarding COVID-19 extended this petition's filing date. As a result, this petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Rule 10(a) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the U.S. Constitution:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the ad-

> judication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Offense and Sentence

In April 1993, Mr. Clemons was convicted in federal court of fatally shooting undercover DEA agent George Douglas Althouse during a bungled carjacking in Alabama. *Ex parte Clemons*, 720 So. 2d 985, 987–988 (Ala. 1998). Only 20 years old at the time of the offense, Mr. Clemons performs, at best, in the "borderline range of intellectual functioning" or lower. *See Ex parte Clemons*, 55 So. 3d 348, 350 (Ala. 2007); Appendix in the Court of Appeals for the Eleventh Circuit ("C.A. App.") 1265. His impaired intellectual functioning was presented to the federal court, which ultimately sentenced Mr. Clemons to life without parole. *Clemons* v. *State*, 55 So. 3d 314, 317 n.1, 321 (Ala. Crim. App. 2003); C.A. App.1228.

Dissatisfied with the sentence of life without parole, the State of Alabama tried Mr. Clemons for the same offense in state court. *Id*. Mr. Clemons' appointed lawyers withdrew from his case after just six months, and an attorney with a material conflict of interest and a recent law school graduate were appointed in their place. *See* C.A. App. 1708, 1750–1751. This time, neither the judge nor jury was made aware of Mr. Clemons' low intellectual functioning.

Mr. Clemons' lawyers failed to pursue evidence of his intellectual disability, including his diagnosis of

mental retardation as early as the age of six. They failed to have him evaluated by a mental health professional, and they failed to present *any* mitigation evidence during sentencing. C.A. App. 36–85, 91, 1478–1479, 1482, 1509–1510. Nor did they present any evidence of his appalling childhood and the abuse he endured. Mr. Clemons' father repeatedly placed him inside a sealed diaper pail and left him there for hours when he was an infant. *Id*. at 1551–1554, 1640–1643, 1764–1767. He was often forced to watch his father beat his mother, and, in one instance, witnessed his father setting her nightgown on fire. *Id*. at 1771. His father later held Mr. Clemons and his family hostage for two weeks. *Id*. at 1554–1557. Mr. Clemons' mother was a drug addict and abandoned him for long periods of time when he was a child. *Id*. at 1595–1598. His appointed counsel failed to present any of this information to the judge or jury.

Mr. Clemons was convicted and sentenced to death on September 25, 1994. *Ex parte Clemons*, 720 So. 2d at 987.

B. State Court Appeals

On appeal, Mr. Clemons' counsel, William Mathews, was under the influence of narcotics and alcohol during court proceedings. C.A. App.1678–1680, 1660, 1667–1668. He has since been disbarred and has admitted his failure to adequately represent Mr. Clemons. *Id*. at 1691–1692, 1699.

Mr. Clemons' sentence was affirmed by the Court of Criminal Appeals in 1996 and the Supreme Court of Alabama in 1998, and this Court denied Mr. Clemons' petition for certiorari in 1999. *Ex parte Clemons,* 720 So. 2d 985 (Ala. 1998), *cert. denied,* 525 U.S. 1124 (1999).

Later, Mr. Clemons obtained new counsel, who filed a Rule 32 petition with the Shelby County Circuit Court on December 27, 1999—some 29 days before expiration of the one-year statute of limitations for federal habeas claims.[1] C.A. App. 1249. Because there was no specific fee amount identified for Rule 32 habeas petitions under Alabama law, local counsel contacted the court clerk for this administrative information, and the clerk advised counsel—incorrectly—that there was no filing fee required for the Rule 32 petition. *Id*. at 182–185. The clerk instead accepted the petition and stamped the extra attorney copy of the document as "received and filed." *Id*. at 221. Catastrophically, the clerk then misplaced the petition (it fell behind a filing cabinet) for approximately four months, and it was never docketed. *Id.* at 2018–2019, 2027; *see also id*. at 220–223. Because the clerk had lost the petition, it did not go through the usual intake process, and no notice of filing deficiency was ever sent to counsel, notwithstanding that internal rules so required.

Absent knowledge that the Rule 32 petition had not actually been filed, Mr. Clemons' counsel later mailed to the court on January 24, 2000—still one day before the AEDPA deadline—an in forma pauperis petition (C.A. App. 222) to avoid the incurrence of fees in the Rule 32 proceeding (Pet. App. 15a). On the same date, Mr. Clemons mailed an amended Rule 32 petition, identical to the December petition but inserted on the state court's pre-printed Rule 32 template. C.A.

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[1] Alabama had a two-year statute of limitations for the filing of Rule 32 petitions at the time but changed it to one year in 2002. Ala. R. Crim. Pro. 32.2(c) & cmt. Jan. 27, 2004. AEDPA has a one-year limitations period, though that time is tolled during the pendency of a properly filed state petition. 28 U.S.C. § 2244(d) (2016).

App. 1249. Having lost the original petition, the clerk docketed only the Amended Petition on the date it was received, January 28, 2000, three days *after* expiration of the statute of limitations for federal habeas claims. *Id*. at 1250.

When the original petition was later found behind a cabinet, the clerk treated it as filed on the date the in forma pauperis and Amended Petition were received, again three days after expiration of the AEDPA deadline and in conflict with the December 27, 1999 "received and filed" stamp. *Id*. at 221. The Shelby County Circuit Court denied the petition. *Id*. at 31.

While Mr. Clemons' appeal was pending, this Court decided *Atkins* v. *Virginia*, 536 U.S. 304 (2002). The state appellate court remanded the case for an *Atkins* evidentiary hearing. C.A. App. 33. The trial court held an evidentiary hearing (*id.* at 487–971) and once more denied the petition (*id.* at 332).

The state court's order denying Mr. Clemons' *Atkins* claim was a verbatim adoption of the Alabama Attorney General's proposed 90-page order. It perpetuated the proposed order's typographical errors, misspelling Mr. Clemons' name on the first page, misidentifying Mr. Clemons' expert, and ruling based on evidence never introduced at the *Atkins* hearing. Some of the errors in the proposed and final orders were so blatant as to suggest that the court never actually read them.

The Court of Criminal Appeals affirmed the trial court's decision (C.A. App. 1228–1264), but the Alabama Supreme Court remanded, holding that the court did not consider Mr. Clemons' ineffective assistance of counsel claims (*id.* at 1265–1277). On remand, the Court of Criminal Appeals once again affirmed the

trial court's denial of the petition. C.A. App.1278–1343. The Supreme Court of Alabama denied review. C.A. App.1344.

C. Federal Post-Conviction Relief

On the first business day after the Alabama Supreme Court denied his petition for certiorari, Mr. Clemons filed his petition for writ of habeas corpus in the U.S. District Court for the Northern District of Alabama. C.A. App. 10. The court dismissed all of Mr. Clemons' claims except his *Atkins* claim, on the basis that his Rule 32 petition in state court had been filed three days after the expiration of the one-year AEDPA limitations period, so the pendency of that petition could not toll the limitations period for the federal claim. *Id*. at 240.

On January 13, 2016, in reference to Mr. Clemons' *Atkins* claim, which was then pending, the court directed both parties to submit a proposed order instructing the Alabama courts to vacate Mr. Clemons' death sentence and resentence him to life without the possibility of parole. Pet. App. 222a. Notwithstanding that order, however, the court later denied Mr. Clemons' *Atkins* claim. C.A. App. 2011. The court subsequently denied in relevant part Mr. Clemons' motion to alter or amend the judgment. C.A. App. 2015.

The Eleventh Circuit granted Mr. Clemons a Certificate of Appealability on his equitable tolling and *Atkins* claims. Pet. App. 38a–39a. As to his equitable tolling claim, the court explained that "Clemons is entitled to a COA * * * because, at a minimum, jurists of reason would find it debatable whether his trial counsel rendered ineffective assistance during the penalty phase of his trial." Pet. App. 39a, n.4.

Ultimately, the Court of Appeals rejected Mr. Clemons' argument for equitable tolling. The court did

not address the clerk's multiple errors, instead deeming the fact that Mr. Clemons was represented by counsel dispositive, finding counsel's reliance on the clerk's filing information unreasonable. Pet. App. 20a–22a; *see also* Pet. App. 18a. The Court of Appeals did not purport to evaluate the clerk's other successive errors, which posed near insurmountable obstacles to counsel's discovery of any filing error.

The Court of Appeals also affirmed the district court's denial of Mr. Clemons' *Atkins* claim. Though the Court of Appeals acknowledged that Mr. Clemons may well be intellectually disabled, at least under today's standards, it found that the state court's approach was neither contrary to nor an unreasonable application of clearly established law at the time of its denial of Mr. Clemons' petition in 2004 and that the state court's finding of fact was not inherently unreasonable.

REASONS FOR GRANTING THE PETITION

Taking a life is "the most extreme sanction available to the State," and thus this Court "has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes." *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002). That is, in part, why this Court in *Holland* cautioned against a "too rigid" approach in the context of equitable tolling and "emphasiz[ed] the need for flexibility" and to "avoid[] mechanical rules." *Holland*, 560 U.S. at 649–650 (internal quotation marks and citations omitted). This "flexibility [is] inherent in equitable procedure" and allows courts "to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct * * * particular injustices." *Id*. at 650 (internal quotation marks and citations omitted).

In this case, the Eleventh Circuit departed from this clear authority, adopting a rigid approach to equitable tolling that conflicts with decisions of multiple courts of appeals, all of which require consideration of *all* the facts and circumstances, rather than confining the analysis to any single criterion. This case presents an ideal opportunity for the Court to resolve this conflict. This case also raises a serious question about the application of *Atkins* v. *Virginia* itself, in the context of a defendant sentenced to death despite clear indications of mental disability. Particularly given the stakes, certiorari is amply warranted in this case, and Petitioner respectfully requests that the Court grant it.

I. The Eleventh Circuit's approach creates a conflict of authority with respect to the standard for equitable tolling and yields an exceedingly unfair result in this case, depriving Petitioner of federal review of serious constitutional claims.

In *Holland*, this Court observed that "AEDPA's subject matter, habeas corpus, pertains to an area of the law where equity finds a comfortable home." 560 U.S. at 647. The Court reversed the Eleventh Circuit's denial of equitable tolling in that case, holding that the Eleventh Circuit's bright-line rule was "too rigid" and inconsistent with equitable principles. *Id.* at 653–654.

Among other things, this Court (1) confirmed that Section 2244(d) of the AEDPA is subject to equitable tolling in appropriate cases, *id.* at 645; (2) reiterated the requirements for a claim of equitable tolling—petitioner must show "that he has been pursuing his rights diligently, and * * * that some extraordinary circumstance stood in his way" preventing timely filing, *id*. at 649; and (3) recognized that the "exercise of a

court's equity powers * * * must be made on a case-by-case basis," with an emphasis on "the need for 'flexibility,'" and "avoiding 'mechanical rules'" (*id.* at 649–650 (internal quotation marks omitted)).

This Court underscored that courts of equity are to "relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the 'evils of archaic rigidity.'" *Id.* at 650 (internal quotation marks omitted). Although courts should be guided by precedent, they must also exercise judgment "with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* at 650.

As discussed below, the Eleventh Circuit has again adopted "too rigid" an approach to equitable tolling, in conflict with the decisions of at least four other courts of appeals. That rigid approach has had a disastrous impact in this case, allowing a death sentence to remain in place despite the presence of a variety of serious constitutional claims that no federal court has ever examined. This Court should grant review to resolve the conflict and avoid a terrible injustice.

A. The Eleventh Circuit's decision departs from this Court's decision in *Holland* and conflicts with the decisions of several other circuits, all of which follow a more flexible approach to equitable tolling.

The Eleventh Circuit denied equitable tolling, finding that Mr. Clemons "had counsel * * * [and] this brings us to the end of the analysis." Pet. App. 18a. Yet this Court has never found that a party is prohibited from seeking, or obtaining, equitable tolling simply because he is represented by counsel. Further, Mr.

Clemons points to successive errors by an arm of the State as giving rise to "extraordinary circumstances" warranting relief. The Court of Appeals declined even to consider these errors. In truncating its approach—and in declining to consider the conduct of the court clerk—the Eleventh Circuit ignored this Court's admonition in *Holland* to exhibit flexibility and charted a path very different from its sister circuits that have required consideration of all the facts and circumstances.

When Mr. Clemons' counsel filed his state court petition, the court clerk committed a panoply of errors:

1. The clerk erroneously told counsel that there was no filing fee. C.A. App.0221; C.A. App.0239, n.8.

2. Upon receiving the hand-delivered petition, the clerk stamped counsel's copy "received and filed" Pet. App. 223a; C.A. App. 221. Before electronic submissions, that stamp was the gold standard for counsel; it informed counsel that the pleading had been, as the stamp indicated, "filed."

3. In breach of the clerk's statutory duty "[t]o keep all papers, books, dockets, and records belonging to their office with care and security," Ala. Code § 12-17-94(a)(3) (1975), the clerk *lost* the petition. Alabama concedes that "[t]he original petition left with the clerk * * * was misplaced and was never docketed." C.A. App. 2018; *see also id*. at 2019, 2027.

4. Presumably because the clerk misplaced the petition, the clerk failed to return the petition to counsel or notify counsel of any deficiency. *Cf. Burton* v. *State*, 641 So. 2d 315 (Ala. Crim. App. 1993) ("When a post-conviction petition seeking relief

> from conviction or sentence is filed with the circuit court that is not in the proper form as proscribed by Rule 32, notwithstanding the style of the petition, the court should return the petition to the petitioner to allow him to file the proper form.").

None of these facts is in dispute. Taken separately, or together, they give rise to "extraordinary circumstances" that stood in the way of timely filing. That the Eleventh Circuit declined even to address the latter three errors reflects the conflict among the various courts of appeals, with at least four courts of appeals finding that all of the facts must be considered in any equitable tolling analysis.

In considering the issue, the Eleventh Circuit focused exclusively on what it concluded was the negligence of Mr. Clemons' counsel in failing to pay the filing fee or to file a timely in forma pauperis petition.[2] In the process, it did not even purport to evaluate or consider the clerk's contribution to that error. More importantly, the court never addressed or evaluated the impact of the clerk's subsequent, serial errors that prevented discovery of any filing deficiency.

The Eleventh Circuit rationalized its holding on the basis that Mr. Clemons "pointed us to no case that extended equitable tolling to a represented party based on his attorney's receipt of misinformation from the state." Pet. App. 22a. Under *Holland*, however,

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[2] Mr. Clemons' initial petition in fact requested the state court to "[p]rovide Mr. Clemons, who is indigent and incarcerated, funds sufficient to present witnesses, experts, and other evidence in support of the allegations in this Petition and any amendments thereto," (Pet. App. 45a), and as the Panel acknowledged, "Clemons had already been granted IFP status in the underlying case" (*id.* at 15a).

this should not have been the end of the analysis, but rather, only a part. The Eleventh Circuit's truncated analysis "threaten[s] the 'evils of archaic rigidity'" this Court warned about in *Holland*. 560 U.S. at 649–650. And it expressly conflicts with decisions of other sister circuits that have concluded, correctly, that *Holland* requires consideration of all the relevant facts and circumstances.

In *Ramos-Martinez* v. *United States*, 638 F.3d 315, 323–324 (1st Cir. 2011), the First Circuit recognized the "fact-intensive" nature of an equitable tolling analysis and looked at the "totality of the circumstances," including petitioner's limited education, lack of familiarity with the English language, and multiple prison transfers when determining whether equitable tolling would apply. "Although any one of these factors, standing alone, may be insufficient to excuse a failure to file a timely habeas petition," the First Circuit held that "the whole may be greater than the sum of the parts" and remanded the case to the district court for further development of the factual record. *Id.* at 324–326.

In *Pabon* v. *Mahanoy*, 654 F.3d 385 (3d Cir. 2011), the Third Circuit rejected the state's proposed bright-line approach in considering application of equitable tolling there, finding instead that such an approach "defies the fundamentals of equity, asking us to conclude that a certain type of circumstance can never be extraordinary." *Id.* at 399, n.21. The court observed that "*Holland* throws into serious doubt the notion that there exist types of circumstances that can never be extraordinary, as courts must use a case-by-case analysis rather than bright lines in this inquiry." *Id.* at 400, n.22. Declaring that "[t]here are no bright lines in determining whether equitable tolling is warranted in a given case," the Third Circuit remanded the case

for an evidentiary hearing on the equitable tolling arguments. *Id.* at 399, 403.

In *Jones* v. *United States*, 689 F.3d 621 (6th Cir. 2012), the Sixth Circuit recognized that *Holland* "instructed us not to be rigid * * * and to consider each claim for equitable tolling on a case-by-case basis." *Id.* at 627. In analyzing the facts and circumstances of the case, including a series of prison transfers separating the petitioner from his legal materials and the petitioner's medical conditions and partial illiteracy, the Sixth Circuit held that "[a]lthough any one of the above factors may not constitute 'extraordinary circumstances' alone, the combination of all of these factors justifies applying equitable tolling to Jones's claims." *Id.* at 627–628.

In *Doe* v. *Busby*, 661 F.3d 1001 (9th Cir. 2011), the Ninth Circuit affirmed application of equitable tolling, explaining that "[e]quitable tolling is not the arena of bright-lines and dates certain; 'determinations * * * whether there are grounds for equitable tolling are highly fact-dependent.'" *Id.* at 1015.

The First, Third, Sixth, and Ninth Circuits have all adopted an approach to equitable tolling that is faithful to this Court's decision in *Holland* and that plainly conflicts with the approach of the Eleventh Circuit here. The confusion among the Courts of Appeals—and the need for clarification of the doctrine's parameters—is further confirmed by divided appellate decisions in two other courts of appeals. *See Jenkins* v. *Greene*, 630 F.3d 298 (2d Cir. 2010) (Parker, J., dissenting) (arguing that the "analytically rigid approach employed by the district court is no longer appropriate" after *Holland*, and that the "district court should have, but did not, examine the equities" in the

case); *see also Whiteside* v. *United States*, 775 F.3d 180 (4th Cir. 2014) (en banc) (Gregory, J., Davis, J., dissenting) (arguing that the majority's opinion "does exactly what *Holland* warns against by applying a rigid rule that results in gross injustice").

That Mr. Clemons was represented by counsel hardly strips him of the right to invoke equitable tolling. The Eleventh Circuit cited no case—and Petitioner is aware of none—that limits application of the doctrine of equitable tolling to *pro se* petitioners.

To the contrary, *Holland* teaches that equity requires consideration of all the facts and circumstances. *See*, *e.g.*, *Busby*, 661 F.3d at 1013 (equitably tolling limitations period where *counsel*, lacking knowledge of the one-year AEDPA deadline, failed to file a timely petition). And clerk errors have been found to give rise to equitable tolling in both pro se and represented cases. *See Burger* v. *Scott*, 317 F.3d 1133, 1136, 1143–1144 (10th Cir. 2003); *Ross* v. *McKee*, 465 F. App'x 469, 473–76 (6th Cir. 2012); *Lewis* v. *Nevada*, 692 F. App'x 353 (9th Cir. 2017); *Corjasso* v. *Ayers*, 278 F.3d 874 (9th Cir. 2002); *Parmaei* v. *Jackson*, 378 F. App'x. 331 (4th Cir. 2010); *Jackson* v. *Astrue*, 506 F.3d 1349, 1356–1357 (11th Cir. 2007); *M.W.* v. *Ford Motor Co.*, No. 14-CV-3132, 2015 WL 4757892, at *5–6 (M.D. Fla. Aug. 12, 2015); *Towner* v. *Astrue*, No. C10-0091 2011 WL 3875425, at *7 (N.D. Iowa Aug. 31, 2011).

Given the conflict of authority and the many fact patterns reflecting unanticipated hardships, *see Holland,* 560 U.S. 650 (citing *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)) ("[t]he 'flexibility' inherent in 'equitable procedure' enables courts 'to meet new situations [that] demand equitable intervention'"), clarity is needed to ensure the

consistent application of law in all the circuits. That the stakes are life and death renders the question especially imperative in this instance.

B. The result of the Eleventh Circuit's approach is exceptionally unfair, given the scope of the clerk's errors and the fact that counsel was *invited* to rely on the clerk.

Even with respect to the single event addressed by the Eleventh Circuit—that is, counsel's alleged failure to pay the filing fee or to file an in forma pauperis petition at the time of the original submission, the court erroneously failed to consider the clerk's role.

According to the Eleventh Circuit, counsel's reliance on the clerk's office to determine that there was no filing fee constituted attorney negligence. And "because a petitioner is bound by the negligence of his attorney, Clemons is not entitled to equitable tolling." Pet. App. 11a–12a.

When, as here, a petitioner has reached out to, consulted with, and relied upon the relevant clerk's office, he has acted with diligence, not negligence. Alabama, through its various clerk offices, affirmatively *invites* counsel to call and learn the fee amount, if any. *See* Tuscaloosa County Circuit Court, *Filing Fees*, https://tuscaloosa.alacourt.gov/fees/ ("For current filing fees, please contact the Circuit Court Clerk's office."); Mobile County Circuit Court, *Circuit Civil Division*, https://mobile.alacourt.gov/circuit-civil/ ("If you are unsure of how to calculate your costs, please call the Clerk's Office * * * . We will be more than glad to assist you in this matter."); Jefferson County Circuit Court, *Filing Fees*, https://jefferson.alacourt.gov/filing-fees/ ("Please contact the Circuit Clerk's office directly

with any questions on filing fees."). Other offices specify that fees might be different than posted, *see*, *e.g.*, Montgomery County Circuit, *Circuit Civil*, https://montgomery.alacourt.gov/circuit-civil/, thereby affirmatively requiring communication with the clerk prior to filing.

The routine invitations by clerk offices in Alabama and elsewhere reflect the common understanding that the determination of filing fees is not "legal" in nature. In short, counsel did not ask for *legal* assistance from the clerk's office. Determining a filing fee is instead a core *administrative* function well within the ambit of the clerk's duties. *Accord Ex parte Thomas*, 215 So. 3d 536, 539 (Ala. 2015) (observing that the clerk is "charged by statute * * * with collection of filing fees" and that "implicit in the duties of a circuit clerk is the duty to ascertain if the [correct] filing fee" has been paid). When, as here, counsel has relied on a state actor's performance of her administrative function in a local Alabama court—consistent with that state court's advertised practice—such reasonable reliance cannot be properly characterized as "negligence."

The Eleventh Circuit noted that the Alabama Code required a $140 filing fee for civil matters. Pet. App. 13a. The Code itself, however, identified differing fee amounts for certain, specific civil actions but no specific fee amount for Rule 32 petitions, thereby at least creating the appearance that Alabama might treat Rule 32 petitions differently than other civil actions, just as other courts do. *Cf. Ignatius* v. *Smith*, No. 15-11123, 2015 WL 8492036, *2 n.3 (D. Mass. Dec. 10, 2015) (noting "differences in filing fee obligations" and "other substantial distinctions between habeas cases and civil actions"); *Pajer* v. *Gidley*, No. 15-cv-10376,

2015 WL 669319, at *1 (E.D. Mich. Feb. 17, 2015) (same).

Rule 32.6(a) did not fix the problem. It referred only to payment and receipt of an unspecified "filing fee" (Pet. App. 20a), thereby leaving open the possibility that the reference is to a "filing fee, if any," per the specific circuit court rules. Most of Alabama's circuit courts also add on an unpublished library fee, which differs from county to county. Recognizing these ambiguities, the Court of Appeals suggested that counsel could have paid a "minimum" of $140, even then acknowledging that $140 might prove incorrect and therefore would not have settled the issue. Pet. App. 21a. Because of the variability among circuit court fees, counsel *had no choice* but to communicate with the clerk to determine the actual fee amount, just as clerk offices invite counsel to do.[3]

But regardless of whether counsel were entitled to rely on the clerk's instruction, the Court of Appeals was still required at least to consider and evaluate the impact of the clerk's remaining serial errors that effectively prevented counsel from discovering the alleged filing error to afford it an opportunity to cure.[4] Indeed,

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[3] Under Alabama state law, a court cannot find attorney negligence in the absence of any hearing on the required standard of care or expert testimony on the ordinary and expected practices of attorneys practicing in the jurisdiction. *See* Alabama Legal Liability Act, Ala. Code § 6-5-572; *Schaeffer* v. *Thompson*, 303 So. 3d 159, 162 (Ala. Civ. App. 2020); *Free* v. *Lasseter*, 31 So. 3d 85, 90 (Ala. 2009).

[4] The Court of Appeals cited *Smith* v. *Commissioner*, 703 F.3d 1266, 1271 (11th Cir. 2012), for the proposition that a petitioner is bound "when a petitioner's postconviction attorney misses a filing deadline." (Pet. App. 18a). But in *Smith*, unlike here, the

had it considered all the facts and circumstances of the case, as *Holland* and other circuits require, the Court of Appeals would have considered not only the clerk's other missteps but also the fact that, notwithstanding all the barriers, Mr. Clemons cured any misfiling a mere three days later. *Cf. Downs* v. *McNeil*, 520 F.3d 1311 (11th Cir. 2008) (though an abandonment case, noting that the petition there was only eight days late); *Busby,* 661 F.3d at 1015 ("we cannot say the circumstance will never arise" for equitable tolling to apply for a filing 20 years late because "[e]quitable tolling is not the arena of bright-lines and dates certain").

The courts below denied application of equitable tolling on the basis that no extraordinary circumstances existed, focusing exclusively on counsel's conduct,[5] failing altogether to address the multiple errors of the county clerk. As a result, neither court found it

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State had not provided misinformation to counsel. And the court clerk there in fact wrote to petitioner and informed him that "a filing fee of $154.00, or informa [sic] pauperis, is required to file the Petition," and asked petitioner to "submit the filing fee * * * to our office at your earliest convenience, so that we may get this Petition filed." *Id.* at 1269. (That the fee in *Smith* exceeded the $140 the Court of Appeals suggested Mr. Clemons' counsel should have paid (Pet. App. 21a) serves only to highlight the difficulty in ascertaining the correct fee amounts in the various Alabama circuit courts and the need to consult with the respective clerk's offices.) The Court also cited *Ex parte Strickland*, 172 So. 3d 857 (Ala. Civ. App. 2014), and *Smith* v. *Cowart*, 68 So. 3d 802 (Ala. 2011). Pet. App. 21a. Again, neither implicated misleading state conduct. And in *Strickland,* the clerk again notified the petitioner of the deficiency. 172 So. 3d at 858–859.

[5] Pet. App. 17a; *see also* Pet. App. 57a (finding "attorney negligence * * * does not by itself qualify as 'an extraordinary circumstance," and that "counsel's error is not an extraordinary circumstance sufficient to warrant equitable tolling of the time for filing his federal habeas petition").

necessary to address the separate question of Mr. Clemons' personal diligence. For its part, however, the State of Alabama has never alleged (much less offered evidence) that Mr. Clemons acted without proper care.

In evaluating a represented petitioner's diligence in *Busby*, the Ninth Circuit "conclude[d] that a reasonable litigant in Doe's situation who is represented by experienced counsel, if asked about the status of his or her lawsuit, would be justified in replying, 'My lawyer is handling it.'" 661 F.3d at 1015. For Mr. Clemons, as in *United States* v. *Martin*, "[t]his is not a case where a petitioner has himself to blame for an untimely filing, nor are we dealing with attorney negligence, simple error, or even abandonment." 408 F.3d 1089, 1096 (8th Cir. 2005). And while Martin's extraordinary circumstance was his attorney's affirmative misrepresentations—while Mr. Clemon's extraordinary circumstances, as set forth above, concern pervasive and successive state errors—the principle is the same: "[w]e will not fault Martin for relying on his attorney." *Id.* at 1095.

Here, Petitioner reasonably relied on experienced local counsel, who in turn coordinated the filing with an arm of the State, which affirmed to counsel that Mr. Clemons' submission was "filed" and never advised counsel of any filing deficiency. Under these circumstances, equitable tolling was required.

II. The Eleventh Circuit's decision conflicts with this Court's precedents relating to the standards for evaluating intellectual disability.

This Court should also grant review because, in finding Mr. Clemons not intellectually disabled, the Eleventh Circuit disregarded this Court's standards

and precedents, thus yielding what this Court has previously found to be an unreasonable determination of fact. As a result, Mr. Clemons will be executed notwithstanding that he is intellectually disabled and ineligible for the death penalty. This case provides an important vehicle to ensure that lower courts do more than give lip service to the appropriate standards; they must in fact apply them.

A. The Eleventh Circuit departed from *Atkins* in failing to ensure that the state court applied the clinical standards that it found governed at that time.

The Eighth Amendment prohibits the government from executing intellectually disabled persons. In *Atkins* v. *Virginia*, this Court repeatedly invoked and relied on the clinical definition of intellectual disability. 536 U.S. at 318 & nn. 3, 5, 22. As this Court later reaffirmed, "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Hall* v. *Florida*, 572 U.S. 701, 719 (2014). "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 720–721. This Court instead recognized the three-part clinical test for intellectual disability in *Atkins*. *See* 536 U.S. at 318 (significant subaverage intellectual functioning; significant limitation in adaptive functioning; and the condition manifesting before the age of 18).

Clemons was clinically diagnosed as "educable mentally retarded" when he was six years old, thereby establishing that he suffered from the condition before the age of 18 and satisfying one of the three prongs for

intellectual disability. C.A. App. 856. Indeed, he was held back twice in elementary school and still earned D's and F's, even though he was competing against children two years younger than he. *Id.* at 543–547, 882–888. The Court of Appeals ignored the third prong of *Atkins* altogether.

As to the other two prongs of the *Atkins* standard, the Court of Appeals acknowledged that (i) Mr. Clemons' IQ range of "70–80" (as found by the state court) demonstrates significant subaverage intellectual functioning consistent with an intellectual disability diagnosis (Pet. App. 32a–33a), at least after this Court's decision in *Hall*, 572 U.S. 701,[6] and (ii) whatever adaptive functioning "strengths" Clemons might have, his six adaptive functioning "deficits" are more than sufficient to demonstrate significant subaverage adaptive functioning consistent with an intellectual disability diagnosis (Pet. App. 34a–35a), at least after this Court's decision in *Moore* v. *Texas*, 137 S. Ct. 1039 (2017).[7] In other words, the Eleventh Circuit recognized that Mr. Clemons may well be intellectually disabled. Yet the court found this fact irrelevant because the state court decision predated—and therefore did

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[6] In *Hall,* this Court reversed a state court finding that IQ scores above 70 negate an intellectual disability diagnosis. *Id.* at 714–724. This Court instead found that clinical standards, as required by *Atkins*, mandate consideration of the standard error of measurement and that "an IQ score between 70 and 75 or lower" is consistent with an intellectual disability diagnosis. *Id.* at 722 (internal quotation marks and citation omitted). The state court's finding that Mr. Clemons' IQ may be as low as 70 easily satisfies this Court's post-*Hall* standard to find significant subaverage intellectual functioning.

[7] An intellectual disability diagnosis turns on a finding of two or more adaptive functioning deficits regardless of any countervailing strengths. *Moore*, 137 S. Ct. at 1050.

not have the benefit of—this Court's decisions in *Hall* and *Moore*. Pet. App. 34a–35a; *see generally Shoop* v. *Hill*, 139 S. Ct. 504 (2019).

Yet Mr. Clemons' entitlement to relief exists independently of this Court's decisions in *Hall* and *Moore*. This is not a case where the state court failed to recognize that clinical standards consistent with *Atkins* governed its decision-making. To the contrary, the state court recognized the clinical standards that governed but then unreasonably disregarded those very standards when it rendered its ultimate finding of fact.

Intellectual Functioning. The state court twice recognized that governing clinical standards did not allow it to apply a strict IQ cutoff at 70 to determine intellectual disability, noting that:

> Any IQ test score should be considered in light of the standard error of measurement which is generally +/- 5.

C.A. App. 247. The state court reaffirmed this principle one page later:

> The general standard of measurement is +/- 5 points even though "this may vary from instrument to instrument."

C.A. App.0248. In so finding, the state court relied on the record evidence, the DSM-IV (C.A. App. 248), the 1992 Manual of the American Association of Mental Retardation (AAMR) (now the American Association of Intellectual and Developmental Disabilities) (*id.* at 247), and the AAMR's "most recent definition" (*id.*) supplied by its website—understood to be the 2002 AAMR (10th ed.). For example, the DSM-IV-TR provides:

> [I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

DSM-IV-TR at 41–42; *see also* C.A. App. 768; C.A. App. 1973. And according to the AAMR Manual (10th ed.), significant subaverage intellectual functioning is defined "as approximately 70 to 75 [IQ], taking into account the measurement error," which, "[i]n effect, * * * expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error." *See* 2002 AAMR Manual (10th ed.) at 58–59; C.A. App. 772; C.A. App. 1973.

Even though both parties' respective experts agreed that there was no IQ cutoff at 70 (*see* C.A. App. 766–772, 824, 505–508), the Court of Appeals relied on the state court's finding that Mr. Clemons "consistently scores in the 70–80 range" to uphold that court's ultimate finding "that Clemons failed to show significantly subaverage intellectual functioning." Pet. App. 31a. Under the clinical standards the state court found governed, and that this Court has affirmed govern, the Court of Appeals had no choice but to rely on that very finding—that Mr. Clemons' IQ may be as low as 70—to conclude that Mr. Clemons *satisfied* the second prong of intellectual disability, not negating it.

The Court of Appeals justified the state court decision on the ground that there was an Alabama decision at the time that applied a cutoff at 70 and so it was purportedly reasonable for the state court here to do the same. Pet. App. 31a–32a (citing *Ex parte Smith*, 213 So. 3d 214, 225 (Ala. 2003)). But unlike the record in *Ex parte Smith*, the record below reflected agreement by both parties' experts—supported by clinical

literature—that a person with an IQ over 70 and up to 75 can still be intellectually disabled, so long as he also suffers from significant limitations in adaptive functioning. And the state court affirmatively recognized and accepted that clinical standard as governing.

Adaptive Functioning. Similarly, the state court adopted the American Psychiatric Association's clinical standard, finding that an intellectual disability diagnosis turns on adaptive functioning *deficits*—regardless of strengths. According to the state court:

> The American Psychiatric Association defines mental retardation as "significantly subaverage general intellectual functioning (Criterion A) that is accompanied by *significant limitations in adaptive functioning* in at least two of the following skill areas * * *.

C.A. App. 248 (emphasis added); *see Atkins*, 536 U.S. at 309 n.3 (citing AAMR and APA definitions); *see also Holladay* v. *Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) (an intellectual disability diagnosis "requir[es] a showing of deficits in only two of ten identified areas of adaptive functioning").[8]

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[8] *See also Moore* v. *Texas*, 137 S. Ct. at 1052 (censuring lower courts for advancing "lay stereotypes of the intellectually disabled," and finding that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. *E.g.*, AAIDD-11 at 47 ('significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills'); DSM-5 at 33, 38 (inquiry should focus on '[d]eficits in adaptive functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits).") (emphasis in original); *see also Brumfield* v. *Cain*, 576 U.S. 305, 320 (2015)

But the state court failed to apply the standard it says it recognized, inexplicably failing even to mention the substantial evidence of Mr. Clemons' adaptive functioning deficits. The only standardized test to measure Mr. Clemons' adaptive functioning was the ABAS-II. Mr. Clemons' expert found, based on this test, that he suffered statistically significant deficits in six of the ten categories of adaptive functioning, even though only two are required to satisfy the standard for intellectual disability. C.A. App. 511–515. But the state court ignored the ABAS-II test results in their entirety. This cannot be interpreted as an implicit finding that the state court rejected the test's validity. *See Pruitt* v. *Neal*, 788 F.3d 248, 263 (7th Cir. 2015) (AEDPA deference applies "only to those issues the state court explicitly addressed"). And neither the State of Alabama nor its expert ever challenged the validity of the test results.

The Court of Appeals acknowledged that the state court evaluated only Mr. Clemons' supposed adaptive functioning *strengths*, but not his deficits—for example, focusing on the fact that he once was a pizza delivery boy (despite testimony that he could not count change and frequently got lost in his own neighborhood). Pet. App. 34a. The Eleventh Circuit also acknowledged that, by today's standards, a court's failure to consider a petitioner's adaptive functioning deficits would constitute grounds to grant habeas relief. Pet. App. 35a.

("strengths in some adaptive skill areas" do not preclude intellectual disability diagnosis); *Moore* v. *Texas*, 139 S. Ct. 666 (2019) (*Moore II*) (criticizing "'incorrect stereotypes' that persons with intellectual disability 'never have friends, jobs, spouses, or children'") (quoting AAIDD amicus brief).

The Court of Appeals found that this too was "not an unreasonable application of *Atkins*" when the state court did not have the benefit of *Moore* v. *Texas*. But this conclusion failed to account for the fact that the state had already determined for itself that the appropriate clinical standards governed. Its failure to apply those same standards was more than enough to render unreasonable its finding of fact that Mr. Clemons was not intellectually disabled, sufficient to support a claim for relief under AEDPA.

* * * *

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003). Consistent with his mental retardation diagnosis as a child, Clemons' IQ falls well within the range of intellectual disability, and the uncontested results of the ABAS-II establish statistically significant limitations in six of the ten adaptive functioning areas when only two are necessary for an intellectual disability diagnosis. On this basis, there can be no doubt that the state court "unreasonably applie[d]" the governing, clinical standard (per *Atkins*) "to the facts of the particular state prisoner's case," contrary to § 2254(d)(1), *Williams* v. *Taylor*, 529 U.S. at 407–08, 413 (2000). Alternatively, the state court made an objectively "unreasonable determination" of fact under § 2254(d)(2*). See Jackson* v. *Kelley*, 898 F.3d 859, 863 (8th Cir. 2018) (determination of intellectual disability is "a pure question of fact").

Federal courts are not free to look the other way under the guise of "deference" when a state court recognizes the governing clinical standards but then

chooses to discard them. The Court should intervene to clarify this critical point.

B. The Eleventh Circuit's decision also conflicts with this Court's decision in *Brumfield* v. *Cain*, which required considering an *Atkins* claim on its merits under comparable circumstances.

This Court's decision in *Brumfield v. Cain*, 576 U.S. 305 (2015), demonstrates the flaws in the Eleventh Circuit's decision, and the tension with the *Brumfield* case provides yet another reason for this Court to grant review.

Like the Alabama court in the instant case, a Louisiana state court denied Kevan Brumfield's *Atkins* claim, also in 2004. Like Clemons here, Brumfield did not have the benefit of this Court's later decisions in *Hall* and *Moore*. In 2014, the Fifth Circuit found reasonable the state court's determination that Brumfield was not intellectually disabled. In so holding, the Fifth Circuit found that Brumfield's IQ of 75 was sufficient to exclude an intellectual disability diagnosis.

After granting certiorari, this Court disagreed, recognizing again that "'an IQ between 70 and 75 or lower * * * is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.'" 576 U.S. at 315–316 (quoting *Atkins*, 536 U. S., at 309, n. 5). The Court explained:

> To conclude, as the state trial court did, that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts.

Id. at 315–316 (internal citations omitted).

As to Brumfield's adaptive skills, this Court recognized that "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns." *Id.* at 320. Citing the clinical standards, however, the Court observed that intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." *Id.* (internal quotes and citations omitted). But such strengths, this Court found, do not negate an intellectual disability diagnosis, and it remanded on that basis. *Id.* at 320–322, 324.

The Court should do the same here. The state court concluded in 2004 that Petitioner's IQ might be even lower than Brumfield's was—as low as 70. Further, the state court conceded it needed to consider Mr. Clemons' adaptive functioning limitations, but it nonetheless failed to evaluate his limitations at all, even going so far as to ignore in its entirety the results of the very test designed to assess limitations in adaptive functioning. Having adopted and recognized the clinical standards to govern its intellectual disability analysis, the state court was not free to make findings of fact entirely untethered from those standards.

As in *Brumfield*, the state court's disregard of the standards that it agreed must apply caused it to render an unreasonable determination of fact. The Eleventh Circuit should have recognized Petitioner's right

to habeas relief under § 2254(d) to prevent the unconstitutional execution of an intellectually disabled person in conflict with *Atkins*. The court's refusal to do so creates a tension with *Brumfield* itself and provides an independent basis for certiorari.

CONCLUSION

Given the record, there can be no question that Petitioner is intellectually disabled and that his execution would violate the Eighth Amendment, as interpreted by this Court. The Eleventh Circuit's refusal to recognize that fact is stunning and requires this Court to act. And so does the Eleventh Circuit's willingness to leave multiple constitutional claims unheard and unresolved, through its rigid refusal to grant equitable tolling. This Court's intervention is urgently required, both to resolve the conflict created by the Eleventh Circuit's decision and to prevent a grave injustice. The petition for certiorari should be granted.

Respectfully submitted.

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FEBRUARY 24, 2021