

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-13020

D.C. Docket No. 2:10-cv-02218-LSC

EUGENE MILTON CLEMONS, II,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS, WARDEN, HOLMAN CF

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(July 30, 2020)

Before WILSON, JILL PRYOR and MARCUS,
Circuit Judges.

MARCUS, Circuit Judge:

In 1994, an Alabama jury convicted Eugene Clemons for the capital murder of Drug Enforcement Administration Special Agent George Douglas Althouse. Thereafter, a unanimous jury recommended that Clemons be sentenced to death; the state trial court followed the jury's recommendation and sentenced the petitioner to die. Nearly a decade later, the Supreme Court held it unconstitutional to execute intellectually disabled people. See Atkins v. Virginia, 536 U.S. 304 (2002). After Atkins, Clemons timely brought a claim of intellectual disability in Alabama state court. The Alabama courts concluded that Clemons had failed to demonstrate either significant subaverage intellectual functioning or significant deficits in adaptive functioning, as required by Atkins and Alabama case law, and denied the petition. Because the state court's decision was neither contrary to nor an unreasonable application of clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts in light of the evidence presented, we are obliged to deny his federal habeas petition.

Clemons also attempts to bring thirty-one other claims in his federal habeas petition, but those claims are untimely. The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires most claims to be brought within one year of a conviction becoming final on direct review. A "properly filed" state-court petition tolls the one-year federal limitations period. But Clemons's state petition was not "properly filed" -- because his attorneys neither paid the filing fee nor filed a motion to proceed without paying the fee -- until more than one year after his conviction had become final. Clemons now says his lawyer received misinformation from the state court clerk's office, so

the federal limitations period should be equitably tolled. But the extraordinary remedy of equitable tolling cannot excuse the simple negligence of an attorney. We affirm the district court's determination that those thirty-one claims are untimely and must be dismissed.

I. Background

On May 28, 1992, Eugene Milton Clemons II shot and killed DEA Special Agent George Douglas Althouse during a carjacking. That evening, Althouse and Naylor Braswell, a Jefferson County Sheriff's Department officer with whom Althouse was working and sharing an apartment, drove a black Camaro to meet another narcotics officer. On the way, they pulled into a service station. Braswell went inside to borrow a telephone book while Althouse remained in the passenger's seat of the car. Braswell looked outside and saw a man get into the driver's seat of the car, armed with a revolver. At trial, he identified Clemons as looking like the man he saw behind the steering wheel. He then heard two shots and saw Althouse dive out of the car. Althouse had been shot, and although he initially returned fire, he eventually succumbed to his injuries and died. Braswell added that a bulletproof vest and a shotgun had been in the Camaro's trunk.

One of Clemons's accomplices, Kenny Reed, also testified at trial. Clemons called him at their mutual friend Herman Shannon's house and asked Reed to pick him up to get "a car." Reed said they drove to an area near a service station and Clemons got out of the car. Reed later heard two gunshots, followed a short time later by several more shots. Clemons then drove off in a black Camaro. When Reed returned to

Shannon's house, Clemons was there and said that "no one better open their mouths" because he had killed a DEA agent. Clemons had previously told Reed that Clemons's car needed a new motor.

The following day, on May 29, 1992, the black Camaro was recovered near Shannon's house and the shotgun that had been in the trunk of the car was discovered near Clemons's home. Shortly thereafter, Clemons was arrested in Cleveland, Ohio. His uncle who lived there testified that Clemons's sister had called to say Clemons was coming to Cleveland. Clemons told his uncle that he shot a police officer because the officer was trying to kill him and that he stole the car to get away.

Because Althouse was a federal narcotics officer, Clemons was first tried for murder in federal district court. He was convicted in April 1993 and sentenced to life without parole. The federal conviction was upheld on direct appeal. United States v. Clemons, 32 F.3d 1504 (11th Cir. 1994), cert. denied, 514 U.S. 1086 (1995). In a parallel proceeding, Alabama indicted Clemons for capital murder in March 1993. He was tried and convicted on September 25, 1994, and sentenced to death soon thereafter. Clemons's direct appeals from his state-court conviction and death sentence became final when the United States Supreme Court denied his petition for certiorari on January 25, 1999. Clemons v. Alabama, 525 U.S. 1124 (1999).

On December 27, 1999, Clemons submitted his petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, in Shelby County Circuit Court. At that time, however, he neither paid a filing fee, nor moved to proceed in forma

pauperis, nor finally did he include a certified copy of his prison account showing his indigency. Clemons says the clerk of the court advised his counsel that there was no filing fee required for a Rule 32 petition. On January 28, 2000, Clemons refiled his Rule 32 petition, only this time along with a request to proceed in forma pauperis and a certified copy of his prison account and a completed nine-page form that is contained in the Rule 32 appendix. After allowing Clemons to amend his petition twice, the circuit court held a limited evidentiary hearing, allowing each party to depose only one witness. The circuit court denied relief on all claims.

At the time of Clemons's trial and the initial filing of his Rule 32 petition, Supreme Court precedent had held that the execution of intellectually disabled persons was not per se unconstitutional. See Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (plurality opinion). But on June 20, 2002, the Court decided Atkins v. Virginia, holding that it is categorically unconstitutional to execute someone who is intellectually disabled.¹ 536 U.S. at 321. The substantive constitutional rule announced in Atkins applies retroactively on collateral review. See, e.g., In re Holladay, 331 F.3d 1169, 1173 (11th Cir. 2003) ("At this point, there is no question that the new constitutional rule . . . formally articulated in Atkins

¹ Although Atkins uses the term "mentally retarded," the Supreme Court has since adopted the term "intellectually disabled" to describe the same condition. See Hall v. Florida, 572 U.S. 701, 704 (2014) ("Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon."). We too now use the term "intellectually disabled." Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1303 n.1 (11th Cir. 2015).

is retroactively applicable to cases on collateral review.”).

Because Atkins was decided after the circuit court’s denial of his Rule 32 petition, but before his appeal to the Alabama Court of Criminal Appeals, Clemons argued for the first time on appeal that his death sentence was unconstitutional because of his intellectual disability. However, Clemons had advanced a related argument, based on the same underlying facts, in his initial Rule 32 petition, claiming that his counsel was ineffective at trial for having failed to present mitigating evidence of his limited mental capacity.

On August 29, 2003, the Alabama Court of Criminal Appeals remanded Clemons’s case to the circuit court with instructions to conduct an evidentiary hearing and make written findings on both his Atkins claim and the ineffective-assistance-of-counsel claim based on his trial attorneys’ failure to present mitigating evidence of his intellectual disability. See Clemons v. State, 55 So. 3d 314, 322 (Ala. Crim. App. 2003).

The circuit court conducted an extensive evidentiary hearing on Clemons’s Rule 32 petition from June 15 to June 18, 2004. Over the four-day hearing, the court heard testimony from four witnesses: Dr. Charles Golden (Clemons’s medical psychological expert); Joseph Chong-Sang Wu (Clemons’s PET brain scan expert); Dr. Helen Mayberg (Alabama’s PET brain scan expert); and Dr. David Glen King (Alabama’s medical psychological expert).

The evidence pertinent to Clemons’s Atkins claim included seven intelligence quotient (“IQ”) tests. His scores on those tests, discussed in more detail in

section III.B.1 of this opinion, varied widely from a score of 84 to a score of 51, and in several instances the administrators of the tests opined that the scores were invalid because Clemons was “malinger,” that is, he intentionally frustrated the efficacy of the IQ test. As for adaptive functioning, only Clemons’s medical expert testified. He had administered a test of adaptive functioning -- the Adaptive Behavior Assessment System test -- and found Clemons severely deficient in six of the ten behavioral areas the test covers.

On October 28, 2004, the Shelby County Circuit Court denied Clemons’s petition, adopting nearly verbatim a 90-page proposed order submitted by the state. On June 24, 2005, the Alabama Court of Criminal Appeals affirmed. See Clemons v. State, 55 So. 3d 314, 322–32 (Ala. Crim. App. 2005). The Court of Criminal Appeals laid out the circuit court’s findings and analysis on the Atkins claim verbatim, and adopted them:

We have reviewed the record in light of [relevant Alabama precedents], and we conclude that it supports the circuit court’s findings. Therefore, we adopt those findings as part of this opinion. Based on the record before us, we conclude that, even under the broadest definition of mental retardation, the appellant is not mentally retarded and that imposition of the death penalty in this case would not be unconstitutional.

Id. at 332.

Intervening appeals relating to procedural bar on the ineffective-assistance-of-counsel claim (which are not relevant here) took the case back and forth

between the Court of Criminal Appeals and the Alabama Supreme Court for several years. Finally, on August 13, 2010, the Alabama Supreme Court denied Clemons's petition for certiorari without opinion. Ex parte Clemons, No. 1070535 (Ala. Aug. 13, 2010) (per curiam).

Three days later, on August 16, 2010, Clemons set his sights on the federal district court, filing the instant habeas petition in the United States District Court for the Northern District of Alabama, pursuant to 28 U.S.C. § 2254. On the same day, he filed a successive Rule 32 petition in Alabama circuit court. See Clemons v. State, 123 So. 3d 1, 3 (Ala. Crim. App. 2012). The federal petition was stayed and held in abeyance while Clemons exhausted his successive state petition. The Court of Criminal Appeals rejected Clemons's successive petition and found that the claim he raised -- the jury must be allowed to consider his low IQ as part of mitigation evidence -- was procedurally defaulted. Id. at 12. That petition was resolved on March 22, 2013, when the Alabama Supreme Court denied certiorari. Ex parte Clemons, No. 1120150 (Ala. Mar. 22, 2013). Thus, the only reasoned state court opinion relevant to this appeal is the Alabama Court of Criminal Appeals's [sic] June 24, 2005 ruling, affirming the state court's determination that Clemons was not intellectually disabled, and thus that the imposition of the death penalty was not unconstitutional.

With the federal habeas action no longer stayed, Alabama moved to dismiss it, arguing that it had been filed untimely because it was past AEDPA's one-year limitations period. The district court denied the motion as to Clemons's Atkins claim, but granted it as to all the other claims he made because they were

untimely and equitable tolling was not warranted. The court reached this conclusion because Clemons had established nothing more than negligence on the part of his counsel. In a subsequent order, the district court denied relief on the Atkins claim, concluding that the state court's determinations were neither contrary to nor an unreasonable application of clearly established law, nor were they based on an unreasonable determination of the facts in light of the evidence presented. The district court highlighted the credibility determinations made by the state circuit court and found that those determinations were not objectively unreasonable.

II. Standard of Review

“We review de novo a district court's grant or denial of a habeas corpus petition.” McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). Because Clemons filed his federal habeas petition after April 24, 1996, this case is governed by AEDPA. “Under AEDPA, if a state court has adjudicated the merits of a claim -- as the state court did here -- we cannot grant habeas relief unless the state court's decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,’ or ‘was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’ ” Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1309 (11th Cir. 2015) (quoting 28 U.S.C. § 2254(d)).²

² Pursuant to § 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

“Under § 2254(d)(1)’s ‘contrary to’ clause, we grant relief only ‘if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts.’ ” Jones v. GDCP Warden, 753 F.3d 1171, 1182 (11th Cir. 2014) (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)). “Under § 2254(d)(1)’s ‘unreasonable application’ clause, we grant relief only ‘if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.’ ” Id. (alteration in original) (quoting Williams, 529 U.S. at 413). Here, there is no dispute that the state court identified the correct legal principle applicable to the only timely claim before us (Atkins itself), so this case implicates the “unreasonable application” clause of § 2254(d)(1).

Section 2254(d)(2) requires that we afford a state trial court’s fact-finding substantial deference. Brumfield v. Cain, 576 U.S. 305, 314 (2015). “If ‘[r]easonable minds reviewing the record might disagree about the finding in question, on habeas

was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

review that does not suffice to supersede the trial court's . . . determination.' ” Id. (alteration and ellipsis in original) (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)).

III. Analysis

A. Thirty-One of Clemons's Claims are Untimely

The district court dismissed thirty-one of Clemons's federal habeas claims as untimely pursuant to AEDPA's one-year statute of limitations. 28 U.S.C. § 2244(d)(1). The one-year limitations period ran out when Clemons failed to properly file his state habeas petition, which would have tolled the federal limitations period under AEDPA, within one year of his judgment of conviction becoming final on direct review. Although Clemons filed his state petition within one year, he failed to either pay a filing fee or move to proceed in forma pauperis (“IFP”). Thus, his petition was not “properly filed” in accordance with Alabama law. By the time he properly filed the petition with the required motion to proceed IFP, the one-year federal limitations period had run.

Clemons concedes that all of the claims in his habeas petition, but for his Atkins claim, are barred from consideration under AEDPA's one-year limitation. He argues, however, that the federal limitations period should be equitably tolled because his counsel received misinformation from an unnamed person working in the state court clerk's office. That employee allegedly told Clemons's counsel he was neither required to pay a filing fee nor required to file a motion to proceed IFP. But because Clemons was represented by counsel, and because a petitioner is bound by the negligence of his attorney, Clemons is not

entitled to equitable tolling. Thus, we affirm the district court's dismissal of those thirty-one claims.

Under § 2244(d), “[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(d)(1). For claims that could have been brought immediately -- because the constitutional right existed at the time and the factual predicate was discoverable through the exercise of due diligence -- the limitations period runs from the date the conviction becomes final on direct review. See id. § 2244(d)(1)(A)–(D). Clemons's conviction became final on January 25, 1999, when the United States Supreme Court denied certiorari.

However, “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” Id. § 2244(d)(2). Put more plainly, a “properly filed” state habeas petition pauses the clock on the one-year limitations period until that state petition is resolved. If, for example, a petitioner properly files a state habeas petition six months after his conviction becomes final on direct review, he still has six months to file his federal habeas petition after the state courts finally resolve the petition.

But Clemons's state petition was not “properly filed” until after the federal habeas limitations period had expired. Rule 32.6 of the Alabama Rules of Criminal Procedure sets forth the requirements for properly filing a postconviction petition, including these:

“[The petition] shall . . . be accompanied by the filing fee prescribed by law or rule in civil cases in the circuit court unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis. If the petitioner desires to prosecute the petition in forma pauperis, he or she shall file the “In Forma Pauperis Declaration” at the end of the form. In all such cases, the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined, stating the amount of money or securities on deposit to the petitioner’s credit in any account in the institution for the previous twelve (12) months, which certificate may be considered by the court in acting upon the petitioner’s application for leave to proceed in forma pauperis. If the application to proceed in forma pauperis is granted, the filing fee shall initially be waived, but may be assessed as provided in Rule 32.7(e). Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, the clerk shall file the petition and promptly send a copy to the district attorney (or, in the case of a petition filed in the municipal court, to the municipal prosecutor).”

Ala. R. Crim. P. 32.6(a) (emphases added). In 1999, there was a \$140 filing fee for civil cases filed in circuit court in Alabama. See 1999 Ala. Laws Act 99-427 (H.B. 53), Ala. Code § 12-19-71 (1999); see also Ex parte Hurth, 764 So. 2d 1272, 1274 (Ala. 2000) (“The docket fee for the filing of a petition for post-conviction relief is \$140.00.”).

Clemons admits that he attempted to file his Rule 32 petition on December 27, 1999 without either a filing fee or a motion to proceed IFP. The initial filing contained the following request for relief: "Provide 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." But this request did not mention a filing fee or request any kind of waiver of the fee, and though it did reference Clemons's indigent status, it did not provide the required certified copy of his prison account necessary for an IFP request. Notably, the omission was not remedied by counsel until the following month, when Clemons filed another copy of the Rule 32 petition with an explicit request to proceed IFP on January 28, 2000, accompanied by a certified copy of his prison account - three days after the federal limitations period had expired. The circuit court noted in its case action summary that Clemons's petition was "filed" on January 28, 2000. On March 14, 2000, Clemons filed a motion in state court to correct what he termed a "clerical error" in the notation, asking the court to direct the clerk to docket his Rule 32 petition as having been filed on December 27, 1999, obviously anticipating the timeliness issues in federal habeas proceedings. Alabama at the time had a two-year statute of limitations, so the petition was timely in the Alabama courts.

In an accompanying affidavit and at a state court hearing on the motion, local counsel for Clemons at the time, James S. Christie, Jr., associated with the law firm of Bradley Arant, explained that he was prepared to file the petition on December 23, 1999. Because it was proving difficult to have the prison process the

paperwork to execute Clemons's IFP motion, he told Clemons's out-of-state counsel at the law firm of Winston & Strawn, that he would pay the fee and file the petition. Christie's secretary could not determine the amount of the fee, so Christie called the circuit court clerk's office to ask. He thought it was reasonable to call the clerk's office because filing fees differ from county to county, in part because of a library tax that is assessed differently in each court, making it impossible to determine the exact amount of the fee from statute alone. When he called, he spoke to a woman in the clerk's office, though he could not remember her name or the precise words of their conversation. Christie said at the hearing that he was familiar with the people in the clerk's office and that his understanding was that "nobody down there remembers talking to" him. He claimed, however, that he "understood" from their conversation that a fee was not necessary to file the petition, so he had his firm's runner file it without a fee. It "made sense" to him because Clemons had already been granted IFP status in the underlying case. In early January, he saw a copy of the petition stamped "Dec 1999 received & filed," so he believed it had been properly filed.

According to Clemons's counsel, later investigation revealed not only that the petition was not filed by the clerk, but also that the clerk's office apparently lost it for approximately four months, and the petition was never docketed. On January 24, 2000, one day before the AEDPA one-year limitation period would expire, Clemons's counsel mailed to the state court an IFP motion in anticipation of other fees expected in the litigation. He also submitted an amended Rule 32 petition, which contained no substantive changes but merely inserted the identical petition into the state

court's Rule 32 template. Clemons says the petition was mailed rather than hand-delivered because counsel had no notice of any filing deficiencies in the December 1999 petition. The clerk of court received the IFP petition and the amended Rule 32 petition on January 28, 2000 and docketed them on that date. Months later, in April 2000, the original filing was found, and it was docketed as though it had also been filed on January 28, 2000. The Shelby County Circuit Court issued a minute order on the docket in May 2000 that read: "Petitioner's Motion to Correct Clerical Error: Denied, as the Court finds the Defendant's Rule 32 petition was properly filed on January 28, 2000." The Alabama Court of Criminal Appeals affirmed the denial of the motion.

Clemons's counsel does not dispute that Alabama law required his Rule 32 petition to be accompanied by a filing fee or a motion to proceed IFP -- that is, he does not dispute that the petition was not "properly filed" until January 28, 2000. Thus, it is crystal clear that statutory tolling pursuant to § 2244 is unavailable to Clemons. Rather, Clemons says he is entitled to equitable tolling because of the misinformation his attorney allegedly received when he called the clerk's office.

Equitable tolling "is an extraordinary remedy limited to rare and exceptional circumstances" and typically should be "applied sparingly." Cadet v. Fla. Dep't of Corr., 853 F.3d 1216, 1221 (11th Cir. 2017) (quotations omitted); see also Holland v. Florida, 560 U.S. 631, 649 (2010); Lawrence v. Florida, 549 U.S. 327, 336 (2007); Hunter v. Ferrell, 587 F.3d 1304, 1308 (11th Cir. 2009) (per curiam); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000). Indeed, equitable tolling may only be applied where there are "extraordinary

circumstances that are both beyond [the petitioner's] control and unavoidable even with diligence.” Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005) (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)), aff'd, 549 U.S. 327. Moreover, the petitioner seeking equitable tolling bears the burden of demonstrating that he is entitled to it. Drew v. Dep’t of Corr., 297 F.3d 1278, 1286 (11th Cir. 2002), overruled on other grounds as recognized by Jones v. Sec’y, Fla. Dep’t of Corr., 906 F.3d 1339, 1351 (11th Cir. 2018). Under Supreme Court law, “a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” Holland, 560 U.S. at 649 (quotations omitted); see also Helton v. Sec’y for Dep’t of Corr., 259 F.3d 1310, 1312 (11th Cir. 2001) (per curiam) (“Equitable tolling can be applied to prevent the application of the AEDPA’s statutory deadline when extraordinary circumstances have worked to prevent an otherwise diligent petitioner from timely filing his petition.” (quotation omitted)). Clemons has not met his burden.

We begin with the critical fact that Clemons was represented by counsel when he failed to properly file his Rule 32 petition within the one-year AEDPA statute of limitations. Put another way, this is a case in which an attorney made a mistake. As we have held, “attorney negligence, even gross or egregious negligence, does not by itself qualify as an ‘extraordinary circumstance’ for purposes of equitable tolling; either abandonment of the attorney-client relationship, such as may have occurred in Holland, or some other professional misconduct or some other extraordinary circumstance is required.” Cadet, 853

F.3d at 1226–27 (emphases omitted)); see Maples v. Thomas, 565 U.S. 266, 281 (2012). Whatever can be said about the negligence of Clemons’s attorney, it is clear it was just that, negligence. Clemons nonetheless argues that the negligence of his counsel should be excused and the limitations period equitably tolled because he received misinformation from an unnamed clerk. While we have extended the extraordinary remedy of equitable tolling in limited cases where misinformation from the state causes a pro se petitioner to miss a filing deadline, Clemons was not a pro se petitioner. He had counsel. And although his counsel negligently relied on the advice of an unnamed person in the clerk’s office in the face of clear statutory filing requirements, this brings us to the end of the analysis: Clemons is bound by the negligence of his counsel and thus, he is not entitled to equitable tolling.

The cases implicating attorney negligence or mistake are clear: negligence is not enough to warrant equitable tolling. The Supreme Court has repeatedly held “that ‘a garden variety claim of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” Holland, 560 U.S. at 651–52 (quoting Irwin v. Dep’t of Veterans Affairs, 498 U.S. 89, 96 (1990) and Lawrence, 549 U.S. at 336); see also Smith v. Comm’r, Ala. Dep’t of Corr., 703 F.3d 1266, 1271 (11th Cir. 2012) (per curiam) (“As to exceptional circumstances, the general rule is that ‘when a petitioner’s postconviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause.’ ” (quoting Maples, 565 U.S. at 281)).

“[T]here are circumstances where ‘an attorney’s unprofessional conduct can . . . count as an

“extraordinary circumstance” justifying equitable tolling.’” Smith, 703 F.3d at 1271–72 (quoting Maples, 565 U.S. at 281); see also Holland, 560 U.S. at 649–52 (rejecting a per se rule that “grossly negligent” attorney conduct can never amount to a showing of extraordinary circumstances). But the controlling case law is clear on this point: attorney mistakes are generally attributable to a client by agency principles; because the attorney acts as his client’s agent, the client is bound by the mistakes of the attorney.

In Holland, for example, the petitioner’s attorney waited until there were twelve days remaining of the one-year limitations period to file the state petition; he failed to communicate with his client despite his client’s repeated attempts to address the timing problem; and he failed to inform his client of the state court’s ultimate denial of his state petition, despite the client having written repeatedly to plead for information, including citing AEDPA in his correspondence and expressing specific concerns about timeliness. See Holland, 560 U.S. at 635–43. The attorney in Holland finally responded to his client but only weeks after the limitations period had expired telling him -- incorrectly -- that the AEDPA limitations period had expired before the attorney’s appointment. Id. at 641. And, in Maples, the petitioner’s pro bono counsel left their New York law firm while the state petition was pending, were unable to represent Maples under the terms of their new employment, and failed to either inform Maples or seek leave of court to withdraw. 565 U.S. at 270–71. The state court clerk sent notice of the denial of Maples’s state petition to those attorneys, but it was returned as undeliverable, and Maples consequently failed to timely appeal the denial. Id. at 271. There, the Supreme Court concluded

that Maples had been “left without any functioning attorney of record.” Id. at 288. In other words, he had been abandoned.

Applying this standard, we have refused to equitably toll statutes of limitations where there was even gross negligence on the part of counsel. In Cadet, we refused to equitably toll a limitations period where the petitioner’s lawyer had misinterpreted the language of § 2244 and failed to do even rudimentary research after his client repeatedly questioned his calculation. 853 F.3d at 1219–20. We explained that while the attorney’s conduct was grossly negligent, “he did not withdraw from representing Cadet, renounce his role as counsel, utterly shirk all of his professional responsibilities to Cadet, or walk away from their attorney-client relationship.” Id. at 1234; see also Thomas v. Att’y Gen., Fla., 795 F.3d 1286, 1293–94 (11th Cir. 2015) (noting that the relevant inquiry “is not whether an attorney’s mistake or oversight was egregious,” but rather “whether the attorney, through her conduct, effectively abandoned the client,” and remanding for the district court to apply the correct standard).

In this case, it was clearly negligent for Clemons’s attorneys to fail to investigate the statutory filing fee and rely simply on the representations of an unnamed person in the clerk’s office. For starters, the requirements set forth in Rule 32.6(a) of the Alabama Rules of Criminal Procedure are clear and unambiguous. The petition “shall . . . be accompanied by the filing fee prescribed by law or rule in civil cases in the circuit court unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis.” Ala. R. Crim. P. 32.6(a) (emphases added). And if the petitioner seeks to prosecute the petition in

forma pauperis, he is required to file the “In Forma Pauperis Declaration” at the end of the form, along with a statement concerning his prison account. Id. Counsel for Clemons easily could have paid the filing fee or could have filed an in forma pauperis motion along with a certified copy of the petitioner’s prison account when he filed the Rule 32 petition on December 27, 1999. In fact, he filed these same documents on January 28, 2000. While it may be true that filing fees differ from county to county because the Alabama Code authorizes local courts to assess local fees above the statutory filing fee, a diligent lawyer could plainly see that the filing fee was at minimum \$140, as set forth in the Alabama Code, and that the only way to avoid paying the fee was to file a properly supported motion to proceed IFP.

What’s more, even a rudimentary inquiry would have revealed that the duties of the circuit clerk’s office in Alabama as defined in Rule 4 of the Judicial Administration Rules and in sections 12-17-93 and -94 of the Code of Alabama do not include the requirement that the clerk inform counsel how to file a document that complies with Alabama’s rules of procedure. Alabama’s case law has made that point crystal clear. See Smith v. Cowart, 68 So. 3d 802, 812 (Ala. 2011); Ex parte Strickland, 172 So. 3d 857, 859–60 (Ala. Civ. App. 2014).

Clemons nevertheless urges us to apply our law equitably tolling statutes of limitations for pro se litigants who rely on misinformation from court or state officials. See Spottsville v. Terry, 476 F.3d 1241, 1245–46 (11th Cir. 2007) (equitably tolling AEDPA’s statute of limitations where the state habeas court advised a pro se petitioner to file his appeal in the wrong state court, and the petitioner followed the state

court's misleading advice); Knight v. Schofield, 292 F.3d 709, 710–11 (11th Cir. 2002) (per curiam) (equitably tolling AEDPA's statute of limitations where a pro se petitioner did not receive notice of the Georgia Supreme Court's denial of his habeas petition for eighteen months after the court's clerk inadvertently sent notice to the wrong person).

But these cases take Clemons no further because they are limited to pro se litigants, and Clemons was represented by counsel. Clemons has pointed us to no case that extended equitable tolling to a represented party based on his attorney's receipt of misinformation from the state, and our research has turned up none. Indeed, it is not unusual for us to treat pro se litigants leniently while holding represented parties to a higher standard. See, e.g., Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) ("A document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))). Here, the misinformation purportedly provided by someone in the clerk's office was plainly contradicted by the Alabama Code, which, as we have noted, Clemons's attorney should have consulted. We can discern no sound basis to apply the extraordinary remedy of equitable tolling to excuse the negligent conduct of Clemons's attorneys.

B. The State Court Properly Denied Clemons's Atkins Claim

Unlike his other thirty-one claims, Clemons's claim based on Atkins v. Virginia was timely. At the time of Clemons's trial and the initial filing of his Rule 32 petition, Supreme Court precedent had held that it

was not per se unconstitutional to execute intellectually disabled persons. See Penry, 492 U.S. at 340. But on June 20, 2002, the Court decided Atkins v. Virginia, holding for the first time that the execution of an intellectually disabled person categorically violates the Eighth Amendment's guarantee against cruel and unusual punishment. 536 U.S. at 321. And as we've said, the substantive constitutional rule announced in Atkins applies retroactively to cases on collateral review. See, e.g., Holladay, 331 F.3d at 1173. Because Clemons properly raised his Atkins claim in the state courts in a timely manner after the decision and pursued it in this timely federal habeas petition thereafter, Clemons's Atkins claim is properly before us.

1. The State-Court Proceedings

Clemons first argued his Atkins claim before the Alabama Court of Criminal Appeals, which remanded the matter to the state trial court for an evidentiary hearing. After conducting an extensive hearing, the state court denied the claim. Clemons now says the state courts' denial of his claim was either contrary to or an unreasonable application of Atkins, or was based on an unreasonable determination of the facts in light of the evidence presented. We are unpersuaded.

Although the Court suggested in Atkins that an evaluation of intellectual disability should conform to current medical standards -- and embraced two clinical definitions, that of the American Association on Mental Retardation and the American Psychiatric Association, which both set forth the three-part test we use today -- it expressly left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of

sentences.” 536 U.S. at 317 (quotation omitted and alterations in original). The Alabama Supreme Court took up this task in Ex parte Perkins, 851 So. 2d 453 (Ala. 2002). To show intellectual disability under Alabama law, the petitioner is required to prove three things: “(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant’s developmental period (i.e., before the defendant reached age 18).” Smith v. State, 213 So. 3d 239, 248 (Ala. 2007) (emphasis in original) (citing Perkins, 851 So. 2d at 456).

The evidence adduced in the state court on Clemons’s intellectual functioning included seven IQ tests Clemons received over the course of his life, beginning at age six. The scores varied widely, from suggesting that he is highly disabled (51) to suggesting that he has a functioning ability falling within the range of ordinary (84). In two of the seven, the test administrators explicitly found evidence of Clemons’s “malinger,” a term psychologists use to describe an examinee’s intentional frustration of a test, further complicating the state court’s task of determining Clemons’s level of intellectual functioning.

When Clemons was six years old, a school psychologist administered the Stanford-Binet intelligence test, and although school records following the test labeled Clemons “educable mentally retarded,” his full-scale score on the test was a 77. In 1991, while in prison on unrelated charges at the age of 19, one year before the Althouse murder, Clemons took the BETA-II intelligence test and received a full-scale score of 84. This was the highest score Clemons would receive on any intelligence test. The state

court's order referred to this test, but because it was not introduced at the evidentiary hearing, Clemons argues it should be disregarded.

Five additional intelligence tests were administered following Clemons's arrest for the Althouse murder. In 1992, Drs. Mark Hazelrigg and Bruce Berger administered the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") at the federal prison where Clemons was then held. Clemons obtained a full-scale IQ score of 51, which was by far the lowest score he would receive on any intelligence test. The doctors noted that people in the low-50s IQ range are "often in need of structured living and may be institutionalized" and are typically unable to care for themselves. They also observed that it would be virtually impossible to validly score an 84 on BETA-II and one year later validly score a 51 on WAIS-R, in the absence of some intervening traumatic injury. Because Clemons could care for himself before his arrest and had scored an 84 on the BETA-II test administered the year before, Hazelrigg and Berger concluded that the score was invalid because Clemons was malingering.

In 2000, Dr. Kimberly Ackerson, who had been retained by defense counsel, again administered the WAIS-R. Clemons received a full-scale score of 73 this time, and Dr. Ackerson said this score placed Clemons in the "borderline" range for intellectual disability. In contrast to the previous administration of WAIS-R, Dr. Ackerson opined that Clemons did not appear to be malingering; rather, he "appeared motivated," was "cooperative," "deliberate in responding," and "interested in performance." Then, in 2001, the state's expert, Dr. King, administered the Wechsler Adult Intelligence Scale-Third Edition ("WAIS-III"). Clemons obtained a full-scale score of 77.

In 2003, the defense expert, Dr. Golden, administered the Stanford-Binet Intelligence Scale-Fourth Edition. Clemons obtained a full-scale score of 58. Dr. Golden testified that because Stanford-Binet uses a slightly different scoring system, the full-scale score should be adjusted to be comparable with other tests such as the WAIS. Thus, he said the full-scale score of 58 should be adjusted to 61. Then he testified that even 61 was too low and the “better estimate of the Binet IQ is to average [the] four scores” on the different portions of the exam, which in Clemons’s case would yield a total score of 66.

Finally, in 2004, the state’s expert, Dr. King, administered the original, unrevised WAIS, on which Clemons obtained a full-scale score of 67. King testified that WAIS is considered an easier test than WAIS-III, and he adjusted the score to 60 to bring it in line with the contemporary test scores. Dr. King also testified that he suspected Clemons was malingering on this test. He explained that Clemons appeared more indifferent than when he had evaluated him in 2001 (pre- Atkins), and that Clemons gave incorrect answers on several questions that he had previously gotten right. King opined that without an intervening medical event, such as a stroke, a 17-point drop in a three-year period would be difficult to explain. Thus, King concluded that Clemons must have been malingering on the 2004 test. To substantiate this hypothesis, King administered a Test of Memory Malingering (“TOMM”), which is a 50-item recognition test intended to assess malingering in psychological examinations. King testified that Clemons’s score of 44 indicated that he was, in fact, malingering.

Moreover, the record contained additional evidence suggesting that Clemons was malingering

when he was psychologically evaluated. Thus, for instance, Dr. Wilburn Rivenbark examined Clemons in 1992 and 1994 for his competency to stand trial. In the 1992 test, Rivenbark suspected that Clemons was malingering for psychosis, because Clemons reported “seeing and hearing a ‘little green friend,’” and several times smiled or laughed inappropriately but stopped acting this way when confronted. Moreover, Clemons insisted that he had a history of mental illness despite the absence of any documentation supporting the claim. When Rivenbark evaluated Clemons again in 1994, Clemons refused to speak with him or make eye contact, leading Rivenbark again to opine that Clemons was malingering. In both evaluations, Rivenbark concluded that Clemons was competent to stand trial.

In 1993, Clemons was evaluated for competency by Dr. William Grant at the request of defense counsel. Dr. Grant similarly believed Clemons to be malingering. Like Rivenbark, Grant noted that Clemons would laugh inappropriately but stop when confronted. Grant also said that Clemons asked for Valium, and that Grant told him that the drug was unlikely to be available to inmates. Grant did mention twice that a different anti-depressant, Sinequan, was sometimes available. He was later informed that Clemons then asked prison staff for Sinequan by name on multiple occasions. Grant added this: “I mention these events because they are discordant with the Defendant’s inability to repeat” simple phrases on the test. Thus, the record evidence on Clemons’s intellectual functioning was contradictory but shadowed by a pattern of malingering on psychological examinations.

As for adaptive functioning, the second prong of Perkins, the only evidence of Clemons's deficits came from the testimony of Dr. Golden. Dr. Golden administered the Adaptive Behavior Assessment System test ("ABAS-II"). The ABAS-II assesses adaptive functioning in ten areas: communication, use of community resources, functional academics, health and safety, home living, leisure, self-care, self-direction, social skills, and work skills. Dr. Golden concluded that Clemons was severely deficient in self-direction, social skills, work skills, home living, health and safety, and leisure.

Ultimately, the state court concluded that Clemons had not carried his burden to show that he is intellectually disabled under Perkins or Atkins because he had shown neither that his intellectual functioning was significantly subaverage, nor that he had substantial deficits in adaptive functioning. The state trial court thoroughly recounted the testimony of Dr. King and Dr. Golden at the evidentiary hearing, as well as the intelligence tests submitted into the record. The court discounted those scores for which the test administrators noted evidence of malingering -- that is, the 1992 score of 51 on the WAIS-R and the 2004 score of 67 (adjusted to 60) on the WAIS. It further discounted the Stanford-Binet test administered by Dr. Golden, where Clemons received a full-scale score of 58, which Dr. Golden adjusted to a 66. The state court noted that Dr. Golden did not satisfactorily explain why the additional calculations were necessary to accurately assess Clemons's score, nor why the Stanford-Binet test was a better measure of intellectual functioning for those with intellectual disabilities. Ultimately, the court discounted this score -- originally a full-scale score of 58, which was at least

15 points lower than Clemons's remaining test scores -- because of his extensive history of malingering. Having discounted the very low scores, the state court was left with four IQ scores: a 77 on the Stanford-Binet when Clemons was a child; an 84 when the BETA-II was administered in 1991; a 73 on the WAIS-R in 2000; and a 77 on the WAIS-III in 2001. The state court concluded, based on the tests, the evidence of malingering, and the fact that, of all of the doctors who evaluated Clemons over the years, only Dr. Golden ever opined that Clemons was intellectually disabled, that Clemons had failed to establish significant subaverage intellectual functioning. The court explained its finding this way: "when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests" and "when Clemons malingers he consistently scores in the 50-60 range."

The state trial court likewise found insufficient evidence of adaptive functioning deficits to support a finding of intellectual disability. The state court did not discuss Dr. Golden's testimony or the ABAS-II test. Instead, it relied on evidence of Clemons's adaptive strengths, including his employment history, his ability to form intimate relationships, his extensive involvement in criminal activity, his "post-crime craftiness," and his ability to use community resources. Clemons, 55 So. 3d at 329. In particular, the state court discussed Clemons's job as a pizza delivery worker and his relationships with women, including the fact that he had fathered two children. The court also highlighted Clemons's efforts to evade law enforcement and his false statements following the Althouse murder. The court found that this established a certain degree of criminal sophistication. Finally, it noted Clemons's ability to use community

resources, as evidenced by his ability to take a bus to Cleveland in order to elude capture. Id. at 331.

The Alabama Court of Criminal Appeals affirmed, adopting the state trial court's findings and decision as its own. See Clemons, 55 So. 3d at 322–32. Finally, on August 13, 2010, the Alabama Supreme Court denied Clemons's petition for certiorari without an opinion. Ex parte Clemons, No. 1070535 (Ala. Aug. 13, 2010) (per curiam). Clemons claims that the Alabama Court of Criminal Appeals unreasonably applied Atkins and unreasonably determined the facts in light of the evidence.

2. Intellectual Functioning

Clemons says that the state court unreasonably discounted certain valid IQ scores and unreasonably credited other invalid scores. As we've elaborated, there are seven IQ scores in the record: 77 in childhood; 84 in 1991; 51 in 1992; 73 in 2000; 77 in 2001; 58 (adjusted to 66) in 2003; and 67 (adjusted to 60) in 2004. The parties dispute several of these scores. But regardless of those specific disputes, the state court's factual determinations were not unreasonable.

First, it is abundantly clear that a state court may discount IQ scores where there is evidence of malingering. See Carroll v. Sec'y, DOC, 574 F.3d 1354, 1359, 1367–68 (11th Cir. 2009) (holding that it was not objectively unreasonable to discount low IQ scores in the face of evidence of malingering). It was not unreasonable for the state court to discount an IQ score of 51 obtained in 1992 and a score of 67 (adjusted to 60) obtained in 2004. Both tests were rendered infirm because, the state court found, Clemons was malingering. Moreover, there was a substantial body of additional evidence suggesting that Clemons had

engaged in a pattern of malingering, including the reports of several other doctors who had evaluated Clemons over the years.

Second, as the trier of fact considering the Rule 32 petition, the state court was entitled to make credibility determinations. There was nothing objectively unreasonable about the state court having discounted the testimony of Dr. Golden and the 2003 Stanford-Binet test he administered. In that one, Clemons received a full-scale score of 58, but Dr. Golden adjusted it to a 66. Golden's testimony about the reliability of the Stanford-Binet test and the need to adjust Clemons's score was contradicted by the testimony of the state's expert, Dr. King. The state court was entitled to believe Dr. King and discount Dr. Golden's opinion.

Discounting three scores on account of malingering left the state trial judge with four to consider: a 77 in childhood; an 84 in 1991; a 73 in 2000; and a 77 in 2001. Based on all the evidence it heard, the court found that "when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests" but that "when Clemons malingers he consistently scores in the 50-60 range." The valid scores placed Clemons in the 70–80 IQ range; therefore, the state court determined that Clemons failed to show significantly subaverage intellectual functioning.

At the time the state court denied Clemons's petition, no clearly established federal law prohibited state courts from using a bright-line cutoff for IQ scores above 70. IQ scores at 70 and below indicate intellectual disability, while typically those above 70 do not. The state court tellingly cited Alabama

precedent which, at the time, explained that a full-scale score of 72 “seriously undermines any conclusion that [a petitioner] suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions.” Ex parte Smith, 213 So. 3d 214, 225 (Ala. 2003).

Years after Alabama’s denial of Clemons’s Atkins claim, however, the Supreme Court decided Hall v. Florida, 572 U.S. 701 (2014). There, the Court held for the first time that “when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error [$\pm$ 5], the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” Id. at 723; see also Kilgore, 805 F.3d at 1308. “Hall explained that a state’s assessment of a defendant’s intellectual disability should focus on whether he has evidenced, beginning ‘during the developmental period,’ both (1) ‘significantly subaverage intellectual functioning,’ and (2) ‘deficits in adaptive functioning (the ability to learn basic skills and adjust behavior to changing circumstances).’ ” Kilgore, 805 F.3d at 1308 (quoting Hall, 572 U.S. at 710). Because these criteria are “interrelated” and no “single factor [is] dispositive,” “an individual with an IQ test score between 70 and 75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.” Hall, 572 U.S. at 722–23 (quotation omitted). However, we subsequently held that Hall’s procedural constitutional rule was not retroactive. See Kilgore, 805 F.3d at 1314, cert. denied, 138 S. Ct. 446 (2017) (mem.); In re Henry, 757 F.3d 1151, 1161 (11th Cir. 2014).

Clemons relies heavily on Hall because the scores he argues are valid and should be considered -- 73 in

2000, 75 in 2001 (adjusted down to credit Clemons's claim that Dr. King made a scoring error that produced the score of 77), 66 in 2003, and 67 in 2004 - average to 70.25. After Hall, this would place Clemons in the standard error range of 70 to 75, and the intelligence prong would not be dispositive on its own, but rather must be considered in conjunction with adaptive functioning. But we have already held that before Hall was decided "[n]othing in Atkins suggested that a bright-line IQ cutoff of 70 ran afoul of the prohibition on executing the intellectually disabled." Kilgore, 805 F.3d at 1312. And thus, before Hall, a state court could conclude that a petitioner failed to satisfy the intellectual functioning prong of Atkins when his scores were above 70 but below 75.

In short, it was neither contrary to nor an unreasonable application of Atkins for the state court to conclude, as it did, that "when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests," and thus that he had failed to demonstrate significantly subaverage intellectual functioning.

The state court's conclusion was bolstered by the fact that of the seven experts who evaluated Clemons in his adult years -- five of whom administered tests of intellectual functioning -- only one, Dr. Golden, ever opined that Clemons was intellectually disabled. Indeed, five out of the seven who examined him (Hazelrigg, Berger, King, Rivenbark, and Grant) opined that Clemons was malingering psychological symptoms. In the face of this body of evidence, we cannot say that the state court's determination that Clemons had failed to show significantly subaverage intellectual functioning was based on an unreasonable determination of the facts, or that it was an

unreasonable application of clearly established Supreme Court law.

3. Adaptive Functioning

Finally, Clemons argues that the state court unreasonably applied Atkins because it focused on his adaptive strengths, rather than on his weaknesses, and because it failed to account for Dr. Golden's testimony regarding adaptive deficits and the ABAS-II test. Clemons relies on Moore v. Texas, 137 S. Ct. 1039 (2017), a Supreme Court case that long post-dates the state court's denial of his Rule 32 petition and thus could not have been "clearly established" at the time the state courts decided this matter.³ In Moore, the Supreme Court held that the Texas Court of Criminal Appeals had erred in "overemphasiz[ing] [petitioner's] perceived adaptive strengths," despite the medical community's focus on "adaptive deficits." Id. at 1050 (emphasis in original). Moreover, the Supreme Court heard Moore on direct review, rather than on collateral review, where AEDPA requires substantial deference. And in a more recent decision - - Shoop v. Hill, 139 S. Ct. 504 (2019) (per curiam) -- the Supreme Court, this time on collateral review, rejected the argument that a pre-Moore state court decision unreasonably applied Atkins by focusing on adaptive strengths over adaptive deficits. The Court reasoned that because "Atkins did not definitively resolve how [the adaptive functioning prong] was to be evaluated but instead left its application in the first instance to the States," it was not an unreasonable application of

³ This Court also has held that *Moore* cannot be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). See *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1338–40 (11th Cir. 2019), cert. denied sub nom., *Smith v. Dunn*, 2020 WL 3578738 (July 2, 2020).

Atkins to focus on adaptive strengths. Id. at 508. While that approach today would be contrary to clearly established federal law -- that is, contrary to Moore v. Texas -- it was neither contrary to nor an unreasonable application of clearly established Supreme Court law when the state court denied Clemons's petition.

* * *

At the end of the day, we hold that the district court properly denied Clemons's habeas petition and AFFIRM its judgment.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13020-P

EUGENE MILTON CLEMONS, II,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS, WARDEN, HOLMAN CF

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, JILL PRYOR and MARCUS,
Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no
judge in regular active service on the Court having

37a

requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13020-P

EUGENE MILTON CLEMONS, II,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF
CORRECTIONS, WARDEN, HOLMAN CF

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before HULL, WILSON and JILL PRYOR, Circuit
Judges.

BY THE COURT:

EUGENE Milton Clemons, II's motion for a
certificate of appealability ("COA") is GRANTED on
the following issues:

- (1) Whether, in its March 17, 2015 Order, the district court erred in dismissing Clemons's Claims II through XXXII of his 28 U.S.C. § 2254 petition for a writ of habeas corpus on the ground that those claims were untimely filed under AEDPA's statute of limitations and Clemons had not shown a basis for equitable tolling;⁴ and
- (2) Whether, in its March 28, 2016 Order, the district court erred in concluding that the Alabama state courts' ruling after an evidentiary hearing—that Clemons was not intellectually disabled within the meaning of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)—was not contrary to or an unreasonable application of clearly established federal law, or was not based on an unreasonable determination of the facts in light of the evidence presented.

To the extent Clemons raises other issues in his application, the Court DENIES a COA as to those issues.

⁴ Clemons is entitled to a COA on the first of these issues 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. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Spencer v. United States*, 773 F.3d 1132, 1138 (11th Cir. 2014) (en banc).

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EUGENE MILTON CLEMONS, II,
Petitioner,

v.

WILLIAM G. SHARP, JR., Interim Commissioner,
Alabama Department of Corrections; WALTER
MYERS, Warden, Holman Correctional Facility,
Respondents.

No. 2:10-CV-2218-SLB

Before SHARON L. BLACKBURN, *District Judge*

MEMORANDUM OPINION

This case is presently pending before the court on respondents' Motion to Dismiss Eugene Clemons's Untimely-filed Petition for Writ of Habeas Corpus. (Doc. 25.)¹ Petitioner Eugene Milton Clemons, II, protectively filed a Petition for Writ of Habeas Corpus in this court on August 16, 2010. (Doc. 1.) After a stay of the matter pending additional state post-conviction proceedings, respondents, William G. Sharp, Jr. and Walter Myers, filed a Motion seeking to dismiss Clemons's petition as untimely filed. Upon consideration of the record, the submissions of the parties, and the relevant law, the court is of the

¹ Reference to a document number, ["Doc. ____"], refers to the number assigned to each document as it is filed in the court's record.

opinion that respondents' Motion to Dismiss Eugene Clemons's Untimely-filed Petition for Writ of Habeas Corpus, (doc. 25), is due to be granted in part and denied in part.

Pursuant to the Antiterrorism and Effective Death Penalty Act [hereinafter "AEDPA"], Antiterrorism and Effective Death Penalty Act's (AEDPA):

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.

28 U.S.C.A. § 2244(d). “[Subsection] 2244(d)(1) provides that a ‘1-year period of limitation shall apply to an application for a writ of habeas corpus.’” *Pace v. DiGuglielmo*, 544 U.S. 408, 416 n.6 (2005)(emphasis in *Pace*). Subsection 2244(d)(1) “provides one means of calculating the limitation with regard to the ‘application’ as a whole, § 2244(d)(1)(A)(date of final judgment), but three others . . . require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C)(new right made retroactive); § 2244(d)(1)(D) (new factual predicate).” *Id.* In this Circuit, “the statute of limitations in AEDPA applies on a claim-by-claim basis in a multiple trigger date case.” *Zack v. Tucker*, 704 F.3d 917, 926 (11th Cir.)(en banc); *see also id.* at 927 (Carnes, J., concurring specially)(“Adopting the petitioner’s interpretation of the statutory language [that § 2244(d)(1)(B)-(D) applied to the *application* as a whole] would mean that every time the Supreme Court issued a decision recognizing a new, retroactively applicable constitutional right, the statute of limitations bar would be lifted for any and all other claims a petitioner wished to bring. And that would be true no matter how old those other claims were, no matter how unrelated they were to the new law claim, and no matter how baseless the new law claim was in that case.”).

This case is a “multiple trigger date case.” *See id.* at 926. Petitioner has raised an *Atkins* claim,² (doc. 1

² On June 2, 2002, the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Supreme Court held:

¶¶ 27-41, at pp. 27-30 [stating as a ground for relief, “Mr. Clemons is mentally retarded and cannot be executed under the United States Supreme Court decision in *Atkins v. Virginia*”]), which the parties agree is timely pursuant to § 2244(d)(1)(C). (Doc. 28 at 25; doc. 30 at 22.) Therefore, respondents’ Motion to Dismiss, (doc. 25), will be denied as to petitioner’s *Atkins* claim.

As for Clemons’s remaining grounds for relief, respondents contend the claims are barred by § 2244(d)(1)(A)’s one-year statute of limitations, and such claims are not subject to either statutory or equitable tolling.

A. STATUTORY TOLLING

The issue for this court to decide is whether petitioner’s Rule 32 post-conviction petition was “properly filed” in the Alabama state court on December 27, 1999, or on January 28, 2000. Clemons’s

Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State’s power to take the life of a mentally retarded offender.

Id. (internal citation and quotations omitted). “[T]here is no question that the rule . . . announced by the Supreme Court in *Atkins* . . . is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable.” *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003).

conviction became final on January 25, 1999, the date the Supreme Court of the United States denied his petition for writ of certiorari. Pursuant to § 2244(d)(1), Clemons had one year to file his federal habeas petition; however, this one-year limitations period is tolled while “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending,” *id.* (d)(2). Therefore, if Clemons’s Rule 32 petition was “properly filed” on December 27, 1999, the time for filing his habeas petition in this court was tolled and his habeas petition is timely. However, if his Rule 32 petition was not “properly filed” until January 28, 2000, the time for filing his federal habeas petition expired and his petition, save his *Atkins* claim, was untimely filed.³ See *Sibley v. Culliver*, 377 F.3d 1196, 1204 (11th Cir. 2004)(“We note in closing that none of the documents Sibley attempted to file with the state courts after August 10, 2001 – the deadline for filing a federal habeas petition – could in any way toll that deadline because, once a deadline has expired, there is nothing left to toll. A state court filing after the federal habeas filing deadline does not revive it.” (citing *Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003))).

The undisputed facts show that Clemons, represented by counsel, filed his Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure [hereinafter “Rule 32 Petition”] without a filing fee or application to waive the filing fee and proceed in forma pauperis. Clemons has filed a copy of his Rule 32 Petition, which was stamped “received & filed” on December 27, 1999, by

³ The parties agree that, unless tolled, the deadline for filing his federal habeas petition expired no later than January 26, 2000. (See doc. 25 at 9; doc. 28 at 7).

the Court Clerk of the Circuit Court of Shelby County. (Doc. 28-1 at 2.) His Rule 32 Petition contained the following request for relief – “Provide 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.” (*Id.* at 32.)

On December 27, 1999, Rule 32.6(a) of the Alabama Rules of Criminal Procedures provided:

A proceeding under this rule is commenced by filing a petition, verified by the petitioner or petitioner's attorney, with the clerk of the court. A petition may be filed at any time after entry of judgment and sentence (subject to the provisions of Rule 32.2(c)).⁴ The petition should be filed by using or following the form accompanying this rule. If that form is not used or followed, the court shall return the petition to the petitioner to be amended to comply with the form. The petition shall be accompanied by two copies thereof. It *shall* also be accompanied by *the filing fee* prescribed by law or rule in civil cases in circuit court *unless the petitioner applies for and is given leave to prosecute the petition in forma pauperis*, in which event the fee shall be waived. If the

⁴ On December 27, 1999, Rule 32.2(c) provided that a two-year statute of limitations for filing a Rule 32 petition for post-conviction relief, measured from the date the certificate of judgment was issued by the Court of Criminal Appeals. Ala. R. Crim. P. 32.2(c)(2000). Therefore, Clemons’s Rule 32 Petition was “timely” filed under Alabama law whether it was deemed filed in January 2000, when he filed his application to proceed in forma pauperis, or December 1999, when he filed his Rule 32 Petition without the filing fee and without a request to waive the fee.

petitioner desires to prosecute the petition in forma pauperis, he shall file the In Forma Pauperis Declaration at the end of the form. In all such cases, the petition shall also be accompanied by a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined as to the amount of money or securities on deposit to the petitioner's credit in any account in the institution, which certificate may be considered by the court in acting upon his application for leave to proceed in forma pauperis. Upon receipt of the petition and the filing fee, or an order granting leave to the petitioner to proceed in forma pauperis, the clerk shall file the petition⁵ and promptly send a copy to the district attorney (or, in the case of a petition filed in the municipal court, to the municipal prosecutor).

Ala. R. Crim. P. 32.6(a)(2000)(footnotes and emphasis added).

The Circuit Court's Case Action Summary shows that Clemons's Rule 32 Petition was "filed" on January 28, 2000 – noting:

Motion to proceed In Forma Pauperis filed.
Declaration in support of [motion to] proceed In
Forma Pauperis filed.

⁵ The Alabama Court of Criminal Appeals held, "A Rule 32 petition is *deemed filed* for purposes of the limitations period the date the petition, accompanied by a request to proceed in forma pauperis, is submitted to the circuit court, not the date the circuit court grants the request to proceed in forma pauperis." *Hyde v. State*, 950 So. 2d 344, 353 (Ala. Crim. App. 2006).

Petition for relief from conviction or sentence
pursuant to Rule 32 of the Alabama Rules of
Criminal Procedure filed.
Grounds of petition filed.

(Doc. 28-3 at 2.)

On March 14, 2000, Clemons filed a Motion to Correct Clerical Error, asking the court “to correct a clerical error of the Clerk of the Circuit Court of Shelby County,” and “direct[] the Clerk to docket, as filed on December 27, 1999, Petitioner’s [Rule 32] Petition.” (Doc. 28-7 at 2.) The state court set Clemons’s motion for a hearing and specifically instructed counsel “to provide the Court with appropriate case law re: the issue of filing without the appropriate Motion to Proceed In Forma Pauperis and order thereon being filed with the original petition.” (Doc. 28-3 at 3.) On May 4, 2000, after a hearing on the matter, the state court denied Clemon’s Motion to Correct Clerical Error because “the Court finds the Defendant’s Rule 32 Petition was properly filed on January 28, 2000.” (*Id* at 5.)

The Circuit Court’s decision to deny Clemons’s Motion to Correct Clerical Error was affirmed on appeal. *Clemons v. State*, 55 So. 3d 314, 335 (Ala. Crim. App. 2003), 55 So. 3d 348 (Ala. 2007)(holding that Court of Criminal Appeals could not raise procedural bar of preclusion *sua sponte* absent extraordinary circumstances). In its decision, the Alabama Court of Criminal Appeals held:

In this case, the petition that counsel attempted to file on December 27, 1999, was not accompanied by a filing fee or a request to proceed *in forma pauperis*. Therefore, the

petition was not properly filed at that time, as contemplated by Rule 32.6(a), Ala. R. Crim. P. Thereafter, on January 28, 2000, a Rule 32 petition and a request to proceed *in forma pauperis* were presented to the circuit clerk, and that was the date the circuit clerk used as the filing date for the Rule 32 petition. The circuit court did not grant the request to proceed in forma pauperis until February 2, 2000. Therefore, the circuit court should have used February 2, 2000, as the filing date.⁶ However, as the appellant concedes, any error regarding the filing date is not important in this case because the appellant timely filed his petition. Under these circumstances, the circuit court properly denied the appellant's request to change the filing date to December 27, 1999.

Id.

Clemons contends that his Rule 32 Petition was filed on December 27, 1999, based on two rules:

First, when there is a discrepancy regarding a filing date, the petition is deemed filed when stamped as such by the court. *See Ex parte*

⁶ In *Hyde v. State*, the Court of Criminal Appeals held that the Rule 32 Petition, overruled the *Clemons's* court's finding that the Rule 32 Petition is deemed filed when the filing fee is waived by the grant of IFP status. *See Hyde v. State*, 950 So. 2d 344, 348, 353 and n.6 (Ala. Crim. App. 2006). It held that, "to the extent that *Clemons* holds that a Rule 32 petition is not deemed 'filed' until the date the circuit court grants the request to proceed in forma pauperis, it is hereby overruled;" however, it noted, "In those cases, as in *Clemons*, in which a petition is initially submitted without a request to proceed in forma pauperis, the correct filing date would be the date the request to proceed in forma pauperis is eventually submitted." *Id.* at 353 and n.6.

Nesbitt, 850 So. 2d 228, 229 (Ala. 2002). Second, if a petition initially contains some insufficiency, such as an incomplete filing fee or IFP request, Alabama law deems it properly filed when first submitted to the court so long as the defect is cured within a reasonable period of time. *See id.* at 231-32; *Garrett v. State*, 644 So. 2d 977, 980 (Ala. Crim. App. 1994), *overruled on other grounds by Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005); *Hyde v. Alabama*, 950 So. 2d 344, 353 (Ala. Crim. App. 2006). These two rules, separately and together, dictate that Mr. Clemons'[s] Rule 32 petition be deemed properly filed on December 27, 1999 because (1) the court stamped it filed and received on that date and (2) the deficiency contained in Mr. Clemons' initial IFP request was promptly cured.

(Doc. 28 at 10.)

The fact that the Circuit Court Clerk stamped Clemons's Rule 32 Petition "received and filed" does not indicate that the Rule 32 Petition was "properly filed" as that term has been interpreted by the Supreme Court. In *Artuz v. Bennett*, 531 U.S. 4 (2000), the Court stated, "If, for example, an application is erroneously accepted by the clerk of a court lacking jurisdiction, or ***is erroneously accepted without the requisite filing fee***, it will be *pending*, but not *properly filed*." *Artuz*, 531 U.S. at 9 (bold emphasis added; other emphasis in original). The court, therefore, finds that the "filed" stamp on the face of Clemons's Rule 32 Petition does not prove that his Rule 32 Petition was "properly filed" on December 27, 1999.

The undisputed facts show that Clemons's Rule 32 Petition was not accompanied by the required filing fee

or an application to waive the filing fee in conformity with Rule 32's requirements. However, Clemons contends that a request for relief included in his Rule 32 Petition constituted an application to proceed in forma pauperis, although not in the required "form." (Doc. 28 at 12.) As stated above, Clemons's Rule 32 Petition contained this request for relief – "Provide 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." (Doc. 28-1 at 32.) This request for relief makes no mention of a filing fee or ask for waiver of the same. The court has rejected this argument in a factually-similar case. In *Smith v. Campbell*, Case No. 5:05-CV-1547-LSC-JEO, a death habeas case, the petitioner Smith, like Clemons, had argued that his request to be provided "funds sufficient to present witnesses, experts and other evidence" contained in his Rule 32 Petition was the equivalent of an IFP motion, although not in the proper technical form. The court held:

Smith acknowledges that the Rule 32 application filed on September 27, 2001, was not accompanied by an In Forma Pauperis ("IFP") Declaration or the filing fee. (Doc. 17 at 5-6). He also does not deny that he never filed a Declaration or statement of his prisoner account, and did not pay the filing fee until February 6, 2002. (*Id.*). Instead, he states that "Alabama law does [not] require a motion to proceed in forma pauperis to be in a prescribed form." (*Id.* at 6 n. 5 (citing ALA. R.CRIM. P. 32.6(a)). He further argues,

In the prayer for relief at the end of Mr. Smith's state habeas petition, Mr. Smith stated:

“Petitioner Ronald Bert Smith, Jr. respectfully asks this Honorable court to grant him the following relief. . . (b) provide petitioner, who is indigent, with funds sufficient to present witnesses, experts, and other evidence in support of the allegations contained in this petition.” (E.H. CR. 157). While Mr. Smith’s request to proceed in forma pauperis was not in the proper form, Alabama courts have no authority to provide funds to a petitioner absent a petitioner being deemed in forma pauperis. Accordingly, it is implied, that Mr. Smith, in his prayer for relief, was requesting to proceed in forma pauperis.

(Id.).

Contrary to Smith’s assertion, the foregoing language in his prayer for relief does not imply that he be granted IFP status so that the filing fee could be waived. The filing fee is not even mentioned nor did Smith file a certified copy of his prison account funds as proof of indigence. Smith also does not provide any case law illustrating that Alabama has no authority to “provide funds” in the absence of an IFP declaration. In order to properly file the petition, the mandatory language of Rule 32.6(a) required Smith [to file] a separate declaration form and proof of financial indigence by producing a certified copy of his prison account. Smith clearly did neither.

For the foregoing reasons, this court rejects Smith’s argument that he properly filed his Rule 32 application in accordance with State form and filing requirements. The September

27, 2001, Rule 32 application was not properly filed, and therefore did not trigger the tolling requirements of 28 U.S.C. §2244(d)(2).

Smith v. Campbell, Case No. 5:05-CV-1547-LSC-JEO, doc. 32 at 19-20 (N.D. Ala. Jan. 15, 2009).

The Eleventh Circuit affirmed and held:

Although the February 6, 2002 filing was timely under Alabama's two year statute of limitations, it was not within the one year statute of limitations required by AEDPA. Relying on statutory tolling, Smith[, the petitioner], argues that we should consider the Rule 32 Petition as having been “properly filed” on September 27, 2001, when it was originally submitted to the Clerk, albeit without the filing fee or a motion to proceed *in forma pauperis*. However, Alabama law precludes such a construction of AEDPA's requirement for a “properly filed” state petition. *See Artuz v. Bennett*, 531 U.S. 4, 8, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000) (“[A]n application is ‘*properly filed*’ when its delivery and acceptance are in compliance with the applicable laws and rules governing filings.”). Alabama law requires that a Rule 32 petition “be accompanied by the filing fee prescribed by law or rule in civil cases in the circuit court unless the petitioner applies for and is given leave to prosecute the petition *in forma pauperis*.” Ala. R.Crim. P. 32.6(a). Alabama courts have unequivocally required that one of these formalities, either the payment of the filing fee or the filing of an *in forma pauperis* motion, be completed in order for a Rule 32 petition to be considered properly filed.

See, e.g., Ex Parte Carter, 807 So. 2d 534, 536-37 (Ala. 2001)(holding that where neither a filing fee nor a motion to proceed *in forma pauperis* were filed with a Rule 32 petition, the Alabama circuit court lacked jurisdiction to consider the petition precisely because the petitioner had omitted them); *Hyde v. Alabama*, 950 So. 2d 344, 353 (Ala. Crim. App. 2006)(“A Rule 32 petition is deemed filed for purposes of the limitations period the date the petition, accompanied by a request to proceed in forma pauperis, is submitted to the circuit court, not the date the circuit court grants the request to proceed in forma pauperis.”); *Clemons v. State*, 55 So. 3d 314, 333-37 (Ala. Crim. App. 2003)(“[I]n this case, the petition that counsel attempted to file on December 27, 1999, was not accompanied by a filing fee or a request to proceed in forma pauperis. Therefore, the petition was not properly filed at that time, as contemplated by Rule 32.6(a), Ala. R.Crim. Pro.”), *rev’d on other grounds, Ex parte Clemons*, 55 So. 3d 348 (Ala.2007), *overruled in part by Hyde*, 950 So. 2d at 353. [Footnote] Accordingly, we find no reversible error in the district court's determination that Smith's federal habeas petition was time barred because it was not filed within AEDPA's one-year statute of limitations, which was not statutorily tolled because Smith's Rule 32 Petition had not been “properly filed” during AEDPA's one-year limitation period. *See* 28 U.S.C. § 2244(d)(2).

[Footnote:] Smith's reliance on *Hyde* as support for his position is unpersuasive. In *Hyde*, the state court was willing to treat the date of the

original submission of the Rule 32 petition as the properly filed date because the petitioner *had* fully complied with the state court filing fee rules by filing a motion to proceed *in forma pauperis* and it was the court that caused the delay by not ruling on the motion to proceed *in forma pauperis* for some time. 950 So. 2d at 353. *Hyde's* rationale is simply inapplicable here, where *neither* the filing fee nor motion for *in forma pauperis* was filed. Nor do we find *Garrett v. State*, 644 So. 2d 977 (Ala.Crim.App.1994), *overruled by Ex parte Jenkins*, 972 So. 2d 159 (Ala.2005), applicable to support Smith's argument that his filing date should relate back to the date that his petition was originally sent to the Clerk. *Garrett* addressed the requisite form for a Rule 32 petition. It is not applicable to the circumstances here,⁷ especially in light of the Alabama law explicitly addressing the failure involved in this case. *Smith v. Commissioner, Alabama Dept. of Corrections*, 703 F.3d 1266, 1270-71 & n.4 (11th Cir. 2012) Clemons contends that his situation “is readily distinguishable” from Smith because *Smith* “addresses only a petition that did not contain any sort of request for IFP status.” (Doc. 28 at 13.) However, Smith’s circumstances are indistinguishable from Clemons’s circumstances.

Based on binding Supreme Court and Eleventh Circuit caselaw, the court finds that Clemons’s Rule 32 Petition was not properly filed until after the expiration of the deadline for filing his § 2254 habeas

⁷ Those “circumstances” included a request for relief, similar to that included in Clemons’s Rule 32 Petition, and failure to pay the filing fee or file an IFP petition. *See Smith v. Campbell*, No. 5:05-cv-01547-LSC-JEO, doc. 32 at 19-20.

petition. Therefore, Clemons is not entitled to any period of statutory tolling pursuant to § 2244(d)(2).

In the alternative, the court finds that the Rule 32 Petition was not “properly filed” based on the state-courts’ decisions denying his motion to have his Rule 32 Petition deemed filed on December 27, 1999. *See Carroll v. Price*, Case No. 5:14-CV-0065-JHH-TMP, 2015 WL 225468, *4 (N.D. Ala. Jan. 16, 2015)(“For this court’s purposes, therefore, these [state-court orders finding Rule 32 Petition not timely filed because no filing fee was paid with petition] mean that petitioner never ‘properly filed’ the Rule 32 petition and it had no statutory tolling effect.”). This finding is entitled to deference. *Allen v. Siebert*, 552 U.S. 3, 7 (2007)(citing, *inter alia*, *Pace v. DiGuglielmo*, 544 U.S. 408, 414-17 (2005); *see also Cross v. McDonough*, No. 4:06cv460-RH/WCS, 2008 WL 817088, *6 (N.D. Fla. March 25, 2008).

B. EQUITABLE TOLLING

“[Section] 2244(d) is subject to equitable tolling in appropriate cases.” *Holland v. Florida*, 560 U.S. 631, 645 (2010). However, “a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.” *Id.* at 649 (quoting *Pace*, 544 U.S. at 418)(internal quotations omitted). “Because a lawyer is the agent of his client, a federal habeas petitioner – who does not have a constitutional right to counsel – is ordinarily bound by his attorney’s errors . . .” *Cadet v. Fla. Dep’t of Corr.*, 742 F.3d 473, 477-78 (11th Cir.2014). Therefore, the Eleventh Circuit has held “that attorney negligence, however gross or egregious, does not qualify as an ‘extraordinary

circumstance’ for purposes of equitable tolling; abandonment of the attorney-client relationship . . . is required.” *Id.* at 481.

But for counsel’s failure to pay the filing fee or submit an application for waiver of the filing fee Clemons’s Rule 32 Petition would have been filed on December 27, 1999, and would have tolled the time for filing his federal habeas petition. However, counsel did not pay the filing fee or submit an in forma pauperis application to waive the fee until January 28, 2000, after the expiration of the statute of limitations for filing the federal petition. Counsel’s failure to pay the filing fee or submit an application for waiver of the fee did not constitute an abandonment; rather, their error appears to have been “garden variety” negligence.⁸

⁸ Counsel for Clemons has submitted an affidavit, in which he states that an employee in the Shelby County Circuit Clerk’s Office “informed [him] that a check for a filing fee was not necessary to file the [Rule 32] Petition.” (Doc. 28-12 ¶ 4.) Also, he stated:

If the Shelby County Clerk’s office had indicated that a filing fee was necessary, I would have sent a check . . . with the Rule 32 Petition on December 27, 1999. If the Shelby County Clerk’s office had indicated on December 27, 1999, or anytime thereafter, that a filing fee was necessary, I would have had a check sent immediately to the courthouse. If I had not seen the file-stamped Rule 32 Petition marked “received and filed” on January 3, 2000, I would have inquired and then sent a check. Because there was no indication that a check might be required until after the In Forma Pauperis Petition had been filed, no check was ever issued from my law firm for the Rule 32 Petition in this matter.

(*Id.* ¶ 6.) Counsel contends, “As a result of my conversation with the Clerk’s office, it was my understanding that no fee was required to accompany the Rule 32 Petition.” (*Id.* ¶ 7.)

Therefore, counsel's error is not an extraordinary circumstance sufficient to warrant equitable tolling of the time for filing his federal habeas petition.

CONCLUSION

For the foregoing reasons, the court is of the opinion that respondents' Motion to Dismiss Eugene Clemons's Untimely-filed Petition for Writ of Habeas Corpus, (doc. 25), will be granted in part and denied in part. The court finds Ground I of Clemons's § 2254 Habeas Petition, alleging "Mr. Clemons is mentally retarded and cannot be executed under the United States Supreme Court decision in *Atkins v. Virginia*," (doc. 1, subsection C.I., ¶¶ 27-41, at pp. 27-30), is timely filed and, therefore, respondents' Motion to Dismiss will be denied as to this ground. However, all other claims set forth in the habeas petition, (*see* doc. 1, subsections C.II.-XXXII), are untimely and the Petition will be denied as to these grounds. An Order

The court does not question the reasons given by counsel for his failure to pay the filing fee at the time he filed the Rule 32 Petition. Although he may have been misled to assume that no filing fee or an application to waive the filing fee was necessary at the time of filing, his assumption that the Rule 32 Petition would be "properly filed" on December 27, 1999, was not reasonable, even considering the statement and subsequent non-action of the Shelby County Clerk's Office. Rule 32.6 plainly stated that the filing fee or waiver of the filing fee was required at the time of filing. Moreover, nothing in the words or actions of the Clerk's Office constitute an extraordinary circumstance that prevented counsel from paying the filing fee or submitting an application to waive the fee on December 27, 1999, or filing his federal habeas petition within the time allowed. *See Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.")

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granting in part and denying in part respondents' Motion to Dismiss Eugene Clemons's Untimely-filed Petition for Writ of Habeas Corpus, (doc. 25), will be entered contemporaneously with this Memorandum Opinion.

DONE this 17th day of March, 2015.

s/ Sharon Lovelace Blackburn
SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF ALABAMA
SOUTHERN DIVISION

EUGENE MILTON CLEMONS, II,

Petitioner,

v.

WILLIAM G. SHARP, JR., Interim Commissioner,
Alabama Department of Corrections; WALTER
MYERS, Warden, Holman Correctional Facility

Respondents.

No. 2:10-CV-2218-SLB

Order

ARGUED OCT. 25, 2011—DECIDED FEB. 13, 2012

Before SHARON L. BLACKBURN, *District Judge*

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** that respondents' Motion to Dismiss Eugene Clemons's Untimely-filed Petition for Writ of Habeas Corpus, (doc. 25), is **GRANTED IN PART** and **DENIED IN PART**. The Motion to Dismiss, (doc. 25), is **DENIED** as to Clemons's claim based on

Ground I of his § 2254 Habeas Petition, alleging “Mr. Clemons is mentally retarded and cannot be executed under the United States Supreme Court decision in *Atkins v. Virginia*,” (subsection C.I., doc. 1, ¶¶ 27-41, at pp. 27-30). The Motion to Dismiss, (doc. 25), is **GRANTED** as to all other claims; these claims, based on Grounds II-XXXII of his Petition, (subsections C.II.-XXXII, doc. 1, ¶¶ 42-222, at 30-93 and doc. ¶¶ 222-410, at pp. 1-67), are **DENIED** as time barred.

DONE this 17th day of March, 2015.

s/ Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EUGENE MILTON CLEMONS, II,
Petitioner,

v.

KIM T. THOMAS, Commissioner, et al.,
Respondents.

No. 2:10-cv-02218-LSC
MARCH 28, 2016

Before L. Scott Coogler, *United States District Judge*

MEMORANDUM OF OPINION

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Petitioner Eugene Milton Clemons, II (“Clemons”), a death row inmate at Holman Correctional Facility in Atmore, Alabama. The only claim that remains pending before this Court is Clemons’s claim that he is intellectually disabled and, therefore, ineligible for the death penalty, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2422, 2252 (2002) (holding that under the Eighth

Amendment “death is not a suitable punishment for a mentally retarded criminal”) (hereinafter, Clemons’s “*Atkins* claim”). After conducting a four-day evidentiary hearing, an Alabama circuit court denied Clemons’s *Atkins* claim on the merits, and the Alabama appellate courts affirmed. This Court’s review is thus circumscribed by the parameters of 28 U.S.C. § 2254(d) (providing that a federal court may only grant relief if the state court’s adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”). Upon thorough consideration of the entire record, the Court finds that Clemons’s petition for habeas relief is due to be denied.

I. FACTS OF THE CRIME

In its opinion on direct appeal affirming Clemons’s conviction and death sentence, the Alabama Court of Criminal Appeals (hereinafter, the “ACCA”), stated the facts of the crime as follows:

The state’s evidence tended to show that on May 28, 1992, Douglas Althouse, a special agent with the Drug Enforcement Administration (D.E.A.), was shot and killed while [Clemons] and his codefendant stole the automobile in which he was a passenger. Dr. Joseph Embry, state medical examiner, testified that Althouse was shot twice and that the

fatal bullet entered the left side of his chest and passed through his heart.

Naylor Braswell of the Jefferson County Sheriff's Department testified that the victim and he were sharing an apartment at the time of the murder. Braswell testified that on May 28 at approximately 10:00 p.m., he and Althouse left the apartment in Braswell's black Camaro automobile, to meet a narcotics officer. Braswell pulled into a service station/convenience store to borrow the telephone book to make a call on his cellular telephone. While he was in the store he noticed that a stocky black male had gotten into his car and was sitting behind the steering wheel, armed with a revolver. At trial, Braswell testified that [Clemons] looked like the man he saw in his car. He heard two muffled shots, saw Althouse dive out of the car, and saw Althouse shooting at the car. He ran out to Althouse as he collapsed from his injuries. Braswell testified that a bulletproof vest and a shotgun were in the trunk of the car when it was stolen.

Kenny Reed testified that he was at Herman Shannon's house on May 28 when Dedrick Smith stopped by and asked Reed to pick up [Clemons] to go get "a car." He testified that they picked up [Clemons] and drove to an area near a service station where [Clemons] got out of the car. Reed stated that he heard several

shots, that there was a break in the shooting, followed by several more shots. [Clemons] then drove off in a black Camaro automobile and later went to Shannon's house. When Reed arrived at Shannon's house, [Clemons] said that no one better "open their mouths" because he had just killed a D.E.A. man. He further testified that the week before the murder, [Clemons] had told him that his car needed a new motor.

Early the next morning following the murder, the stolen Camaro was discovered near Shannon's house. The shotgun in the trunk of the car was recovered on the side of the road near [Clemons's] house.

Clemons was arrested by Federal Bureau of Investigation (F.B.I.) agents in Cleveland, Ohio. Michael Clemons, [Clemons's] uncle, who lived in Cleveland, testified that [Clemons's] sister telephoned him and told him that [Clemons] would be coming to his house. Michael Clemons testified that he met with [Clemons's] father and they subsequently met and talked with [Clemons]. Michael Clemons further stated that [Clemons] said that he had to shoot a police officer because the officer was trying to kill him and that he had to steal the car to get away.

Clemons v. State, 720 So. 2d 961, 965-66 (Ala. Crim. App. 1996).

II. PROCEDURAL HISTORY

Clemons was first tried and convicted in federal court of murdering a federal agent who was engaged in the performance of his duties, in violation of 18 U.S.C. §§ 1111 and 1114, and of carrying and using a firearm in the commission of a crime of violence, in violation of 18 U.S.C. § 924(c). *See generally United States v. Clemons*, 32 F.3d 1504 (11th Cir. 1994). Clemons was then indicted by the Shelby County, Alabama Grand Jury on two counts of capital murder. Count One of the indictment charged Clemons with the capital offense of murdering George Douglas Althouse, a special agent of the Drug Enforcement Agency (“DEA”), while he was on duty, in violation of section 13A-5-40(a)(5) of the Code of Alabama. Count Two of the indictment charged Clemons with the capital offense of murdering DEA Special Agent Althouse during a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama. Clemons pled not guilty and not guilty by reason of mental disease and defect to all charges. Before Clemons’s trial began, the Shelby County Circuit Court, on motion of the State, dismissed Count One of the indictment. The Honorable D. A1 Crowson presided over Clemons’s trial.

On September 25, 1994, a jury found Clemons guilty of the capital murder of DEA Special Agent Althouse. That same day, the jurors recommended by a vote of twelve to zero that Clemons be sentenced to death. On October 11, 1994, the court followed the jury’s recommendation and sentenced Clemons to death.

On direct appeal, the ACCA and the Alabama Supreme Court affirmed Clemons’s conviction and death sentence. *Clemons v. State*, 720 So. 2d 961 (Ala. Crim. App. 1996), *aff’d*, *Ex parte Clemons*, 720 So. 2d

985 (Ala. 1998). The United States Supreme Court denied Clemons's petition for writ of certiorari. *Clemons v. Alabama*, 525 U.S. 1124, 119 S. Ct. 907 (1999) (mem.).

Clemons, through counsel, submitted a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, to the state circuit court on December 27, 1999, but he did not submit a filing fee or a request to proceed *in forma pauperis* with his petition. *Clemons v. State*, 55 So. 3d 314, 333 (Ala. Crim. App. 2003). On January 28, 2000, Clemons, again through counsel, filed a Rule 32 petition along with a request to proceed *in forma pauperis* in the circuit court, and the state courts found that he properly filed his post-conviction petition on that date. *See id.* After allowing Clemons to twice amend his Rule 32 petition on or about October 17, 2000, and January 31, 2000, the court dismissed some of the claims. The court then held an evidentiary hearing on other claims (hereinafter “the first Rule 32 hearing”) [R2. 119-730, 6157-6590],¹ but dismissed those thereafter.

¹ Respondents manually filed the indexed state court record consisting of 25 volumes. (Doc. 42.) Respondents cited to the record in the following manner: the clerk's record on direct appeal and the reporter's transcript on direct appeal appeared, respectively, as “C.R.____” and “R.____.” references to the clerk's record on Rule 32 appeal and the transcript of the first Rule 32 evidentiary hearing appeared, respectively, as “C.R2. ____.” and “R2.____.” references to the clerk's record on appeal of the Rule 32 remand proceedings appeared as “C.R3.____.” and references to the clerk's record on appeal of the denial of Clemons's successive Rule 32 petition appeared as “C.R4.____.” Clemons Bates-stamped the record submitted by Respondents and re-filed those documents, consisting of volumes 1-25, corresponding to Bates-stamped numbered pages 00001 to 04502. (Doc. 56.) Clemons also supplemented Respondents' submission to include additional items from the state court record that Respondents had not included, consisting of volumes 26-44, corresponding to Bates-

[C.R21104-1156.] Clemons appealed.

While Clemons's appeal of the denial of his Rule 32 petition to the ACCA was pending, the United States Supreme Court released its decision in *Atkins*. In his Rule 32 petitions, Clemons had argued that his trial attorneys rendered ineffective assistance because they did not develop and present any mitigating evidence concerning his limited mental capacity. In his brief to the ACCA, he reasserted his ineffective-assistance-of-counsel claims. In addition, he argued for the first time that he is intellectually disabled and that, in light of *Atkins*, his sentence of death was unauthorized as a matter of law. On appeal, the ACCA found that *Atkins* applied retroactively to cases on collateral review, and remanded Clemons's case to the circuit court with instructions to conduct an evidentiary hearing on Clemons's *Atkins* claim and his claim that his attorneys rendered ineffective assistance by not developing and presenting evidence concerning his limited mental capacity. *Clemons*, 55 So. 3d at 322. Pursuant to the ACCA's remand directive, the state circuit court held a four-day evidentiary hearing on those claims on June 15-18, 2004 (hereinafter "the *Atkins* evidentiary hearing").

At the hearing, the court heard from Dr. Charles Golden, a neuropsychologist, and Dr. Joseph Wu, a psychiatrist, each retained by Clemons, and from Dr. Glen King, a clinical psychologist, and Dr. Helen Mayberg, a neurologist, each retained by the State. At

stamped numbered pages 04503 to 08340. (*See id.*) Clemons cited to the record as "R" with the corresponding page number. Most citations to the state court record in this opinion will conform to either Respondents' or Clemons's citation formats. Any citations not so labeled will indicate the PDF volume number and corresponding page number.

the conclusion of the hearing the circuit court indicated that it was inclined to find that Clemons was not intellectually disabled, but it ordered and received post-hearing briefs and proposed orders from both Clemons and the State. The circuit court issued an order denying relief on Clemons's claims on October 28, 2004. [C.R3 1-90.] The order issued by the circuit court adopted nearly verbatim the 90-page proposed order the State had submitted.

The ACCA, on return from remand, affirmed the circuit court's denial of relief on Clemons's second amended Rule 32 petition, *Clemons*, 55 So. 3d at 348, and later overruled Clemons's application for rehearing. However, the Alabama Supreme Court granted Clemons's certiorari petition and remanded his case to the ACCA with instructions to address the merits of his ineffective assistance of counsel claims, which it opined that the lower court erroneously found were procedurally barred from review. *Ex parte Clemons*, 55 So. 3d 348, 356 (Ala. 2007). In an unpublished memorandum, the ACCA addressed those claims and affirmed the circuit court's denial of Clemons's second amended Rule 32 petition. *Clemons v. State*, CR-01-1355, slip op. (Ala. Crim. App. Nov. 2, 2007). After that court overruled his application for rehearing, Clemons again petitioned the Alabama Supreme Court for certiorari review. That time, Alabama's highest court denied his petition for writ of certiorari.

On August 16, 2010, Clemons, through counsel, simultaneously filed a successive Rule 32 petition in Alabama circuit court and a petition for writ of habeas corpus in this Court. (Doc. 1.) Clemons then moved this Court to stay and hold in abeyance his federal habeas petition so that he could return to state court to litigate

his successive petition. (Doc. 7.) On November 19, 2010, Magistrate Judge Robert R. Armstrong granted Clemons's motion to stay and hold in abeyance his habeas petition and ordered the parties to file joint status reports at sixty-day intervals. The Alabama circuit court summarily denied Clemons's successive Rule 32 petition on January 18, 2011. [C.R4 95-97.] The ACCA affirmed the circuit court's judgment. *Clemons v. State*, 123 So. 3d 1 (Ala. Crim. App. 2012). The Alabama Supreme Court denied Clemons's petition for writ of certiorari on March 22, 2013. The United States Supreme Court denied his cert petition on October 7, 2013. *Clemons v. Alabama*, 134 S. Ct. 196 (2013) (mem.).

Respondents subsequently moved this Court to enter an order dismissing all of the claims in Clemons's petition for writ of habeas corpus, with the exception of his *Atkins* claim, because they were time-barred. (Doc. 25.) On March 17, 2015, United States District Judge Sharon L. Blackburn issued a Memorandum Opinion in which she held that all of the claims in Clemons's habeas petition were time-barred, with the exception of his *Atkins* claim. (Doc. 33.) On that same day, the Court entered an Order denying all of the claims in his petition, again with the exception of his *Atkins* claim, on the ground that they were time-barred. (Doc. 34.) The Court denied Clemons's Motion for Reconsideration. (Doc. 40.) This action was reassigned to the undersigned district judge on October 16, 2015. (Doc. 48.)

The only claim that remains pending is the *Atkins* claim, which Clemons had presented as Claim I of his federal habeas petition. Respondents filed an answer and brief regarding that claim (docs. 44 & 45), and Clemons filed his reply brief and a motion for an

evidentiary hearing (docs. 53 & 54). The Court then ordered and received supplemental briefing on various issues. (Docs. 58 -61.) Accordingly, what remains of this federal habeas petition is ripe for adjudication.

III. STANDARDS OF AEDPA REVIEW

Because Clemons’s petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the provisions of 28 U.S.C. § 2254 apply to this claim. The “AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights.” *Burt v. Titlow*, 134 S. Ct. 10,15 (2013). The AEDPA thus “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Id.* at 16. Indeed, the purpose of AEDPA’s amendments to § 2254 “is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction.” *Greene v. Fisher*, 132 S. Ct. 38, 43 (2011) (quotation marks omitted). Accordingly, federal review of final state court decisions under § 2254 is “greatly circumscribed” and “highly deferential.” *Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (quotation marks omitted). Indeed, the fact that the AEDPA mandates highly deferential review of state court decisions cannot be overstated, as explained by the Eleventh Circuit:

In *Harrington v. Richter*, — U.S. —, 131 S. Ct. 770, 178 L.Ed.2d 624 (2011), for example, the Supreme Court stated: As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims

already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. ... As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. *Id.* at 786-87 (citations omitted) (internal quotation marks omitted).

Cave v. Sec'y for Dep't of Corn, 638 F.3d 739, 744 (11th Cir. 2011).

Thus, as a general rule, a § 2254 state petitioner may not obtain federal habeas relief “with respect to any claim that was adjudicated on the merits” by a state court. 28 U.S.C. § 2254(d). However, a petitioner may avoid that general rule if one of two conditions exist: either (1) that the state court's adjudication “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,” *id.* § 2254(d)(1); or (2) that the state court's adjudication “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,” *id.* § 2254(d)(2). These conditions are set forth in the disjunctive, leaving federal courts alternatives for the exercise of their power to remedy

constitutionally infirm state court judgments. *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (granting relief after finding petitioner satisfied (d)(2) without mentioning (d)(1)). The petitioner carries the burden of proof under § 2254(d)(1) & (2). *Cullen v. Pinholster*, 563 U.S. 170,180-81,131 S. Ct. 1388,1398 (2011).

The Court’s § 2254(d)(1) analysis is based on the state court record. *Id.* at 181-82, 131 S. Ct. at 1398-99. Pursuant to § 2254(d)(1), the phrase “clearly established Federal law” means “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of the relevant state-court decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166,1172 (2003) (quotation marks omitted). However, the “contrary to” and “unreasonable application” clauses of § 2254(d)(1) must be given “independent meaning.” *Williams v. Taylor*, 529 U.S. 362, 404,120 S. Ct. 1495,1518 (2000).

A state court determination is “contrary to” Supreme Court precedent, and merits habeas relief, in at least two circumstances:

First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Id. A state court decision is “contrary to” Supreme

Court precedent if it is “substantially different from the relevant precedent of [the Supreme] Court,” for example, holding a petitioner to a state law pleading or evidentiary standard that exceeds the requirements of the controlling federal law satisfies 2254(d)(1)’s “contrary to” clause. *Id.* at 405-06, 120 S. Ct. at 1519.

A state court decision involves an “unreasonable application” of clearly established Supreme Court precedent, and merits habeas relief, also in at least two circumstances:

First, ... if the state court identifies the correct governing legal rule from this Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case. Second, ... if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407, 120 S. Ct. at 1520. For purposes of the “unreasonable application” analysis, the federal court must determine whether “the state court’s application of clearly established federal law was objectively unreasonable.” *Id.* at 409-10, 120 S. Ct. at 1521.

As to § 2254(d)(2), “a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). This Court may not characterize state-court factual determinations as unreasonable “merely because [it] would have reached a different conclusion in the first instance.” *Wood v.*

Allen, 558 U.S. 290, 301, 130 S. Ct. 841, 849 (2010). Instead, § 2254(d)(2) requires that the reviewing court accord the state trial court substantial deference. However, “[e]ven 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*, 537 U.S. at 340, 123 S. Ct. at 1041.

Respondents invoke 28 U.S.C. § 2254(e)(1) to contend that the Eleventh Circuit applies that subsection to the exclusion of § 2254(d)(2) and presumes state court factual determinations to be correct unless rebutted by clear and convincing evidence. Section 2254(e)(1) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

However, as many courts have noted, subsections (d)(2) and (e)(1) appear to contradict one another. Subsection (d)(2) permits a federal court to grant habeas corpus relief if the state court’s determination of the facts is unreasonable “in light of the evidence presented in the state court proceeding.” By contrast, subsection (e)(1) appears to attach a presumption of correctness to *any* “determination of a factual issue made by a State court,” a presumption that can be overcome only by “clear and convincing evidence.” The distinction matters because it determines whether a

petitioner such as Clemons must show that the state court's determination of the facts was merely unreasonable or "clearly and convincingly" unreasonable. In other words, this Court's review of the state court's factual determination is more deferential if it applies (e)(1) than (d)(2).

The Eleventh Circuit has recognized that courts have "struggled to interpret how these abutting standards interact in the context of fact-based challenges to state court adjudications." *Cave*, 638 F.3d at 745. Indeed, in 2010, the Supreme Court granted certiorari to "address the relationship between §§ 2254(d)(2) and (e)(1)" and "resolve the question of how § 2254(d)(2) and (e)(1) fit together." *Wood*, 558 U.S. at 293, 300, 130 S. Ct. at 845, 849. However, after finding that the petitioner in that case could not satisfy the more liberal standard of subsection (d)(2), the Court found that there was no need to review the state determination under § 2254(e)(1). As in *Wood*, in *Cave*, the Eleventh Circuit similarly found there was no need to define the respective purviews of (d)(2) and (e)(1) because "the state court's decisions on Cave's claims were not based on unreasonable factual determinations in light of the evidence before it under any standard." 638 F.3d at 747. Because the Court finds the same is true here, it need not decide in this case whether subsection (d)(2) or (e)(1) applies.

**IV. ATKINS AND ALABAMA'S APPLICATION
OF IT AT THE TIME OF CLEMONS'S
STATE POST-CONVICTION
PROCEEDINGS IN 2004**

At the time of Clemons's trial, the Supreme Court's precedent permitted the imposition of the death penalty

on “mentally retarded”² persons. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989). However, in 2002, the United States Supreme Court held in *Atkins* that the execution of mentally retarded individuals violates the Eighth Amendment of the Constitution. 536 U.S. at 321, 122 S. Ct. at 2252. The Court created a categorical exemption from the death penalty for mentally retarded persons based on its finding that defendants with mental retardation are less culpable because they have diminished capacities to understand and process information, to communicate, to learn from mistakes and experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. 536 U.S. at 318-20, 122 S. Ct. at 2250-52.³

² The clinical field now primarily uses the term “intellectual disability” rather than “mental retardation.” However, because state and federal authorities at the time of Clemons’s *Atkins* hearing, and the parties and experts themselves, used the term “mental retardation,” the Court will do so throughout this opinion.

³ In reaching that conclusion, the *Atkins* Court first noted that a punishment is prohibited by the Eighth Amendment if it is “excessive,” as indicated by a punishment that is disproportionate to the offense. *Id.* at 311, 122 S. Ct. at 2246. Further, it stated that an excessiveness claim is judged by “evolving standards of decency that mark the progress of a maturing society.” *Id.* at 312, 122 S. Ct. at 2247 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01, 78 S. Ct. 590, 598 (1958)). To determine the “evolving standards of decency,” the *Atkins* Court looked to legislation enacted by state legislatures which it stated was the “clearest and most reliable evidence of contemporary values.” *Id.* The *Atkins* Court noted that, since its decision in *Penry*, 492 U.S. 302, 109 S. Ct. 2934, which rejected a challenge to the constitutionality of a death sentence imposed upon a mentally retarded criminal, fifteen states had passed statutes prohibiting the execution of mentally retarded capital murderers. *Id.* at 314-15, 122 S. Ct. 2248- 49. The Court then noted, however, that it was not the number of states enacting such legislation, “but the consistency

The Supreme Court pointed out that, “[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded.” *Id.* at 317, 122 S. Ct. at 2250. The Court expressly left “to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.” *Id.* (quotation marks omitted and alterations adopted).

Despite charging the States with implementing *Atkins*’ mandate that the execution of mentally retarded persons is unconstitutional, the Court did observe in a footnote that even though the statutory definitions of mental retardation adopted by Congress and the twenty states that already prohibited the execution of such persons were not identical, all of them “generally conform[ed] to the clinical definitions” promulgated by the American Association on Mental Retardation (“AAMR”) and the American Psychiatric Association. *Id.* at 317 n.22, 122 S. Ct. at 2250 n.22. The Court embraced two clinical definitions of mental retardation—one provided by the AAMR in its Mental Retardation: Definition, Classification, and Systems of Supports (9th ed. 1992) (“AAMR Manual 1992”) ⁴ and one by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders, 4th edition (“DSM-IV-TR”). *Id.* at 308 n.3, 122 S. Ct. at 2245 n.3. Both the AAMR Manual 1992 and DSM-IV-TR define mental retardation as (1) significantly subaverage intellectual functioning (2) accompanied by significant limitations in adaptive functioning and (3)

of the direction of change” that was “powerful evidence.” *Id.* at 315-16, 122 S. Ct. at 2249.

⁴ This organization is now called the American Association on Intellectual and Developmental Disabilities.

originating before the age of 18. The Supreme Court explained these three-part definitions in *Atkins*, stating:

The American Association on Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” Mental Retardation: Definition, Classification, and Systems of Supports (9th ed. 1992).

The American Psychiatric Association’s definition is similar:

“The essential feature of Mental Retardation is 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: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure,

health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.” Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). “Mild” mental retardation is typically used to describe people with an IQ level of 50- 55 to approximately 70.

Id. (emphasis in original).

The *Atkins* Court also explained that the Wechsler Adult Intelligence Scales test (“WAIS-III”) is “the standard instrument in the United States for assessing intellectual functioning,” which is the first of the three diagnostic criteria central to both definitions of mental retardation quoted above. *Id.* at 309 n.5, 122 S. Ct. at 2245 n.5 (citing AAMR Manual 1992). The Court explained:

The WAIS-III is scored by adding together the number of points earned on different subtests, and using a mathematical formula to convert this raw score into a scaled score. The test measures an intelligence range from 45 to 155. The mean score of the test is 100, which means that a person receiving a score of 100 is considered to have an average level of cognitive functioning. A. Kaufman & E. Lichtenberger, *Essentials of WAISIII Assessment* 60 (1999). It is estimated that between 1 and 3 percent

of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000).

Id. at 309 n.5, 122 S. Ct. at 2245 n.5.

Thus, although the Supreme Court instructed the States to develop standards for identifying mentally retarded defendants, it was also instructive regarding the nature of the factual inquiry to be taken, pointing the States in the direction of clinical definitions of mental retardation that have three constituent parts: /.&, 1) significantly substandard intellectual functioning as measured by such normative standards as the WAIS-III, which is "the standard instrument in the United States for assessing intellectual functioning," and which, when it results in an IQ score of "between 70 and 75 or lower," typically means that the subject has significantly subaverage intellectual functioning; accompanied by 2) significant limitations in adaptive skills in at least two areas such as communication, self-care, and self-direction; and, 3) both deficiencies must be manifest before the age of eighteen years. *Id.* at 308-09 n.3 & n.5, 122 S. Ct. at 2245 n.3 & n.5.

One of the first opportunities the Alabama courts had to apply *Atkins* was in the case of defendant Roy Edward Perkins, which was pending on certiorari in the Supreme Court at the time *Atkins* was decided. Because the case raised a mental retardation claim, the high court remanded the case to the Alabama Supreme

Court for reconsideration in light of *Atkins*. On remand, in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), the Alabama Supreme Court noted that the state legislature had not adopted a procedure for determining whether a capital defendant is mentally retarded. *Id.* at 455. In the absence of legislative guidance, the court referenced both the clinical definitions of mental retardation considered by the Supreme Court in *Atkins*, *i.e.*, those promulgated by the AAMR and the American Psychiatric Association, *supra*, as well as the mental retardation statutes of those states prohibiting the imposition of the death penalty on a mentally retarded defendant, stating:

[T]his Court can determine, based on the facts presented at Perkins's trial, that Perkins, even under the broadest definition of mental retardation, is not mentally retarded. Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (*i.e.*, before the defendant reached age 18).

Id. at 456.

The court noted in support of its conclusion that Perkins was not mentally retarded that he had been tested as an adult and achieved a full scale IQ score of

76, and that an expert had concluded he was in the borderline range of intelligence but was not mentally retarded. *Id.* The court also examined Perkins's adaptive functioning and concluded that he had no substantial deficits in that domain prior to the age of 18. *Id.* In support, the court noted that "Perkins was able to have interpersonal relationships. Indeed, he was married for 10 years. He maintained a job as an electrician for a short period." *Id.*

Roughly a year after *Perkins*, the Alabama Supreme Court applied the standard from *Perkins* in *Ex parte Smith*, noting that a full-scale IQ of 72 "seriously undermines any conclusion that Smith suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions." 2003 WL1145475, at *9 (Ala. 2003).

V. THE CLAIM

Clemons raises three arguments in support of his *Atkins* claim: 1) the traditional deference owed to state court judgments under § 2254(d) is inapplicable because the circuit court failed to exercise independent judgment, as evidenced by its verbatim adoption of the Attorney General's 90-page proposed order denying his *Atkins* claim; 2) § 2254(d)(2) compels relief because the Alabama courts' factual determination that he is not mentally retarded was unreasonable in light of the facts before it, and 3) § 2254(d)(1) also compels relief because the Alabama courts' decision denying his claim was contrary to or was an unreasonable application of clearly established Federal law, *i.e.*, *Atkins*. Each argument is addressed in turn.

A. The Effect, if Any, of the Circuit Court's Adoption of the Attorney General's Proposed Order

It is obvious from comparing the proposed order drafted by the Attorney General's office and the order signed by the circuit court that they are nearly identical, inclusive of various typos and other errors. Courts have certainly criticized the practice of the mechanical adoption of proposed findings of fact prepared by prevailing parties and condemned the ghostwriting of judicial orders. *See, e.g., Anderson v. City of Bessemer*, 470 U.S. 564, 572, 105 S. Ct. 1504, 1510 (1985); *In re Colony Square Co.*, 819 F.2d 272, 274 (11th Cir. 1987). These practices lead to the "utter lack of an appearance of impartiality." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997). However, Clemons offers no authority for the proposition, and the Court can independently find none, mandating that such a practice by a state post-conviction court in-and-of-itself warrants habeas relief to a petitioner under § 2254(d)(1) or (2). *Jefferson v. Upton*, 560 U.S. 284, 130 S. Ct. 2217 (2010), relied upon by Clemons, is distinguishable in several respects. First, that case was decided under the pre-AEDPA version of § 2254(d). *See id.* at 289, 130 S. Ct. at 2220. Second, in that case the attorneys for the State of Georgia drafted the order denying the state habeas petitioner's claims pursuant to an *ex parte* request from the state-court judge, who made no such request of the petitioner. *Id.* at 292, 130 S. Ct. at 2222. In Clemons's case, the circuit court indicated at the conclusion of the four-day evidentiary hearing that it was inclined to find that Clemons is not mentally retarded but requested proposed orders from both parties. Indeed, both submitted proposed orders. Clemons has not demonstrated that § 2254(d) should not apply under these circumstances.

**B. Whether Clemons Has Established
that § 2254(d)(2) Applies**

The ACCA ⁵ stated the following with regard to why Clemons's *Atkins* claim failed:

The appellant argues that he is mentally retarded and that, therefore, his sentence of death is unauthorized as a matter of law. In *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L.Ed.2d 335 (2002), the Supreme Court held:

“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.

Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we therefore conclude that such

⁵ The ACCA is the highest Alabama court to have provided any analysis on the merits of Clemons's *Atkins* claim, thus the Court looks to its reasoning for § 2254(d) purposes. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594 (1991) (“Where there has been one reasoned state judgment rejecting a federal claim,” federal habeas courts should presume that “later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.”). However, the Court notes that for purposes of the § 2254(d)(2) analysis, this Court may look to the fact findings of both the circuit court and the ACCA, as the ACCA in large part merely quoted the circuit court's order. *See Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1150 (11th Cir. 2009) (noting that AEDPA deference to the fact findings of state courts “applies to fact findings made by both state trial courts and state appellate courts”).

punishment is excessive and that the Constitution ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender. “

Subsequently, in *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), the Alabama Supreme Court stated:

“[T]his Court can determine, based on the facts presented at Perkins’s trial, that Perkins, even under the broadest definition of mental retardation, is not mentally retarded. Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).”

See also Ex parte Smith, [Ms. 1010267, March 14, 2003] — So.2d — (Ala. 2003).

The parties presented extensive and often conflicting evidence regarding whether the appellant is mentally retarded. In its order denying the petition, the circuit court made the following findings:

“[I]t is clear that Clemons does not meet either the intelligence or adaptive functioning elements to establish mental retardation.

“The Court first addresses the intelligence component in determining whether Clemons is mentally retarded.

“Clemons has been administered intelligence testing on numerous occasions, and his scores are remarkable in their divergence, ranging from a low of 51 to a high of 84. The scores are most likely divergent because Clemons frequently malingers when he is tested, a conclusion that was drawn by many of the mental health professionals who have examined Clemons. Because Clemons has taken so many intelligence tests, the Court will list them in chronological fashion.

“Clemons was first administered an intelligence test, the Stanford-Binet Intelligence Test, when he was six and a half years old. EH at 53. Clemons scored a 77 on the test which placed him in the borderline range of intelligence. Despite this fact, his school records indicate that he was labeled ‘educable mentally retarded’ soon after taking this test. Clemons’ school records which tend to indicate minimal academic achievement were consistent with his relatively low score on the Stanford- Binet Intelligence Test. They show that by the end of the elementary school, Clemons was two years behind and that he completed the tenth grade and did not receive a high school diploma. Petitioner’s Exhibits 2-5. The records do not show that Clemons

was administered any additional intelligence tests throughout his school career.

“Clemons, while in prison at age 19, was administered a BETA-II intelligence test on which he scored a full-scale IQ of 84. R32 Vol. 7 at 1317, 1326. This test result was the highest score that Clemons ever achieved. In the fall of 1992, after being charged in both state and federal court with murdering a federal law enforcement official, Clemons began the first of three rounds of testing by various mental health professionals.

“During a court-ordered forensic evaluation at a federal prison in Butner, North Carolina, Clemons was administered various psychological tests including an intelligence test. Clemons was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and scored a full-scale IQ of 51. R32 Vol. 7 at 1323. The psychologist who administered this test was dubious that he had obtained a valid result. He stated that people in the low- 50 s IQ range are ‘often in need of structured living and may be institutionalized’ and are typically unable to care for their basic needs. *Id.* The Butner report further states that [i]t would be virtually impossible for a person with an IQ of 51 (from the present testing) to earn a score of 84 on the BETA-II only one year previous.’ *Id.* The psychologist who conducted the testing

noted that when he tried to obtain a writing sample Clemons wrote with his left hand even though he is right handed, another indicator that Clemons was not giving his best effort. R32 Vol. 7 at 1324. The psychologist ultimately concluded that Clemons was in the borderline range of intellectual functioning and that the results of the testing were invalid because Clemons was malingering. R32 Vol. 7 at 1325. FN 1

FN1. The examiners noted the appellant's lack of participation in the testing and concluded:

“[T]he present psychological testing of Mr. Clemons' intellectual ability must be considered invalid. It seems clear that Mr. Clemons did not provide a sincere effort and very likely purposely presented an appearance of impaired ability. Based on previous results, educational history, and impressions from his relatives, Mr. Clemons is probably functioning in the borderline range of intellectual ability. It is unlikely that he falls in the range of mild mental retardation. Regardless of his formal IQ level, his social, educational, and occupational functioning do not suggest significant intellectual impairment.”

(C.R. 1324.) The examiners further noted:

“The diagnosis of malingering was made to describe a pattern of

voluntary behavior and it is not considered to be a mental disorder. The evidence that Mr. Clemons was malingering mental disorders was quite detailed and can be divided in two areas: a) malingering of psychotic symptoms (e.g., hallucinations of little green men); and b) malingering of cognitive deficits. The psychotic symptoms that Mr. Clemons described are very implausible. Clearly defined visual hallucinations are quite rare. In addition, people who experience genuine hallucinations report that they are not constant experiences and that distractions, such as singing or exercise, will temporarily make the hallucinations decrease or disappear entirely. Mr. Clemons denied this. Mr. Clemons' own discussions about his symptoms were inconsistent. For example, telling one staff member everyone should be able to see what he claimed and telling someone else the next day that nobody else could see them. In addition, people with genuine psychotic disorders often neglect their personal hygiene, but Mr. Clemons was consistently careful to maintain his hygiene and personal appearance. Finally, there was no evidence of disordered thought processes such as tangentiality, circumstantiality, loose associations, thought blocking, or disorganization. Such disrupted

thinking processes are nearly universally present among people who suffer genuine hallucinations to the degree Mr. Clemons reports.

In sum, there are numerous inconsistencies with Mr. Clemons' reports and what is known about people who suffer genuine psychotic thought disorders."

(C.R. 1325.)

"Before his trial in federal court, Clemons' attorneys had Clemons evaluated by Dr. William Grant, a psychiatrist. R32 Vol. 7 at 1289-1301. Although Dr. Grant did not conduct any intelligence tests or psychological tests, he agreed with the psychologist at Butner Correctional Facility that Clemons was malingering. Dr. Grant's report indicated that Clemons entered the interview room 'laughing hysterically and incessantly.' R32 Vol. 7 at 1290. His report indicated that Clemons stopped laughing when he was informed that 'faking' would not be in his best interest. *Id.* Dr. Grant's overall conclusions were that Clemons was malingering and that he was antisocial. R32 Vol. 7 at 1299. Dr. Rivenbark, at Taylor Hardin Secure Medical Facility, evaluated Clemons in 1992 and 1994 and also concluded that Clemons was malingering. R32 Vol. 7 at 1281, R32 Vol. 29 at 5646. Dr. Rivenbark apparently did not perform any testing on Clemons. FN 2

FN 2. While he was awaiting trial in Alabama, the appellant was evaluated at Taylor Hardin Secure Medical Facility in July 1994. One examiner, who was not able to complete all of the tests because the appellant was not cooperative, made the following observation:

“Based upon the information available to me, it is my opinion that Mr. Clemons’ silence and lack of cooperation were deliberate and conscious decisions and were not due to any significant mental disease or defect. Furthermore, given the information gathered by other examiners since my initial evaluation I am more convinced than ever that he has been deliberately malingering concerning his intellectual ability and his mental state.

“. . . Mr. Clemons’ intelligence probably falls somewhere in the mid 70’s to mid 80’s, which is within the Borderline to Low Average range of intelligence.”

(C.R. 1309-10.)

“The second round of testing occurred before Clemons’ first Rule 32 evidentiary hearing held in 2001. Dr. Kimberly Ackerson, a psychologist practicing in Birmingham, was hired by Clemons’ present counsel to perform a psychological evaluation of Clemons. As a part of this evaluation,

she administered various tests including the Wechsler Adult Intelligence Scale-Revised (WAIS-R). Clemons obtained a full-scale IQ of 73 on this intelligence test. On the score sheet, Dr. Ackerson noted that Clemons appeared motivated and that he was deliberate in making his responses. Dr. Ackerson stated that Clemons' score placed him in the 'borderline' classification. Dr. Ackerson testified at the Rule 32 evidentiary hearing conducted in 2001 but was not called as a witness at the most recent Rule 32 evidentiary hearing conducted in June 2004.

"Dr. Glen King, a board-certified clinical psychologist, was hired by the Attorney General's Office to perform a psychological evaluation of Clemons before the first Rule 32 evidentiary hearing. Dr. King was not called as a witness at the first Rule 32 evidentiary hearing but was called at the recent Rule 32 evidentiary hearing and testified, among other things, about the testing he performed in 2001. In February 2001, Dr. King administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III) to Clemons and obtained a full-scale IQ score of 77. EH at 771. Dr. King stated that Clemons had a nine-point difference between the verbal and performance IQ score

which was ‘a little larger than we would like to see’ but stated that the difference could be attributed to Clemons’ low score on the ‘digit symbol coding’ test where it did not appear that Clemons was ‘. . . trying hard.’ EH at 773. Dr. King stated that Clemons’ full scale IQ score “indicates functioning in the general area that we call borderline intellectual ability, which is between mentally retarded functioning and the average.” EH at 771. During this same round of testing, Dr. King stated that he administered the spelling and reading portion of the ‘Wide Range Achievement Test—Third Edition’ which is a measure of academic achievement. EH at 778-79. Clemons scored a 98 on the reading part and a 96 on the spelling part which equates to Clemons being able to read and spell at the ‘high school level.’ EH at 779.

“The third round of testing occurred after the Court of Criminal Appeals remanded the case for this Court to determine, among other things, whether Clemons is mentally retarded. In February 2004, Dr. King administered the Halsted-Reitan test battery which includes the original version of the Wechsler, the Wechsler Adult Intelligence Scale (WAIS). Dr. King testified that he noticed Clemons

was much more indifferent in his attitude during the more recent testing. EH at 784. During the testing, Clemons did not appear to be motivated to give his best effort and even claimed that the 'right side' of his body was going numb to the point that he was paralyzed. EH at 784-85. Dr. King stated that he had not seen anything in Clemons' medical history that indicated Clemons suffers from temporary paralysis in his right side. EH at 786. On the WAIS, Clemons obtained a full-scale IQ score of 67. Because the WAIS is considered an easier test than the WAIS-III, Dr. King subtracted seven points from the results of the WAIS so that those scores would equate with the results of the WAIS-III. EH at 792-93. Therefore, Clemons' full-scale IQ score on the WAIS is 60 as compared with the full-scale IQ of 77 that Clemons received three years previous on the WAIS-III.FN 3 Dr. King stated that without some intervening event such as a stroke, physical problem, or serious disease it is difficult to account for a 17-point drop in a full-scale IQ score. EH at 793. Dr. King concluded that Clemons was malingering in an effort to score lower on the WAIS that was given in 2004.FN 4 Dr. King's overall assessment is that Clemons functions in the 'borderline range of intellectual

ability.’ EH at 819. FN 3. With regard to the disparity in the appellant’s test scores from 2001 and 2004, the following occurred:

“[STATE:] Is it possible that Mr. Clemons’ full scale IQ would drop seventeen points from seventy-seven to sixty in about three years?

“[KING:] Not ordinarily without some kind of intervening event, like stroke or serious disease or development of some physical problem that might account for that.

“[STATE:] Are you aware of any such?

“[KING:] I am not.

“[STATE:] So what is your interpretation of his scores on the WAIS?

“[KING:] That he was dissembling; in other words, that he was not providing his best effort on many of the subtests.

“[STATE:] Do certain portions of the WAIS and the WAIS-III contain—such as the vocabulary and similarities sections, contain some of the same questions?

“[KING:] Yes, they do. Some things overlap.

“[STATE:] Were there any questions that he got wrong in 2004 on the

WAIS that he actually got right in 2001 on the WAIS-III?

“[KING:] For example, on the vocabulary items when asked to define winter, in 2001 he gave a two-point response saying it was the cold time of the year. And in 2004 he said it was fall, which would be a zero response.

“In 2001 when asked the question on comprehension, ‘what should you do if you find an envelope in the street that is sealed and addressed and has a new ‘stamp’? In 2001 he indicated ‘put it in a mailbox’ and in 2004 he said ‘look at it’?

“[STATE:] Could you please tell us, Doctor, what those differing answers might indicate to you?

“[KING:] In my experience, they indicate to me clearly the presence for malingering, giving false answers in a purposeful fashion.”

(Remand R. 793-96.)

FN 4. King also administered the Test of Memory Malingering (“TOMM”). The scores indicated that the appellant was malingering for memory difficulties and appeared to give incorrect responses to every third item on the test. (Remand R. 789.)

“Dr. Golden, the psychologist hired by Clemons’ present counsel to perform a

psychological evaluation, administered the Stanford-Binet Intelligence Scale-Fourth Edition to Clemons on October 23, 2003. EH at 133. Dr. Golden testified that he gave this particular intelligence test because it is a better measure of intelligence for a person who is mentally retarded. EH at 133-37. Dr. Golden did not support this conclusion, however, with literature from any journals. Clemons achieved a full-scale IQ score of 58 on the Stanford-Binet administered by Dr. Golden. EH at 139. However, Dr. Golden stated that because the Stanford-Binet uses a 'slightly different scoring system' from the Wechsler test, Clemons' scores should be adjusted upward by three, thus giving Clemons a full-scale IQ score of 61. EH at 139. Dr. Golden then stated that this score was 'probably an overcorrection.' *Id.* Dr. Golden then performed another calculation:

“Probably a better estimate of the Binet IQ is to average these four scores together [verbal reasoning-62; abstract visual reasoning-62; quantitative reasoning-59; short term memory-68], which actually gives you a score of sixty-six overall as his IQ. And this is the more comparable score to what we are working on with the WAIS.’

“EH at 139 and 140. Dr. Golden gave no justification on why these additional calculations were necessary to derive Clemons’ full-scale IQ score.

“Dr. King testified that he was not aware of any information that requires a psychologist to scale an IQ score that is attained on the Stanford-Binet test. EH at 823-24. In fact, Dr. King stated that ‘[t]he Stanford-Binet Intelligence Scale as Revised uses norms like other tests, and you come up with an IQ score based on those norms and that’s the IQ score.’ EH at 824. During the evidentiary hearing, Clemons presented no evidence to support Dr. Golden’s assertion that it is necessary to scale scores upward that are obtained from the administration of the Stanford-Binet Intelligence Test.

“As can be seen above, Clemons’ IQ scores vary widely from a low of 51 on the WAIS-R given at the Butner Correctional Facility in fall 1992 to a high of 84 on the BETA-II, apparently administered by the Alabama Department of Corrections sometime in 1991. The evidence demonstrates that when Clemons puts forward effort, he consistently scores in the 70- 80 range on intelligence tests. These scores place him in the borderline range of intellectual functioning and

establish that he is not mentally retarded. The testing revealed that Clemons scored below 70 three times, twice as a part of the latest round of testing when Clemons was presumably aware of the Court of Criminal Appeals' remand on the mental retardation issue. In the fall of 1992, Clemons scored a 51 on the WAIS-R, a score which was discounted by the test administrator because it was inconsistent with the 84 score that Clemons achieved on the BETA-II the previous year. R32 Vol. 7 1323. The psychologist at Butner stated that a person scoring a 51 on an intelligence test would possibly have to be institutionalized and not be able to take care of basic needs. *Id.* Despite Clemons' score of 51, the psychologist at Butner found that Clemons was functioning in the borderline range. R32 Vol. 7 at 1325.

"During the most recent round of testing, Clemons scored below 70 on tests administered by Dr. Golden and Dr. King. Clemons obtained a 58 on the Stanford-Binet administered by Dr. Golden who offered cryptic explanations in an effort to demonstrate that a 58 really meant that Clemons scored a 66. Dr. King stated that he was unaware of any reason why the final score on a Stanford-Binet becomes another

score. Clemons was offered the chance to present rebuttal evidence and never refuted Dr. King's statement. The Court finds that Clemons received a 58 full-scale IQ on the test administered by Dr. Golden and that Dr. Golden offered incredible reasons in an effort to make the score appear more consistent with Clemons' other scores. Dr. King, during the most recent round of testing, administered the original version of the Wechsler as a part of a neuropsychological test battery and obtained a full-scale IQ score of 67. Dr. King then scaled the score to a 60 to make the score equivalent to a score derived on the WAIS-III because the WAIS is an easier test than the WAIS-III. EH at 792. Again, despite being given the opportunity to present rebuttal evidence, Clemons never refuted Dr. King's statement that the WAIS should be scaled down if the score is to be given a WAIS- III equivalent score. FN 5

FN 5. Another expert who was retained by the appellant's attorneys, Dr. Joseph Chong-Sang Wu, an associate professor at the University of California Irvine College of Medicine and clinical director of the University of California Irvine-Brain Imaging Center, testified that he came to Alabama to perform a

Positron Emission Tomograph (“PET”) scan on the appellant. Based on the results, he concluded that the appellant had brain damage.

Dr. Helen Mayberg, a neurologist who was retained by the State, testified that the PET scan was not considered reliable for the purpose for which it was used by Dr. Wu. She further testified that her review of the PET scan findings showed that the appellant had normal brain activity and did not have a brain injury.

The appellant attempted to use the PET scan results to show that he had suffered from a brain injury at or near birth. The appellant was born in 1971, and the test was conducted in 2004. Also, Wu conceded that none of the scientific journals or studies supported the use of a PET scan as a diagnostic tool to ascertain old brain injuries. The appellant could not show that the PET scan was reliable and generally accepted in the scientific community to diagnose 30-year-old brain injuries. Therefore, the circuit court properly found that the PET scan results were not admissible because they did not satisfy the *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923), test.

“Therefore, the Court finds that Clemons does not satisfy the criteria

to establish mental retardation under the intellectual functioning element. The evidence demonstrates that when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests. Further, the evidence demonstrates that when Clemons malingers he consistently scores in the 50-60 range. Clemons has failed to establish that he meets the criteria to establish 'significantly subaverage general intellectual functioning.' Because Clemons has not established this criteria, he is not mentally retarded.

"Notwithstanding the above finding that [the] Petitioner is not mentally retarded, the Court also addresses the adaptive functioning element of mental retardation.

"As previously stated, the state appellate courts have looked to various factors in examining whether a criminal is mentally retarded and therefore exempt from the death penalty. *Perkins*, 851 So.2d at 456; *Smith*, [Ms. 1010267, March 14, 2003] — So.3d at—; *Stallworth v. State*], 868 So.2d [1128] at 1182 [Ala. Crim. App. 2001] Among these factors are: employment history, the ability to have interpersonal relationships, being extensively involved in criminal activity, post-crime craftiness

on the part of the criminal, and being able to use community resources. The record demonstrates that all of the above-mentioned factors apply to Clemons and establish that he is not mentally retarded.

“Even though Clemons went to jail when he was 19 years old and therefore did not have much of an opportunity to hold many jobs, the record demonstrates that he was still able to hold a few jobs. The Butner report indicates that ‘[Clemons] has held a variety of unskilled positions, none lasting more than a few months.’ R32 Vol. 7 at 1317. Clemons’ most notable job was as a delivery driver for Domino’s pizza. Daryl Pritchett, the manager who employed Clemons, testified at the first Rule 32 hearing that this job requires an individual to have a valid driver’s license. R32 Vol. 36 at 304-05. Clemons’ grandfather had purchased a car for Clemons so that he could work at Domino’s. R32 Vol. 36 at 300. Although Pritchett said that Clemons returned more pizzas than other delivery drivers, he recalled that if Clemons was familiar with the neighborhood he would not have trouble delivering the pizza. R32 Vol. 36 at 307. Pritchett said that a delivery driver was expected to be able to make change out of the ‘bank’ that was provided to them at the beginning of the shift without the benefit of a calculator. R32 Vol. 36 at 309. Pritchett admitted

that sometimes Clemons would ‘come up short’ when all of his receipts were reconciled at the end of the evening. *Id.* Clemons’ work performance was satisfactory, however, but he just stopped coming to work after a month or two. R32 Vol. 36 at 306.

“The lack of an employment history is perhaps better explained by Clemons’ lack of desire rather than inferior adaptive functioning. As the psychologist at Butner Correctional Facility stated:

“In addition to outright illegal behavior, Mr. Clemons has never chosen to support himself or be responsible for his own needs. He has lived with relatives, even as an adult, has not maintained employment, and has spent his time engaged in illegal behavior, substance abuse, and promiscuous sexual activity. ‘

“R32 Vol. 7 at 1325. If Clemons has a lack of employment history, this Court finds the records introduced during the Rule 32 proceedings establish it is due to a lack of motivation on his part to find work.

“Clemons had the ability to form interpersonal relationships with women, a factor the appellate courts have ruled has relevance in examining whether a criminal defendant is mentally retarded. *Smith*. . . . The Butner report indicates that Clemons had a number of

relationships with women. Clemons stated that he had numerous relationships with women and one serious relationship. R32 Vol. 7 at 1317. Clemons stated that he fathered at least two children but because he had been with so many women, he did not remember the names of the women who bore his children. *Id.*

“Clemons’ post-crime conduct supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime, another factor indicating Clemons does not have substantial deficits in adaptive functioning. After being placed under arrest, Clemons gave a statement to the FBI. Supp.R.-Exhibits Vol. 4 at p. 1 (unnumbered pages). In the statement, Clemons in a clever way minimized his criminal culpability and even attempted to establish that he was defending himself when he killed Agent Althouse. Clemons stated that on the day of the crime, he was picked up by Kenny Reid and Dedrick Smith who both had guns and were talking about taking cars at gunpoint. *Id.* As they were riding around looking for cars, Clemons told them, ‘if you’re going to take cars, take me home.’ *Id.* They saw a black Camaro at a convenience store and Reid and Smith told Clemons to take the car. *Id.* at p. 2. When Clemons hesitated, they taunted him. *Id.* As Clemons exited the car, they

threw a gun for him to use. *Id.* As Clemons approached the car, he noticed a white male in the passenger seat talking on a cell phone. *Id.* When Clemons pointed the gun at Agent Althouse and said he was taking the car, Althouse dropped the phone and stated, '[O]kay, sure.' *Id.* Clemons stated that Agent Althouse then smirked and pulled a gun from his 'rear area' and appeared as if he was going to shoot Clemons. *Id.* After Clemons observed Agent Althouse draw the gun, Clemons 'poured' his gun, meaning that he fired a number of rounds. *Id.* This statement reflects Clemons' criminal sophistication in that he attempted to make himself look like a follower and, at the same time, contend he killed only in self-defense. "Other facts presented at Clemons' trial demonstrate that Clemons' statement contained numerous false statements. A week before the murder, Herman Shannon testified that Clemons came to his house and asked if anyone had a gun. R. 1423. Shannon gave Clemons a gun and testified that it was the same gun Clemons was in possession of immediately after the crime occurred. R. 1423. Shannon's testimony indicates that Clemons acted with premeditation by obtaining a gun a week before he carried out the carjacking. Kenny Reid testified that on the night of the crime they were

traveling down Highway 280 when Clemons told Smith to pull into the Chevron gas station. R. 1327-28. Clemons, referring to a car parked at the gas station, yelled 'that's it, right there.' R. 1329. Smith let Clemons out and parked at the Wendy's next door to the gas station. R. 1330. Soon thereafter, Reid heard two gunshots and then several more rounds of shots and saw Clemons drive through a red light at a high rate of speed. R. 1331-32. Reid said that when he saw Clemons later that night, Clemons instructed him not to talk because he had killed a DEA man. R. 1335. Leon Johnson, who was at the house where Clemons drove immediately after the murder, stated that Clemons said he would kill him if he talked to the police. R. 1449. These facts demonstrate that Clemons was not an unwitting follower due to his low intelligence but rather that he had a deliberate plan to carjack a car.

"Another factor relative to adaptive functioning is being extensively involved in criminal activity. *Smith*. . . . There was evidence presented at trial that indicated Clemons carjacked cars on three separate occasions at gunpoint. R. 1478-80, 1493- 99, 1503-08. In all of these crimes, Clemons committed the forcible taking of the car without any assistance. Clemons' ability to repeatedly engage in illegal behavior refutes the notion that

he had significant limitations in adaptive behavior.

“Finally, the state courts have indicated that being able to use community resources is relevant in determining adaptive functioning. In *Stallworth*, 868 So.2d at 1182, the Court of Criminal Appeals indicated that a person qualifying for food stamps is evidence of adequate adaptive skills. After Clemons killed Agent Althouse, he soon fled the Birmingham area and left for Cleveland, where he had family. Clemons was transported to Cleveland on a Greyhound Bus, which is an indication that Clemons could use the community resource of public transportation.

“All of the above various factors refute Clemons’ contention that he has significant limitations in adaptive behavior. Two of the psychologists that have examined Clemons have stated that he does not have significant limitations in adaptive functioning. Dr. King stated the following:

“ ‘In addition, by history, Mr. Clemons had a driver’s license, he worked some places for a year at a time. He was able to matriculate through school to the tenth grade, even if he stopped at that point. He has literacy levels that seem to vary by whoever is giving him the test and under what circumstances, but clearly with me he was able to recognize

words and spell words, rather sophisticated words, at about a high school level with ninety-eight, ninety-six scores.'

"EH at 836. Dr. Grant, who was hired by Clemons' attorneys to perform an evaluation before the federal trial, found that Clemons was a hardened criminal who demonstrated adaptive skills in prison that refuted any notion that he was mentally retarded:

" 'Data from Jefferson County Jail personnel indicate that Mr. Clemons is currently housed on a violent floor with twenty-two other violent criminals. Individuals with low IQs in this setting tend to be victimized by other inmates, who steal food off their trays, their money, and their candy (the Defendant arrived at the interview carrying candy). Defendants in this setting who are mentally slow, typically get into fights or have to be put in protective custody on the medical unit. Mr. Clemons' survival on a violent unit may attest to his true ability to function.'

"R32 Vol. 7 at 1298-99. Clemons has not demonstrated that he has significant limitations in adaptive functioning.

"The third element to prove mental retardation is that significantly subaverage intellectual functioning and significant deficits in adaptive behavior must occur before the age of 18. *Ex parte*

Perkins, 851 So.2d at 456; *Ex parte Smith*.... Clemons was first administered an intelligence test when he was six and a half years old, scoring a 77 on the test which placed him in the borderline range of intelligence. Clemons was apparently not administered any more intelligence tests until he was past age 18. The Alabama Supreme Court has ruled that scores above 70 place a defendant above the cut-off to establish significantly subaverage intellectual functioning. *Ex parte Perkins*, 851 So. 2d at 456; *Ex parte Smith*. . . . Clemons likewise did not produce any evidence of significant deficits of adaptive functioning before age 18.

“For the foregoing reasons, this Court finds that Clemons is not mentally retarded. “

(Remand C.R. 9-29) (footnotes omitted).

We have reviewed the record in light of *Perkins* and *Smith*, and we conclude that it supports the circuit court’s findings. Therefore, we adopt those findings as part of this opinion. Based on the record before us, we conclude that, even under the broadest definition of mental retardation, the appellant is not mentally retarded and that imposition of the death penalty in his case would not be unconstitutional. FN 6

FN 6. The appellant argues that he was entitled to have a jury empaneled

to determine whether he was mentally retarded. However, he did not first present this argument to the circuit court. Therefore, it is not properly before this court. *See Pate v. State*, 601 So. 2d 210 (Ala. Crim. App. 1992).

Clemons, 55 So. 3d at 323-32.

To succeed on his claim, Clemons must establish that the state courts' determination that Clemons is not mentally retarded, which is a finding of fact, *see Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014), is objectively unreasonable based on the record. The Court will address each of the three underlying factual determinations on which the circuit court's order was premised—that Clemons's IQ scores were inconsistent with a diagnosis of mental retardation, that he presented no evidence of adaptive impairment, and that these limitations did not originate before he turned 18. Here, upon examination of the record before the state court, the Court cannot conclude that any of the three critical factual determinations was objectively unreasonable.

1. Significantly Subaverage Intellectual Functioning

The first prong of the mental retardation test is satisfied upon a showing that a person exhibits "significantly subaverage" intellectual functioning. *Atkins*, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3 (quoting the AAMR Manual 1992 and the DSM-IV-TR). The circuit court determined that Clemons failed to establish that he met this prong because "when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests. Further,

. . . when Clemons malingers he consistently scores in the 50-60 range.” 55 So. 3d at 327-28. Clemons argues that this determination was unreasonable based on the facts that were before the court because it does not take into account the Standard Error of Measurement (“SEM”), which is the concept that obtained IQ test scores actually represent a range of several points in either direction. Clemons’s argument fails, however, for two reasons. First, there no indication that the circuit court did *not* apply the SEM in calculating his scores. Second, even when one takes the SEM into account, the mean of the scores from the few IQ tests that were not discredited as invalid by the circuit court still results in an IQ score that does not fall within *Atkins*’s significantly subaverage intellectual functioning definition.

As Clemons points out, both the AAMR Manual and the American Psychiatric Association’s DSM-IV-TR, which contain the clinical definitions of mental retardation that the Supreme Court discussed in *Atkins*, mandate that in order to accurately assess a subject’s intellectual functioning through the use of intelligence tests, consideration must be given to the SEM.⁶ According to the AAMR Manual in effect at the time of Clemons’s *Atkins* hearing in 2004, “[t]he criterion for diagnosis is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used and the instruments’ strengths and limitations.” Am. Ass’n on Mental Retardation, Mental

⁶ For purposes of this opinion, the Court refers both to the 1992 AAMR Manual cited in *Atkins*, the 2002 edition in effect at the time of Clemons’s *Atkins* evidentiary hearing in 2004, and to the DSM-IV-TR, which was in effect at the time of the hearing and when *Atkins* was decided.

Retardation: Definition, Classification, and Systems of Support 13, 58 (10th ed. 2002) (“AAMR Manual 2002”). On page 57, the AAMR Manual 2002 further explains:

The assessment of intellectual functioning through the primary reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement. An obtained IQ standard score must always be considered in terms of the accuracy of its measurement. Because all measurement, and particularly psychological measurement, has some potential for error, obtained scores may actually represent a range of several points. . . . this process is facilitated by considering the concept of standard error of measurement (SEM), which has been estimated to be three to five points for well-standardized measures of general intellectual functioning. The AAMR Manual notes that a standard deviation from a mean of 100 is 15 points on the Wechsler Adult Intelligence Scales (“WAIS”) and 16 points on the Stanford-Binet, 4th edition—“the two instruments most commonly used to assess intelligence”—and the SEM on most IQ tests is approximately three to four points. 20 AAMR Manual 2002 at 57, 61-62. Thus, an IQ of 70—two standard deviations below the mean on the WAIS —“is most accurately understood not as a precise score, but as a range of confidence with parameters of at least one SEM (*i.e.*, scores of about 66 to 74; 66% probability), or parameters of two SEMs

scores of 62 to 78; 95% probability).” *Id.* at 57. Indeed, the AAMR Manual 2002 further states:

[T]his expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error. Any trained examiner is aware that all tests contain measurement error; many present scores as confidence bands rather than finite scores. Incorporating measurement error in the definition of mental retardation serves to remind test administrators (who should understand the concept) that an achieved Wechsler IQ score of 65 means that one can be about 95% confident that the true score is somewhere between 59 and 71.

AAMR Manual 2002 at 59 (emphasis added). Similarly, the DSM-IV-TR in effect at the time of Clemons’s *Atkins* hearing similarly defined “significantly subaverage intellectual functioning” as “an IQ of about 70 or below (approximately two standard deviations below the mean),” but it also emphasized the importance of the SEM:

[T]here is a measurement error of approximately 5 points in assessing IQ although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it 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 (emphasis added). It is thus clear

that neither the AAMR nor the American Psychiatric Association advocated at the time of Clemons's *Atkins* hearing a fixed, finite IQ score of 70 to separate persons who are mentally retarded from those who are not. The *Atkins* Court acknowledged the existence of the SEM when it referenced that an IQ of "between 70 and 75 or lower [] is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition." 538 U.S. at 309 n.5, 122 S. Ct. at 2245 n.5.

There is no indication from the circuit court's order that it did *not* consider the SEM in calculating Clemons's IQ. To the contrary, the circuit court expressly recognized the existence of the SEM in a part of the order not reproduced by the ACCA on appeal, as follows:

Even though the *Atkins* Court did not create a national standard to determine mental retardation, it did list the definitions of mental retardation as promulgated by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. [*Atkins*, 536 U.S.] at 308 n. 3. The most recent definition of mental retardation disseminated by the AAMR states that "[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills."FN 1 The AAMR further states that this disability must originate before the age of 19.

See [www.aamr. Org/Policies](http://www.aamr.Org/Policies). “In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an IQ test score of approximately 70 or below.” *Id.* *Any IQ test score should be considered in light of the standard error of measurement, which is generally +/- 5.* *Id.*

FN 1. The *Atkins* Court cited the Ninth Edition definition of mental retardation as promulgated by the AAMR in 1992. *Atkins*, 536 U.S. at 308 n.3. The AAMR’s most recent definition of mental retardation can be found on its website. See www.aamr.org/Policies.

[R. EMC_644 (emphasis added).] Additionally, the two experts who testified at Clemons’s *Atkins* evidentiary hearing, Dr. Golden for Clemons and Dr. King for the State, recognized the existence of the SEM, actually discussing it in some detail, and agreed that the proper range was five points. [R. EMC_911 (Dr. Golden noting a measurement error of five points for IQ tests); R. EMC_1633 (Dr. King conceding that the appropriate SEM is plus or minus five points).] Granted, the Alabama Supreme Court at the time presumably did not acknowledge or utilize the SEM in defining mental retardation because it found in *Perkins* that scores “above 70” place a defendant above the cutoff to establish significantly subaverage intellectual functioning. See 851 So. 2d at 456. Although the circuit court and the ACCA on appeal quoted and purported to apply *Perkins*, they never stated that Clemons was

not mentally retarded because his IQ was above 70. Rather, they concluded that the scores that resulted when Clemons put forth effort on IQ tests were *in the range of 70 to 80*, a range that they found inconsistent with a diagnosis of significantly subaverage intellectual functioning.

More importantly, although the circuit court characterized Clemons's IQ score as being in the 70 to 80 range, when a mean score is actually calculated from the few IQ tests Clemons took that the circuit court deemed valid, *i.e.*, the ones in which Clemons did not provide false answers purposefully, Clemons's IQ is at least two points above the "70 to 75 or below" SEM range discussed by the Supreme Court in *Atkins* and by the clinical journals in existence at the time.⁷ To understand this, a thorough discussion of the seven IQ tests administered to Clemons throughout his life is warranted. Additionally, five out of the seven mental health professionals who examined Clemons found him to be malingering for psychotic problems and cognitive disabilities, providing reports more detailed than what the circuit court recounted in its order. As such, the facts in the record regarding Clemons's malingering must also be addressed because they severely complicate the process of assessing his intellectual functioning using standardized IQ tests.

To begin, the only record of any test administered to Clemons before the age of 18 was the Stanford-Binet Intelligence Test, which he took when he was six and a half years old. The Stanford-Binet is one of the most

⁷ Clinical practice indicates that the appropriate method of determining an individual's IQ when there are several tests in the record is to average the scores of the various tests to reach a mean score. *See e.g., In re Holladay*, 331 F.3d 1169, 1174-75 (11th Cir. 2003).

widely recognized and utilized intellectual functioning assessment instruments, along with the WAIS tests. *See Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010). Clemons scored a full scale IQ of 77 on that instrument, which placed him squarely within the range of borderline intellectual functioning. [*Id.*] There was no evidence presented that Clemons malingered on this test at such a young age.

When Clemons was nineteen years old and in prison in 1991, he was administered the Beta-II intelligence test, and he generated a full scale IQ score of 84 on that instrument, which the circuit court noted was his highest score on any test. [R. EMC_657.] There were no allegations concerning malingered on that test. Although that test was never actually mentioned or submitted into evidence during Clemons's *Atkins* hearing in 2004, it was in the record and discussed at the first Rule 32 hearing in 2001 over which the same judge presided. Clemons argues that several courts have recognized that the Beta-II is not the best tool for measuring an individual's IQ. *See, e.g., Pruitt v. Neal*, 788 F.3d 248, 253 (7th Cir. 2015) (expert noted that Revised Beta (Beta-II) "is not an accurate test, it is not well regarded in the field, and it is not well accepted in the field as a general test of intelligence"; test "severely overestimates" an individual's IQ by "20-30 points"); *Ladd v. Thaler*, 2013 WL 593927, at *2 n.3 (E.D. Tex. Feb. 15, 2013) (state court conclusion that Ladd did not meet intellectual functioning prong of *Atkins* due to 86 Beta test score was rebutted by clear and convincing evidence because Wechsler score was 67 and Beta test is a less accurate and less reliable IQ test); *Allen v. Wilson*, 2012 WL 2577492, at *4,10,15 (S.D. Ind. July 3, 2012) (Beta "antiquated" and not an individualized test but group administered; court finds defendant suffers

significantly subaverage intellectual functioning despite 104 score on Beta because Stanford-Binet score of 68 is “most reliable” of IQ tests administered). However, Clemons’s argument is misguided because the circuit court was never presented with any substantive argument or evidence as to the Beta-II’s reliability during Clemons’s Rule 32 proceedings.⁸ Accordingly, it was not objectively unreasonable for the circuit court to have taken the score of 84 into account in calculating Clemons’s IQ.

The next series of psychological evaluations and IQ testing was conducted prior to Clemons’s federal and state trials for the general purpose of determining whether he suffered from any mental illness or cognitive difficulty that would make him incompetent to stand trial. Prior to his federal trial, Clemons submitted to a court-ordered evaluation at the Taylor Hardin Secure Medical Facility in Tuscaloosa. [R. EMC_7201-7214.] Dr. Wilburn H. Rivenbark, a psychologist and certified forensic examiner, evaluated Clemons on August 12, 1992. [R. EMC_7202, 7211.] While he did not conduct any IQ tests on Clemons, his interview with him led him to suspect that he was malingering for psychotic problems, due to the fact that Clemons reported “seeing and hearing ‘little green friends,’ ” and several times smiled or laughed out inappropriately apparently without prompting, but

⁸ Clemons points out that one of the State’s experts testified at his trial in 1994 that the Beta-II test is “typically used as a screening” and has a “wider range” of error than the WAIS and Stanford-Binet. [R. EMC_8257-58.] Although the same judge presided over his trial, it is unrealistic to suggest that he should have discredited the results of the Beta-II at Clemons’s *Atkins* hearing based on his memory of this isolated statement from ten years prior.

stopped the behavior once confronted. [R. EMC_7205-7206, 7210.] Dr. Rivenbark also noted that despite any history of mental illness or treatment, Clemons insisted that he had been suffering from mental illness all his life, but no one believed him. [*Id.*] Dr. Rivenbark concluded that Clemons “was able to understand and appreciate the consequences of his acts at the time of the alleged offenses, and ... was responsible for his actions.” [*Id.*]

Clemons was then subjected to a more thorough psychological evaluation before his federal trial while in prison in Butner, North Carolina. [R. EMC_7240.] On December 10, 1992, Drs. Hazelrigg and Berger administered the Wechsler Adult Intelligence Scale-Revised (“WAISR”) to Clemons, and he generated full-scale IQ of 51 on that instrument. [R. EMC_7250.] Drs. Hazelrigg and Berger opined that the results of that test were invalid because Clemons was deliberately malingering for psychotic symptoms and cognitive deficits. As the circuit court noted in its order, in support of their conclusion that he had given false answers purposefully on the WAISR, they noted that it would be nearly impossible for him to have scored an 84 on the Beta-II one year prior and then score a 51 on the WAISR, and stated that a score of 51 would place Clemons in the category of individuals who are need of structured living and may be institutionalized. [*Id.*] They also made the following observations:

Mr. Clemons indicated that he was unable to read or write at an adult level. To assess this issue, a writing sample was obtained. Mr. Clemons did not cooperate with providing the sample. He wrote with his left hand (although he is right-handed), printed, and discontinued writing in the middle of a sentence,

breaking the pencil. His writing is filled with misspellings, many of which appear contrived and very implausible. For example, he spelled "finger" and "plate" correctly, but misspelled "room" ("rumm") and "girls" ("gurlz"). His handwriting and literacy skills were compared with a written statement he provided in 1991, which was certified as being written by Mr. Clemons in his own handwriting. In this longer sample there is only one trivial misspelling ("dropped" instead of "dropped") and it is written in cursive. A comparison of his signature made righthanded (09/16/92) and left handed (12/07/92) shows very little similarity.

When asked about this discrepancy, Mr. Clemons acknowledged the two were different, would offer no explanation, but also refused to provide a third sample for comparison.

Mr. Clemons' cognitive ability can be established to be much higher than his presentation during the present evaluation made it appear. Previous IQ scores were of 77 at age six and 84 at age 19 Although he pretended to be illiterate, his school performance suggests otherwise. Also, he was reported to read the nine page affidavit at the time of his arrest. A written statement from 1991 was certified to be in his handwriting and his wording. Although he reported amnesia for the time of the

alleged offenses and stated that he could not recall any of the numerous instances he was informed of the charges against him, his memory for many incidental events during the evaluation was totally intact and no amnestic episodes or signs of memory deficits were in evidence. Finally, his responses during an evaluation in August 1992 were much more complete than [sic] responses to the same questions in November 1992. For example, in August he knew the colors of the American flag, where the sun rises, and many details about proper courtroom proceedings. In November, he claimed to not know any of this information. There is no known factor that could account for such a dramatic loss of long-term knowledge. Therefore, the diagnosis of Malingering of cognitive deficits is also clearly established.

[*Id.*] They concluded that Clemons's intellectual level is "above the range of retardation" and that Clemons "does not suffer from any mental disorder that would render him unable to understand the nature and consequences of the proceedings against him, or assist his attorney in his own defense." [R. EMC_7254.]

Prior to his state trial, Clemons was evaluated by two additional professionals who again did not conduct any IQ tests but who agreed with others that Clemons was malingering for psychotic problems and was not mentally retarded. Dr. William H. Grant, a psychiatrist, evaluated Clemons at the request of his counsel on February 3 and 6, 1993, and he cited in support of his conclusion that Clemons malingered for

psychotic problems but was in actuality competent to stand trial that he “entered the interview room laughing hysterically and incessantly,” but stopped when confronted; that he was able to survive on a violent floor of the jail; and that he asked him for particular antidepressant drugs by name. [*Id.* at 7216, 7220, 7223- 26.] Dr. Grant also noted the following with regard to Clemons’s academic record:

An Alabama basic competency test, from the 9th grade, indicates that the defendant is capable of writing cursive. The title of the defendant’s composition is “If I Could Travel Anywhere.” The copy I reviewed is barely legible, but appears to read as follows, “If I could travel anywhere, I would never stayed (sic) in one spot. Course, (sic), I’ll always be on the run visiting many different places such as New York, Italy, and France and learn how to speak all sourts (sic) of languages. But most of all, I learne (sic) how to be (illegible) in all of those different places plus ect.” His grades in 1988 at age seventeen while in the 10th grade, his marks apparently ranged from 10 (in social studies) to 75 (in upholstery). Most are in the sixties and seventies.

[R. EMC_7219-20.] Dr. Grant also noted:

At the close of the interview Mr. Clemons asked me for Valium. I told him that it was not likely that an abusable street drug like Valium would be prescribed to inmates in jail. I told him that in some custodial facilities Sinequan was

available and was popular with inmates (Sinequan is an antidepressant drug with a marked sedating effect). As I recall, the name of the drug was only mentioned once on the first visit and once on the second visit. Subsequently, Mr. Clemons asked jail personnel for Sinequan, by name, on a number of occasions. I'm told he was quite persistent. I mention these events because they are discordant with the Defendant's inability to repeat "The judge runs everything" and "The prosecutor is there to burn me."

[*Id.*]

Finally, Dr. Rivenbark, the psychologist and certified forensic examiner who evaluated Clemons in 1992, attempted a court-ordered evaluation of Clemons on July 26, 1994 at Taylor Hardin. [*Id.* at 7236-7239.] However, he was unable to communicate with Clemons because Clemons refused to speak or make eye contact with him, which Dr. Rivenbark concluded was a deliberate effort on his part and not due to any mental disease. [*Id.* at 7237.] He too opined that Clemons was "deliberately malingering concerning his intellectual ability and his mental state" and that he is competent to stand trial. [*Id.* at 7238-39.]

The next round of IQ testing did not occur until 2000, in preparation for Clemons's first Rule 32 evidentiary hearing in 2001 that dealt in part with his allegations of ineffective assistance of counsel for failure to litigate his alleged mental deficiencies, but before he first raised the claim that he was mentally retarded and thus ineligible for the death penalty

pursuant to *Atkins*. In November 2000, Dr. Kimberly Ackerson, a psychologist hired by Clemons's counsel, administered the WAISR to Clemons. Clemons scored a full-scale IQ of 73 on that instrument, and there was no evidence presented that Clemons malingered on that instrument. [R. EMC_815-17.] In fact, as the state court specifically noted, Dr. Ackerson found that Clemons appeared motivated and was deliberate in his responses. Dr. Ackerson also administered an additional intelligence test, the Woodcock-Johnson Revised, on which Clemons tested fairly well regarding his ability to sound out words and identify words (nearly a ninth grade level), but worse at reading comprehension (a sixth grade level). [R. EMC_818-21.] While Dr. Ackerson was not called to testify at the *Atkins* hearing in 2004, Dr. Golden, Clemons's expert for that hearing, had consulted with her, reviewed all of her material, and testified concerning her findings. [R. EMC_ 814.]

In February 2001, Dr. Glen King, a clinical psychologist hired by the Attorney General's Office to perform a psychological evaluation of Clemons, administered the WAIS-III to Clemons, and Clemons scored a full-scale IQ of 77. [R. EMC_850-51, 853-58, 1505, 1896-1906.] It was Dr. King's opinion that Clemons's full scale IQ of 77 means that he is "borderline intellectual ability," which he said is not the same as mentally retarded. [R. EMC_1505.] Dr. King stated that it was his observation that Clemons "was not trying hard" on the performance IQ section of the test where he scored a 74. [R. EMC_1507.] Dr. Golden, Clemons's expert at the 2004 *Atkins* hearing, testified that because Dr. King made several scoring errors when scoring Clemons's test, Clemons's score should have been a 75. However, the particular items on the

test that were questioned by Dr. Golden were discussed at length during the evidentiary hearing in 2004 [R.EMC_ 850-51, 853-58 (Dr. Golden's testimony concerning the three questions), 1507-12 (Dr. King's testimony concerning the three questions), 1896- 1906], and the circuit court obviously rejected Dr. Golden's opinion that Clemons's score should have been a 75, finding as fact that Clemons's score was a 77. During the same evaluation, Dr. King also administered the Minnesota Multiphasic Inventory ("MMPI"), which tests for the presence of psychopathology. [R. EMC_1515.] Dr. King's overall conclusion from Clemons's results on the MMPI was that he was producing false information purposefully and malingering for the presence of a mental illness. *Id.* Finally, during that evaluation Dr. King also administered the Wide Range Achievement Test Division Three, which measures academic achievement, and Clemons scored a 98 on the reading part, meaning that he was reading on high school level, and a 96 on the spelling part, meaning that he was spelling at a high school level. [R. EMC_1512-14.]

The last two IQ tests were administered in preparation for Clemons's *Atkins* hearing in 2004. In October 2003, Dr. Golden administered the Stanford-Binet Intelligence Scale, Version 4, on which the circuit court in its order concluded that Clemons scored a 58, thus rejecting Dr. Golden's testimony that the score of 58 should be adjusted upward to a 66 to make it more comparable to Clemons's scores on the WAIS tests. Finally, in February 2004, Dr. King, again retained by the Attorney General's Office, administered an original WAIS to Clemons, in which the court found that Clemons scored a full-scale IQ of 60, and on which Dr. King opined Clemons was malingering in an effort to

score lower than he had scored three years prior when he gave him the WAIS-III. [R. EMC_1527.] As described by the circuit court in its order, Clemons appeared much more indifferent to Dr. King than he had appeared three years prior, and he gave incorrect answers on several of the same questions that he had given better answers to on the previous test. [*Id.* at 1527-30.] Dr. King opined that people whose scores drop so dramatically generally have documented evidence of a stroke, traumatic brain injury, or a brain tumor, none of which he found in Clemons. Dr. King also administered a number of other tests that test for neuropsychological problems and sensory problems, such as the Tactual Performance Test, Trail-Making Part B, the Speech Sounds Perception Test, and the Seashore Rhythm Test, from which he opined that Clemons was malingering. [R. EMC_1541-45, 1548-52.] Finally, he administered a Test of Memory Malingering (“TOMM”), which is a 50-item recognition test that assesses malingering in the adult population. Dr. King testified that Clemons’s score of 44 on the second trial indicated malingering for memory difficulties. [R. EMC_1523.] This was the last evaluation in the record.

Based on the foregoing, the Court finds that there was ample evidence in the record supporting the circuit court’s decision to discount the results of several IQ tests due to malingering. Malingering is a common threat to the validity of a diagnosis of mental retardation and presents a challenging problem to an *Atkins* claim. Clinically, malingering is defined as the “intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives.” DSM-IV-TR, American Psychiatric Association, 739-40 (2000). In the *Atkins* context malingering has been described as the

“deliberate feigning of mental retardation in order to avoid the death penalty.” *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1302 (N.D. Ala. 2009), *aff’d*, 607 F.3d 749 (11th Cir. 2010). Generally, evidence of malingering on IQ tests is sufficient to discredit those tests for determining a petitioner’s intelligence. *See, e.g., Green v. Johnson*, 515 F.3d 290, 300 (4th Cir. 2008) (finding it not an objectively unreasonable application of *Atkins* to discredit a low IQ score after credible evidence has been presented that the petitioner malingered results); *State v. Hill*, 894 N.E.2d 108, 113 (Ohio Ct. App. 2008) (where defendant’s results on a malingering test indicated malingering, the associated IQ test was not credible and was due to be ignored); *Ybarra v. State*, 247 P.3d 269, 283 (Nev. 2011) (evidence from the TOMM administered to defendant indicated malingering and could be used to discredit the defendant’s low IQ score); *compare with Chase v. State*, 171 So. 3d 463, 481 (Miss. 2015) (where results on a malingering test did not indicate malingering, the associated IQ test was found to be a reliable measure of the defendant’s intellectual functioning); *Thomas*, 614 F. Supp. 2d at 1302 (the results of a malingering test that did not indicate malingering bolstered the court’s confidence that the defendant suffered from subaverage intellectual functioning).

Thus, the circuit court reasonably discredited the WAIS-R administered in 1992 by Drs. Hazelrigg and Berger, on which Clemons scored a 51, and the WAIS administered in 2004 by Dr. King, on which he scored a 60. The professionals who administered those tests gave firsthand accounts supporting their conclusions that Clemons was at that time giving false answers purposefully. Dr. King’s testimony is particularly useful because he was able to compare Clemons’s demeanor

and effort in 2001, before *Atkins* made it possible for him to claim mental retardation to avoid the death penalty, with his more indifferent attitude and poor answers in 2004, when he could. Dr. King also administered the TOMM, which indicated malingering. Psychologists developed such tests to measure, in conjunction with IQ tests and other evidence, whether someone is putting forth a satisfactory effort. See J. Horn & Robert Denney, Preface: Detection of Response Bias in Forensic Neuropsychology, Part 1, 2 *Journal of Forensic Neuropsychology* xv (2002). The results of these tests are such useful tools in assessing malingering that some state courts even require that such a test be administered before finding a defendant mentally retarded. See, e.g., *Foster v. State*, 848 So. 2d 172, 175 (Miss. 2003) (requiring that a test to detect malingering be administered in *Atkins* cases before a court can find a defendant mentally retarded).

Nor does the Court find it objectively unreasonable that the circuit court also considered the opinions from the professionals who examined Clemons in the 1990s, such as Dr. Rivenbark in 1992 and 1994 and Dr. Grant in 1993, even though they did not conduct IQ tests. According to Clemons, clinical practice indicates that malingering and mental retardation are not mutually exclusive: in other words, a petitioner may be manipulative and a malingerer but may also be mentally retarded. This may be true, but the fact remains that the ability to malingering involves a certain level of cunning. Regardless, because malingering is at its heart a question about a person's internal motivations, it appears that any diagnosis would involve considerable clinical judgment by the evaluating medical professional. Drs. Rivenbark and Grant's firsthand accounts are powerful evidence

against a finding that Clemons's possesses significantly subaverage intellectual functioning because not only did they find him to be a malingerer but they also rejected any notion that Clemons was mentally retarded.

Finally, the Court finds that it was entirely reasonable for the circuit court to similarly discount the results of the Stanford-Binet administered by Dr. Golden in 2003, on which Clemons scored a 58, even though Dr. Golden did not testify that Clemons malingered on that test. The circuit court was entitled to take into account Clemons's extensive documented history of malingering in assessing his intellectual functioning, including his widely divergent test scores, and to conclude that because Clemons would have known that he was being tested in preparation for his *Atkins* hearing, he had an incentive to mangle. *See Clemons*, 55 So. 3d at 328 ("The testing revealed that Clemons scored below 70 three times, twice as a part of the latest round of testing when Clemons was presumably aware of the Court of Criminal Appeals' remand on the mental retardation issue.") (quoting circuit court's order). Certainly the legal consequences of a low IQ score in the *Atkins* setting—namely, the potential to reverse a death sentence—serves as a powerful motivation for a defendant to give less than their maximum effort. The Court cannot ignore that Clemons received a 73 and a 77 on tests administered before *Atkins* was decided, but scored nearly 20 points lower just two years later, after he had instituted his *Atkins* proceedings. Although Dr. Golden testified that there was no evidence of malingering on *any* of the four tests administered between 2000 and 2004 [R. EMC_903], the circuit court's order clearly indicates that the court did not find Dr. Golden a credible expert.

Indeed, Dr. Golden was the only psychological professional out of seven who ever opined that Clemons was mentally retarded. The circuit court noted that Dr. Golden did not provide clinical support for his conclusion that the Stanford-Binet he administered in 2003 is a better measure of intelligence for a person who is mentally retarded, nor did he justify or otherwise explain why he increased Clemons's score on that test from a raw score of 58 to a "scaled" score of 66, seemingly to place it more in accord with his scores on the WAIS tests. Additionally, in other parts of the circuit court's order not reproduced by the ACCA on appeal, the court noted that Dr. Golden only testifies on behalf of criminal defendants and never on behalf of prosecutors; that he has testified on behalf of capital petitioners in a post-conviction setting 6-10 times; that he charged \$250 per hour and had already incurred fees of approximately \$25,000 at the time of Clemons's *Atkins* hearing; that he remained at Clemons's hearing for three additional days after his testimony was completed presumably in an effort to charge more, and that he perhaps revealed some bias as he referred to Clemons as his "client." [R. EMC_683.] Clemons now quarrels with the circuit court's use of these facts to discredit Dr. Golden, but any such argument is irrelevant to this Court's analysis on federal habeas review pursuant to § 2254(d)(2). *See Chester v. Thaler*, 666 F.3d 340, 348 (5th Cir. 2011) ("As factfinder, the trial court is entitled to deference in credibility determinations.") (citing *Thompson v. Keohane*, 516 U.S. 99, 111, 116 S. Ct. 457, 465 (1995)). The circuit court was entitled to make credibility determinations in the first instance, and none of the aforementioned factual findings could be considered "objectively unreasonable." *See Miller-El*, 537 U.S. at 340, 123 S. Ct. at 1041 (citing the § 2254(d)(2) standard); *see also*

Wood, 558 U.S. at 301,130 S. Ct. at 849 (a federal reviewing court may not characterize state-court factual determinations as unreasonable “merely because [it] would have reached a different conclusion in the first instance”); *Chester*, 666 F.3d at 349 (in finding that § 2254(d)(2) was not met, noting that “Proceedings at the state trial court were a battle between experts with additional testimony and evidence that was inconclusive and invited credibility testing. It is not this court’s place to second-guess the court’s credibility determinations.”).

Malingering aside, when the remaining untainted IQ test scores are averaged to reach a mean score, Clemons does not meet the “70 to 75 or below” SEM range. Specifically, excluding the score of 51 on the WAIS-R while in federal prison in 1992, the 58 on the Stanford-Binet that Dr. Golden administered in February 2003, and the 60 on the WAIS administered by Dr. King in February 2004, there was no evidence presented that Clemons malingered when he generated scores on the Stanford-Binet he took at age six and a half, on which he scored a 77; on the Beta-II that he took while in prison in 1991, on which he scored an 84; on the WAIS-R that Dr. Ackerson administered to Clemons in November 2000, on which he scored a 73; and on the WAIS-III that Dr. King administered in February 2001, on which he scored a 77. The mean of these untainted scores is 77.75 (77 + 84 + 73 + 77 divided by 4). Not only that, but Clemons scored in the ninety-eight and ninety-six percentiles on an achievement test administered in 2001, indicating that he was reading and spelling at a high school level.

In *In re Henry*, 757 F.3d 1151,1162 (11th Cir. 2014), the Eleventh Circuit held that a habeas petitioner’s score of 78 on the WAIS was insufficient to meet the

first prong of an *Atkins* claim raised on the eve of his execution. By the time *Henry* was decided, the Supreme Court had recently held unconstitutional a Florida statute imposing a fixed cutoff score of 70 without considering the five point SEM required by the clinical definitions discussed in *Atkins*. See *Hall v. Florida*, 134 S. Ct. 1986 (2014). Still, the Eleventh Circuit noted in *Henry*:

The rule announced in *Hall*, however, affords Henry no relief in this case. In *Hall*, as we've noted, the Supreme Court concluded that because of a +/- 5 standard of error, "an individual with an IQ test score 'between 70 and 75 or lower' ... may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Hall*, 134 S. Ct. at 2000 (quoting *Atkins*, 536 U.S. at 309 n. 5, 122 S. Ct. 2242). The dissent elides around this holding in *Hall*, and suggests that no matter the IQ score—be it 75, 78, or presumably even 88—a defendant should still be allowed to present evidence about the deficiencies in his adaptive functioning in order to make a claim of intellectual disability. But this is not what *Hall* says. *Hall* squarely holds that it is "the Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 134 S. Ct. at 2000; see American Psychiatric Association, Diagnostic and Statistical

Manual of Mental Disorders (DSM-5) 37 (5th ed. 2013) (“Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). . . . [T]his involves a score of 65-75 (70 ± 5)”). The Supreme Court never said that a petitioner who could only establish an IQ score of, say, 78 would be entitled anyway to make up the difference with other evidence of deficiencies. *See* 134 S. Ct. at 1996 (“Petitioner does not question the rule in States which use a bright-line cutoff at 75 or greater . . . and so they are not included alongside Florida in this analysis.”). The problem petitioner has under *Hall* is he can point to no IQ test yielding a score of 75 or below. Thus, building in the standard error approach explicated by the Supreme Court in *Hall* would not entitle Henry to the additional “opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning.” *Hall*, 134 S. Ct. at 2001. The Supreme Court in *Hall* did not hold that a petitioner like Henry, who only has IQ test scores above 75 (here an IQ score of 78), must have an additional chance to demonstrate intellectual disability by pointing to deficiencies in adaptive skills. At the end of the day, taking into account the standard error of measurement explicated by *Hall* does not entitle Henry to the opportunity to

present additional evidence of an intellectual disability.

757 F.3d at 1162-63. Similar to *Henry*, even building in the standard error approach, Clemons's mean IQ score is not 75 or below. Granted, Clemons does have one valid IQ score within the "70 to 75 or below" SEM range: the 73 on the WAIS-R administered by Dr. Ackerson in 2000. That score could support a finding of subaverage intellectual functioning, but it could also sustain a finding that Clemons is not retarded. One score that perhaps cuts both ways, however, does not entitle Clemons to a finding by this Court that the circuit court's factual findings were objectively unreasonable. See *Miller-El*, 537 U.S. at 340, 123 S. Ct. at 1041; *Wood*, 558 U.S. at 301, 130 S. Ct. at 849.

In this way, this case is distinguishable from *Smith v. Campbell*, 620 F. App'x 734, 750 (11th Cir. 2015) (unpublished), in which the Eleventh Circuit held that the state court's factual determination that the petitioner there was not mentally retarded was unreasonable under § 2254(d)(2) and warranted relief. Petitioner Smith had received an IQ score of 72 as an adult and did arithmetic at a kindergarten level. *Id.* at 738. The Eleventh Circuit rejected the state court's determination that Smith did not offer adequate proof of significantly subaverage intellectual functioning, stating, "[T]he problem for the State here is that the trial evidence showed that Smith's IQ score could be as low as 69 given a standard error of measurement of plus-or-minus three points." *Id.* at 749-50. Not only is Clemons's average score higher, but *Smith* is also distinguishable because Smith was never afforded an evidentiary hearing on the *Atkins* claim that he raised in his second amended Rule 32 petition, and the Alabama courts instead relied solely on the trial

evidence and the factual allegations that Smith raised in his petition in denying relief on his *Atkins* claim. In Clemons's case, he was afforded a four-day evidentiary hearing on the claim that he was mentally retarded and thus the circuit court had the benefit of a fully developed record. Nor does *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), control the outcome here. In that case, the Supreme Court recently found that a petitioner's IQ score of 75 "was entirely consistent with intellectual disability" when "[a]ccounting for th[e] margin of error." *Id.* at 2277- 78. Not only does Clemons have a higher mean score than Smith or Brumfield, but there was no evidence of malingering present in either of those cases. The fact that the record is replete with instances of Clemons's malingering on IQ tests and in the context of other interviews with mental health professionals makes it virtually impossible to compare this case with other *Atkins* cases where malingering was not an issue.

The record supports the circuit court's factual finding that since Clemons did not meet *Atkins*'s first prong, he is not mentally retarded. However, this Court will also consider whether the circuit court's determination that Clemons did not suffer significant deficits in adaptive functioning was unreasonable.⁹

⁹ At this point the Court takes a moment to note that Clemons makes several other claims in support of his argument that the state courts made unreasonable factual determinations. For one thing, he argues that the circuit court's conclusion that his IQ scores did not place him in the range of decreased intellectual functioning was unreasonable because it did not take into account the "Flynn effect," which is the name given to the recognition that IQ scores have been increasing from one generation to the next because as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that instrument increases. According to Clemons, when one applies the Flynn effect to his

2. Significant Limitations in Adaptive Functioning

Per *Atkins*, the second prong of the mental retardation test is satisfied when the petitioner demonstrates “significant limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.” *Atkins*, 536 U.S. at 308 n.3; 122 S. Ct. at 2245 n.3 (referencing the AAMR and the American Psychiatric Association’s definitions).

In determining that Clemons does not meet the adaptive functioning element of mental retardation, the circuit court, relying on the Alabama cases of *Perkins*, 851 So. 2d at 456, *Smith*, 2003 WL 1145475, and *Stallworth*, 868 So. 2d at 1182, cited the following factors as evidence of whether a criminal is mentally retarded: “employment history, the ability to have interpersonal relationships, being extensively involved in criminal activity, post-crime craftiness on the part of

mean score, it is well under 70. However, while Clemons discusses other opinions, some from the Eleventh Circuit, stating that the Flynn effect is an empirically proven statistical fact, there was no evidence presented to the state courts regarding this phenomenon. It would be improper for this Court to find that the state courts’ findings were somehow unreasonable by relying on an issue that was never presented to them. Secondly, Clemons points, in passing, to evidence before finding that he had any deficits in adaptive functioning for numerous the state courts that he argues shows he suffers from frontal lobe dysfunction and impaired brain function. While he apparently offers this evidence in support of his claim that he is mentally retarded, the circuit court rejected such evidence as inadmissible at his *Atkins* hearing, and the ACCA affirmed that ruling. Perhaps for that reason Clemons devotes little to no discussion to why such evidence supports his claim. Any such claim is rejected.

the criminal, and being able to use community resources.” *Clemons*, 55 So. 3d at 329. The circuit court found that the application of these factors to Clemons counseled against a reasons. Clemons was employed in several low skill jobs, each lasting a few months, including a job as a delivery driver for Dominos pizza. He had a drivers license, and his employer at Dominos testified that if he was familiar with the neighborhood he had no trouble delivering pizzas. He had relationships with women and fathered at least two children. The court rejected any notion that Clemons’s lack of employment history was due to inferior adaptive functioning, relying instead on Drs. Berger and Hazelrigg’s report that he was not motivated but spent his time engaging in illegal behavior, substance abuse, and promiscuous sexual activity rather than seeking work. He acted with premeditation by obtaining a gun the week before he carried out the carjacking. Further, a codefendant testified that he told him which gas station to drive into to commit the carjacking, and that after the murder Clemons instructed him not to talk because he had “just killed a DEA man.” Clemons exhibited post-crime craftiness by telling police after the murder that he was pressured into committing the carjacking by his friends and that he acted in self-defense. He was extensively involved in criminal activity because he had single-handedly carjacked cars on three separate occasions at gunpoint prior to the murder of DEA Agent Althouse. The fact that he travelled on a Greyhound Bus to Cleveland after the murder showed that he could use the community resources of transportation. The circuit court also relied on Dr. King’s testimony regarding Clemons’s adaptive functioning:

In addition, by history, Mr. Clemons had a driver's license, he worked some places for a year at a time. He was able to matriculate through school to the tenth grade, even if he stopped at that point. He has literacy levels that seem to vary by whoever is giving him the test and under what circumstances, but clearly with me he was able to recognize words and spell words, rather sophisticated words, at about a high school level with ninety-eight, ninety-six scores.

So those adaptive functions along with assessed IQ scores indicate to me he is certainly not mentally retarded and probably functions in the high borderline to low average range of ability.

[R. PDF Vol. 8 at 836.] Finally, the court relied on Dr. Grant's testimony that Clemons was a hardened criminal, whose ability to survive among violent inmates at the Jefferson County Jail may attest to his true ability to function.

Clemons argues that the circuit court unreasonably determined that he was not mentally retarded because it improperly assessed his adaptive functioning based on his strengths rather than his weaknesses. Clemons contends that it was unreasonable for the circuit court to do so because the DSM-IV-TR manual in effect at the time of his *Atkins* hearing cautions that "[t]he diagnostic criteria for Mental Retardation do not include an exclusion criterion;" DSM-IV-TR at 47 (emphasis added), which Clemons argues means that the presence of one or more strengths does not exclude a subject from a mental retardation diagnosis.

Clemons's argument fails for two reasons. First, nothing in *Atkins* or the Alabama Supreme Court cases developing the standard for assessing mental retardation at the time of his hearing instructed that courts could *not* consider a petitioner's abilities in assessing their adaptive functioning. Thus, the Court rejects the notion that the aforementioned instruction in the DSM-IV-TR was enough to have put the circuit court on notice that it could only assess Clemons's weaknesses to the exclusion of any strengths. Although it was undisputed that Clemons needed to have established deficits in only two areas of adaptive functioning, certainly neither expert at the hearing testified that the court was *prohibited* from considering Clemons's abilities in making the determination.

Second, the circuit court's order implies that it rejected the testimony of Dr. Golden, who was the only expert in the record who testified that Clemons suffered any deficits in adaptive functioning, and the court's credibility determination will not be overturned on federal habeas review. *See Chester*, 666 F.3d at 348. As Clemons points out, Dr. Golden testified at his hearing that Clemons had deficits in six out of ten areas of adaptive functioning. In support of his testimony, he cited to the results of a test that he administered to Clemons in 2003, the Adaptive Behavior Assessment System test ("ABAS-II"). The ABAS-II assesses functioning in ten areas—Communication, Community Use, Functional Academics, Health and Safety, Home or School Living, Leisure, Self-Care, Self-Direction, Social, and Work—from which four domain composite scores (Conceptual, Social, Practical, and General Adaptive Composite) are calculated. Dr. Golden described the test at Clemons's *Atkins* hearing as "the best normed and current available test for looking at

adaptive system[s]. One that was derived specifically from the criteria from DSM-IV and the AAMR.” [R. EMC_917.] The ABAS-II is designed so that a score of ten in each adaptive area is considered average, and any score of four or below is considered impaired. According to Dr. Golden, Clemons’s scores were average in communication and use of community resources. He scored a five in functional academics, indicating that he was impaired but not impaired enough to show a significant deficit. Dr. Golden found that Clemons scored a one in self-direction skills, a one in social skills, a one in work skills, a two in home living skills, a three in health and safety skills, and a four in leisure activities. [R. EMC_918-19.] The only individuals Dr. Golden spoke to in order to allow him to score the test were Clemons’s grandmother, with whom he had lived off and on up until the age of eighteen, as well as Clemons’s former employer at Dominos pizza, Mr. Pritchard. [R. EMC_919.] The ABAS-II test that Dr. Golden administered is a nine-page questionnaire that asks the parent of a child aged 5 to 21 to fill out various questions regarding the child’s abilities. [R. PDF Vol. 11 at 317-328.] For each question asked, the parent may circle a zero indicating that the child “is not able,” a one indicating that the child does a particular action “never when needed,” a two indicating that the child does a particular action “sometimes when needed,” a three indicating that the child does a particular action “always when needed,” or a box indicating that the parent guessed on the answer. For example, under the heading “Home Living,” there were twelve questions for the parent to rank the child’s ability on, such as whether the child “wipes up spills at home,” “clears the table completely after a meal,” or “uses a clothes dryer.” [R. PDF Vol. 11 at 321-22.] Someone, presumably Dr. Golden after speaking with Clemons’s grandmother,

gave Clemons a “2” for wiping up spills at home, a “2” for clearing the table completely after a meal, and a “2” for uses the clothes dryer, all indicating that Clemons does those things “sometimes when needed.” [*Id.*] At Clemons’s hearing, Dr. Golden did not provide examples or offer anecdotes as to why certain scores were calculated in any of these fields, or otherwise explain in any further detail the test or the test results. On cross examination, Dr. Golden admitted that Clemons exhibited goal-directed behavior when he obtained a gun and held up a man to get a car that he wanted. [R. PDF Vol. 5 at 268.]

Although the circuit court’s order did not mention the results of the ABAS- II administered by Dr. Golden, its silence as to that test, taken along with its choice to credit Dr. King’s, Dr. Berger’s, Dr. Hazelrigg’s, and Dr. Grant’s opinions instead and the other enumerated ways in which it discredited Dr. Golden as an expert, discussed *supra*, indicate that the circuit court did not find Dr. Golden’s conclusions on the ABAS-II as evidence that was pertinent to Clemons’s capabilities with regard to the adaptive functioning prong, and instead found that Clemons had not demonstrated deficits in any areas. Indeed, the aforementioned facts cited by the circuit court highlight the deficiency of Clemons’s claim that the state court’s factual findings were unreasonable. In short, Clemons’s actions before and after the murder were not the work of a person with diminished intellectual capacity. Indeed, *Atkins* explains:

[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and

self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. *There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.*

536 U.S. at 318, 122 S. Ct. at 2250 (emphasis added). The record before the circuit court is clear that Clemons did not act on an impulse, but rather “pursu[ed] a premeditated plan,” acting of his own volition rather than as a “follower[].” *Id.* Nothing about this crime suggests Clemons had difficulties “process[ing] information” or “engag[ing] in logical reasoning.” *Id.*

This Court will not second-guess the circuit court’s credibility determination with regard to Dr. Golden’s testimony that Clemons suffered deficits. Even if one could say that the evidence as to this prong of the *Atkins* analysis cuts both ways, given the conflicted nature of the evidence, Clemons cannot overcome the state court’s findings on a review pursuant to §2254(d)(2). The Court concludes that the circuit court’s factual

determination that Clemons did not demonstrate significant limitations in adaptive functioning was not unreasonable.

3. Originating Before the Age of 18

The third criterion for establishing mental retardation under accepted clinical definitions is that the functional limitations develop before the subject is 18 years of age. The circuit court found that Clemons also failed to meet this prong because he scored a full-scale IQ of **77** on the Stanford-Binet administered when he was six-and-a-half-years-old and did not demonstrate significant deficits in adaptive functioning before age 18. Clemons contends this finding was unreasonable because Dr. Golden testified that a score of **77** obtained when the subject was six years old is not reliable for diagnostic purposes because IQ does not stabilize until a child reaches the age of ten to twelve. [R. EMC_923.] However, Dr. King disagreed, opining that scores stabilize at “six to eight” years of age. [R. EMC_1618-19.] As noted previously, the circuit court’s order indicates that it found Dr. King to be a more credible expert than Dr. Golden, which was entirely within its purview.

Clemons presents the following evidence in support of his claim that the court’s factual determination was unreasonable: a physician and school psychologist diagnosed him as “educable mentally retarded” when he was six years old [R. EMC_1698-1722]; he was held back in school twice, starting third grade when he should have been in fifth [R. EMC_791]; he earned many Ds and Fs [R. EMC_791-800, 1723-38]; and he eventually dropped out of school at age 18 [R. EMC_1752-56]. In contrast to this evidence of poor

school performance, however, his IQ score of 77 at age six and a half during the developmental period, when there was no incentive for Clemons to malingering, is powerful objective evidence of his true intellectual ability. Additionally, this score is consistent with his scores later in life that were untainted by malingering allegations, such as the 77 he received in 2001 on the WAIS administered by Dr. King before he was aware that he could bring a claim for mental retardation in light of *Atkins*. In *Hines v. Thaler*; 456 F. App'x 357 (5th Cir. 2011) (unpublished) (denying application for a certificate of appealability), the court was presented with the petitioner's full-scale IQ score of 96 on a test administered when he was thirteen and a score of 69 on the WAIS-III when he was 31 years old and incarcerated. *Id.* at 368. The Fifth Circuit affirmed the district court's ruling that it was entirely reasonable for the state court to give more weight to the IQ test taken during the petitioner's childhood over "those conducted in the shadow of habeas litigation." *Id.* at 369. Thus, the court found that it was not an unreasonable determination of *Atkins* for the state court to sustain a finding that the petitioner had not proved he had subaverage intellectual functioning. *Id.* at 369-70. Nor can Clemons overcome the circuit court's finding that deficits in adaptive functioning before the age of 18 had not been proven. Dr. Golden was the only psychological professional who said that he suffered deficits before the age of 18, and he based this conclusion on the results of the ABAS-II, which is not without problems. [R. EMC_921.]

In sum, Clemons presented a thin case of mental retardation. His penchant for malingering impeded the court's ability to determine whether he suffers from significantly subaverage intellectual functioning, and

the average of the untainted IQ scores was above the “70 to 75 or below” cutoff, even considering the SEM. As to the second and third prongs of his *Atkins* claim, the evidence relied upon by the circuit court strongly suggested that Clemons did not fit that criteria, and any evidence that cut the other way was appropriately discredited by the finder of fact in the first instance. Of course, Clemons’s burden here is higher than simply convincing this Court that he is mentally retarded under *Atkins*. He must show that the state court’s determination was unreasonable; he falls short of this burden.

C. Whether Clemons has Established that § 2254(d)(1) Applies

Clemons also contends that the state courts violated clearly established Federal law when they 1) relied on *Perkins* to apply a fixed IQ cutoff score of 70 or below as a prerequisite to a finding that a petitioner has established subaverage intellectual functioning, and 2) relied on evidence of Clemons’s strengths to the exclusion of any weaknesses in finding that he did not suffer deficits in adaptive functioning because *Atkins* required courts to “generally conform” to the accepted clinical definitions of mental retardation. 536 U.S. at 317 n.22, 122 S. Ct. at 2250 n.22.

This argument deserves little analysis. The Supreme Court unequivocally left to the States the task of developing their own standards for determining mental retardation. *Atkins*, 536 U.S. at 317, 122 S. Ct. at 2250. Alabama’s standard, as announced in *Perkins*, thus governed Clemons’s *Atkins* claim in 2004. *See, e.g., Burgess v. Comm’r Ala. Dept. of Corrs.*, 723 F.3d 1308, 1321 (11th Cir. 2013) (“it is Alabama’s standard, announced in *Ex parte Perkins*, which governs

Burgess's *Atkins* claim . . .); *Smith*, 620 Fed.Appx at 747-48. Thus, it was not error for the circuit court to apply *Perkins*. In any event, as already discussed, in reaching its factual determination that Clemons is not mentally retarded, the circuit court applied not only the Alabama standard announced in *Perkins* but also the AAMR and American Psychiatric Association's clinical definitions espoused in *Atkins*, including their recognition of the SEM. Nor was it a violation of *Atkins* for the circuit court to have discussed the overwhelming evidence of Clemons's strengths in various areas of adaptive functioning, merely because the DSM-IV-TR may have indicated that "exclusion criteria" should not be applied. *But see Atkins*, 536 U.S. at 318, 122 S. Ct. at 2250 (discussing that mentally retarded individuals are often followers rather than leaders and act on impulse rather than pursue a premeditated plan, attributes at odds with Clemons's behavior).

Clemons relies heavily on *Hall* to make the point that in the years since *Atkins*, the Supreme Court reaffirmed that *Atkins* requires state definitions of mental retardation to "generally conform to the clinical definitions." *See Hall*, 134 S. Ct. at 1999. In *Hall*, the Court explained that while *Atkins* left states free to "develop[] ways to enforce" the constitutional protection, that is, to create procedures for determining mental retardation, "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.' *Id.* at 1998. However, even if this Court were writing on a clean slate, it is not immediately obvious that *Hall*, even with its explicit recognition of the five point SEM, would direct a finding of mental retardation under these facts. In any event, this Court must consider Clemons's claim through the AEDPA's discriminating lens, and of course, the

Alabama courts could not have violated clearly established Federal law that was not in existence in 2004. *See Lockyer*, 538 U.S. at 71, 123 S. Ct. at 1172.

VI. EVIDENTIARY HEARING

Clemons moved for an evidentiary hearing in the event the Court denied his petition for habeas relief based on the state court record alone. (Doc. 54.) That motion is hereby DENIED. Rule 8(a) of the Habeas Rules states that “[i]f the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any material submitted under Rule 7 to determine whether an evidentiary hearing is warranted.” Rules Governing § 2254 Cases, Rule 8(a), 28 U.S.C. § 2254. Because the Court finds Clemons’s habeas petition is due to be dismissed, the court also finds Clemons’s request for an evidentiary hearing is due to be denied.

VII. CONCLUSION

For all of the reasons set forth herein, Clemons’s petition for writ of habeas corpus is due to be dismissed, or in the alternative denied.

Rule 11(a) of the Rules Governing Section 2254 Cases requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. This Court may issue a certificate of appealability “only if the applicant has a made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, a “petitioner must demonstrate that reasonable jurist would find the district court’s assessment of the constitutional claims debatable and wrong,” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000), or that “the issues presented were adequate to deserve encouragement to proceed

further.” *Miller-El* 537 U.S. at 336, 123 S. Ct. at 1039 (internal quotations omitted). This Court finds Clemons’s claim does not satisfy either standard. Accordingly, a motion for a certificate of appealability is due to be denied.

A separate order in accordance with this opinion will be issued.

DONE AND ORDERED ON MARCH 28, 2016.

s/ L. Scott Coogler

L. SCOTT COOGLER

UNITED STATES DISTRICT JUDGE

150a

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EUGENE MILTON CLEMONS, II,
Petitioner,

v.

KIM T. THOMAS, Commissioner, et al.,
Respondents.

No. 2:10-cv-02218-LSC
MARCH 28, 2016

Before L. Scott Coogler, *United States District Judge*

DISMISSAL ORDER

In accordance with the Memorandum of Opinion entered contemporaneously herewith, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The petition for writ of habeas corpus is DENIED;
2. The petitioner's request for an evidentiary hearing (doc. 54) is DENIED;
3. A certificate of appealability under 28 U.S.C. § 2253(c) is DENIED; and
4. Costs of this action are TAXED as paid.

DONE and **ORDERED** on March 28, 2016

s/ L. Scott Coogler

L. SCOTT COOGLER

UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EUGENE MILTON CLEMONS, II,
Petitioner,

v.

KIM T. THOMAS, Commissioner, et al.,
Respondents.

No. 2:10-cv-02218-LSC
MARCH 28, 2016

Before L. Scott Coogler, *United States District Judge*

ORDER

Before the Court is a Motion to Alter or Amend the Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, filed by Petitioner, Eugene Milton Clemons, II, on April 25, 2016. (Doc. 64.) For the following reasons, the motion is due to be granted in part and denied in part to the extent described herein.

Petitioner contends that the Court's March 28, 2016 memorandum of opinion and dismissal order should be altered or amended in order to correct a manifest error of law or fact. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) ("The only grounds for granting a Rule

59 motion are newly-discovered evidence or manifest errors of law or fact.”) (quotation marks and internal brackets omitted). The manifest error of law or fact contained in the opinion and order, as alleged by the Petitioner, is the Court’s failure to address the issue of, and ultimately grant, a certificate of appealability on the question of whether this Federal habeas petition was properly filed within the applicable statute of limitations or otherwise subject to statutory or equitable tolling.

By an opinion and order dated March 17, 2015, this Court dismissed all of Petitioner’s non-*Atkins* claims contained in his Federal habeas petition as time-barred. (Doc. 33 and 34.) At the time, the Court did not consider the appropriateness of granting, or denying, Petitioner a certificate of appealability, presumably because the *Atkins* claim remained pending—and Rule 11 of the Rules Governing Section 2254 and 2255 cases mandates that the district court should consider the appropriateness of a certificate of appealability only upon issuance of a final judgment. However, on March 28, 2016, this Court dismissed Petitioner’s remaining habeas claim but only considered the appropriateness of granting a certificate of appealability with respect to the single *Atkins* claim at issue in that decision, not the other claims that had been previously dismissed as time-barred in March 2015. (See Doc. 62 at 82.) Accordingly, this Court will now consider the appropriateness of a certificate of appealability for Petitioner’s non-*Atkins* habeas claims dismissed in March 2015 as time-barred.

This Court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, a “petitioner must

demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039 (internal quotations omitted). This Court finds that all of Petitioner's non-*Atkins* claims dismissed in March 2015 do not satisfy either standard. In other words, Petitioner has not proven the debatability of the Court's dismissal of those claims as time-barred. Accordingly, a certificate of appealability as to those claims is not warranted.

In sum, the motion to alter or amend the judgment (doc. 64) is hereby GRANTED IN PART to add the analysis contained in this opinion. However, the motion is DENIED IN PART to the extent Petitioner requests a certificate of appealability.

DONE and ORDERED on April 27, 2016.

s/ L. Scott Coogler

L. SCOTT COOGLER

UNITED STATES DISTRICT JUDGE

APPENDIX I

IN THE CIRCUIT COURT OF SHELBY COUNTY,
ALABAMA

EUGENE MILTON CLEMONS,

Petitioner,

v.

STATE OF ALABAMA

Respondent.

No. CC-1993-313.60

Order Pursuant to Remand

THIS CAUSE came on before the court for hearing for June 16, 17 and 18, 2004 pursuant to remand by the court of Criminal Appeals dated August 29, 2003 on the following issues: whether Petitioner Clemons is mentally retarded; whether his trial counsel was ineffective by not developing and presenting mitigating evidence concerning his alleged limited mental capacity; and also Petitioner's claim that his death sentence is unauthorized as a matter of law. Further, the Court of Criminal Appeals directed this court's attention to the United States Supreme Court decisions in Wiggins v. Smith, 123 S.Ct. 2527 (2003) and Williams v. Taylor, 529 U.S. 362 (2000) to use in its analysis.

I. WHETHER CLEMONS IS MENTALLY RETARDED

This Court had previously conducted a hearing on Petitioner's initial Rule 32 Petition which was appealed to the Court of Criminal Appeals. While on appeal, Atkins v. Virginia, 536 U.S. 304 (2002) was decided precipitating this remand. Atkins held that executing a mentally retarded criminal was cruel and unusual punishment violating the Eighth Amendment of the U.S. Constitution. 536 U.S. 304. The Court of Criminal Appeals further concluded that Atkins applied retroactively to cases that are: on collateral review. Clemons, at *3. The Court of Criminal Appeals also indicated that it could not decide whether Petitioner was mentally retarded because there was conflicting evidence concerning his intelligence and therefore remanded back to this Court for a determination whether Clemons was mentally retarded. Id. at *4. The Court of Criminal Appeals stated: "On remand, the circuit court shall address this question only after allowing both parties to submit evidence in support of their respective positions and in compliance with this opinion." Id. Finally, the Court ordered this Court to analyze this issue pursuant to Ex parte Perkins, 851 So. 2d 453 (Ala. 2002); Ex parte Smith, 2003 WL 1145475 (Ala. Mar. 14, 2003); and, Stallworth v. State, 868 So. 2d 1128, 1177-83 (Ala. Crim. Apr. 7. 2001).

The Atkins Court stated that a punishment is prohibited by the Eighth Amendment if it is "excessive," as indicated by a punishment that is disproportionate to the offense. Atkins, 536 U.S. at 311. An excessiveness claim is judged by "evolving standards of decency that mark the progress of a maturing society." Id. at 312, quoting Trop v. Dulles,

356. U.S. 86, 100-01 (1958). To determine the “evolving standards of decency, “the Atkins Court looked to legislation enacted by state legislatures which it stated was the “clearest contemporary values.” Id. The Atkins Court noted that, since its decision in Penry v. Texas, 492 U.S. 302 (1989), that rejected a challenge to the constitutionality of a death sentence imposed upon a mentally retarded criminal, 15 states had passed statutes prohibiting the execution of mentally retarded capital murderers. Id. at 314-15. The Court then noted, however, that it was not the number of states enacting such legislation, “but the consistency of the direction of change” that was “powerful evidence.” Id. at 315-16. The Atkins Court refused to set a national standard for determining mental retardation, but left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.” Id. at 317 (punctuation and citation omitted).

The Atkins Court’s independent evaluation of the issue revealed no reason for the Court to disagree with the legislative “consensus.” Id. at 317. The Court noted that mentally retarded defendants have “disabilities in areas of reasoning, judgment, and control of their impulses,” that have the effect of lowering their “level of moral culpability that characterizes the most serious adult criminal conduct.” Id. at 306. A mentally retarded capital defendant has a lower level of moral culpability because they tend to act on “impulse rather than pursuant to a premeditated plan, and in group settings they are followers rather than leaders.” Id. at 318. Finally, the Atkins Court concluded that executing mentally retarded capital murderers would not “measurably advance the deterrent or the

retributive purpose of the death penalty.” Id. at 321.

Even though the Atkins court did not create a national standard to determine mental retardation, it did list the definitions of mental retardation as promulgated by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. Id. at 308 n. 3. The most recent definition of mental retardation disseminated by the AAMR states that “[m]ental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.”¹ The AAMR further states that this disability must originate before the age of 18. See www.aamr.org/Policies. “In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an IQ test score of approximately 70 or below.” Id. Any IQ test score should be considered in light of the standard error of measurement which is generally +/- 5. Id. “Adaptive behavior is the collection of conceptual, social, and practical skills that people have learned so they can function in their everyday lives.” Id. 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: communication, self-care, home living, social/interpersonal skills, use of community

¹ The Atkins Court cited the Ninth Edition definition of mental retardation as promulgated by the AAMR in 1992. Atkins, 536 U.S. at 308 n. 3. The AAMR’s most recent definition of mental retardation can be found on its website. See www.aamr.org/Policies.

resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C.)” Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, at p. 41. “Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean).” Id. The general standard of measurement is +/- 5 points even though “this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75).” Id. “Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.” Id. at 42.

Accordingly, the Alabama Supreme Court on several occasions has applied the following standard to determine whether a capital defendant is mentally retarded: “Those states that have statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior[.]” the onset of which must occur before age 18. Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002); Ex parte Smith, 2003 WL 1145475, *9 (Ala. 2003). The court of Criminal Appeals has likewise applied the above-stated definition and also noted that in a different context Alabama has a definition of mental retardation that states: “[a] person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and

manifested during the developmental period, as measured by appropriate standardized testing instruments.” Stallworth, 868 So. 2d at 1182, quoting Ala. Code§ 15-24-2(3).

In applying the above-stated definitions to determine the intelligence element of mental retardation, the Alabama Supreme Court stated that a full-scale IQ of 72 “seriously undermines any conclusion that Smith suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions.” Smith, at *9. In Perkins at page 456, the Alabama Supreme Court applied a cutoff of 70 or below in determining that an individual with a full-scale IQ of 76 is not mentally retarded. Under Perkins, the Court of Criminal Appeals found that two full-scale IQ scores of 77 and 78 “revealed an IQ well above 70 - an IQ that is above the “significant subaverage” range. Stallworth, 868 So. 2d at 1182. (citation omitted).

To determine the adaptive functioning element, the state courts have looked to various factors. In holding that a defendant possessed sufficient adaptive behavior skills, the Alabama Supreme Court noted that Perkins “was able to have interpersonal relationships” as indicated by his ten-year marriage and that he was employed as an electrician “for a short period.” Perkins, 851 so. 2d at 456. In another case, the Alabama Supreme Court ruled that a defendant had sufficient adaptive functioning skills where he was able “to hold various jobs” and to maintain “an ongoing year-long relationship with his girlfriend.” Smith, 2003 WL 1145475, *9. The Alabama Supreme Court also noted that being involved in criminal activity such as “an interstate illegal-drug enterprise “indicates adaptive behavior above the level of mental

retardation. Id. Furthermore, post-crime craftiness on the part of a criminal indicates the defendant is not mentally retarded. Id. at *10. The Court of Criminal Appeals has likewise applied evidence of employment and social relationships to reject a contention that a defendant is mentally retarded and also ruled that the use of community resources such as qualification for food stamps as being evidence of adequate adaptive skills. Stallworth, 868 So. 2d at 1182.

Applying these precedents, it is clear that Clemons does not meet either the intelligence or adaptive functioning elements to establish mental retardation.

The Court first addresses the intelligence component in determining whether Clemons is mentally retarded.

Clemons has been administered intelligence testing on numerous occasions, and his scores are remarkable in their divergence, ranging from a low of 51 to a high of 84. The scores are most likely divergent because Clemons frequently malingers when he is tested, a conclusion that was drawn by many of the mental health professionals who have examined Clemons. Because Clemons has taken so many intelligence tests, the Court will list them in chronological fashion.

Clemons was first administered an intelligence test, the Stanford-Binet Intelligence Test, when he was six and a half years old. EH at 53.² Clemons scored a 77 on the test which placed him in the borderline range of intelligence. Despite this fact, his school records indicate that he was labeled “educable mentally retarded” soon after taking this test.

² “EH” is a reference to the transcript of the remand hearing.

Clemons's school records which tend to indicate minimal academic achievement were consistent with his relatively low score on the Stanford-Binet Intelligence Test. They show that by the end of elementary school, Clemons was two years behind and that he completed the tenth grade and did not receive a high school diploma. Petitioner's Exhibits 2-5. The records do not show that Clemons was administered any additional intelligence tests throughout his school career.

Clemons, while in prison at age 19, was administered a BETA-II intelligence test on which he scored a full-scale IQ of 84. R32 Vol. 7 at 1317, 1326.³ This test result was the highest score that Clemons ever achieved. In the fall of 1992, after being charged in both state and federal court with murdering a federal law enforcement official, Clemons began the first of three rounds of testing by various mental health professionals.

During a court-ordered forensic evaluation at a federal prison in Butner, North Carolina, Clemons was administered various psychological tests including an intelligence test. Clemons was administered the Wechsler Adult Intelligence Scale-Revised (WAIS-R) and scored a full-scale IQ of 51. R32 Vol. 7 at 1323. The psychologist who administered this test was dubious that he had obtained a valid result. He stated that people in the low-50's IQ range are "often in need of structured living and may be institutionalized" and are typically unable to care for their basic needs. Id. The Butner report further states that "[i]t would be

³ "R32" is a reference to the 38-volume Rule 32 evidentiary hearing transcript. "R32Supp" is a reference to the 5-volume Rule 32 supplemental record.

virtually impossible for a person with an IQ of 51 (from the present testing) to earn a score of 84 on the BETA II only one year previous.” Id. The psychologist who conducted the testing noted that when he tried to obtain a writing sample Clemons wrote with his left hand even though he is right handed, another indicator that Clemons was not giving his best effort. R32 Vol. 7 at 1324. The psychologist ultimately concluded that Clemons was in the borderline range of intellectual functioning and that the results of the testing were invalid because Clemons was malingering. R32 Vol. 7 at 1325.

Before his trial in federal court, Clemons’s attorneys had Clemons evaluated by Dr. William Grant, a psychiatrist. R32 Vol. 7 at 1289-1301. Although Dr. Grant did not conduct any intelligence tests or psychological tests, he agreed with the psychologist at Butner Correctional Facility that Clemons was malingering. Dr. Grant’s report indicated that Clemons entered the interview room “laughing hysterically and incessantly.” R32 Vol. 7 at 1290. His report indicated that Clemons stopped laughing when he was informed that “faking” would not be in his best interest. Id. Dr. Grant’s overall conclusions were that Clemons was malingering and that he was antisocial. R32 Vol. 7 at 1299. Dr. Rivenbark, at Taylor Hardin Secure Medical Facility, evaluated Clemons in 1992 and 1994 and also concluded that Clemons was malingering. R32 Vol. 7 at 1281, R32 Vol. 29 at 5646. Dr. Rivenbark apparently did not perform any testing on Clemons. The second round of testing occurred before Clemons’s first Rule 32 evidentiary hearing held in 2001. Dr. Kimberly Ackerson, a psychologist practicing in Birmingham, was hired by Clemons’s present counsel to perform a psychological evaluation

of Clemons. As a part of this evaluation, she administered various tests including the Wechsler Adult Intelligence Scale Revised (WAIS-R). Clemons obtained a full-scale IQ of 73 on this intelligence test. On the score sheet, Dr. Ackerson noted that Clemons appeared motivated and that he was deliberate in making his responses. Dr. Ackerson stated that Clemons's score placed him in the "borderline" classification. Dr. Ackerson testified at the Rule 32 evidentiary hearing conducted in 2001 but was not called as a witness at the most recent Rule 32 evidentiary hearing conducted in June 2004.

Dr. Glen King, a board-certified clinical psychologist, was hired by the Attorney General's Office to perform a psychological evaluation of Clemons before the first Rule 32 evidentiary hearing. Dr. King was not called as a witness at the first Rule 32 evidentiary hearing but was called at the recent Rule 32 evidentiary hearing and testified, among other things, about the testing he performed in 2001. In February 2001, Dr. King administered the Wechsler Adult Intelligence Scale-Third Edition (WAIS- III) to Clemons and obtained a full-scale IQ score of 77. EH at 771. Dr. King stated that Clemons had a nine-point difference between the verbal and performance IQ score which was "a little larger than we would like to see" but stated that the difference could be attributed to Clemons's low score on the "digit symbol coding" test where it did not appear that Clemons was "... trying hard." EH at 773. Dr. King stated that Clemons's full-scale IQ score "indicates functioning in the general area that we call borderline intellectual ability, which is between mentally retarded functioning and the average." EH at 771. During this same round of testing, Dr. King stated that he administered the

spelling and reading portion of the “Wide Range Achievement Test - Third Edition” which is a measure of academic achievement. EH at 778-79. Clemons scored a 98 on the reading part and a 96 on the spelling part which equates to Clemons being able to read and spell at the “high school level.” EH at 779.

The third round of testing occurred after the Court of Criminal Appeals remanded the case for this Court to determine, among other things, whether Clemons is mentally retarded. In February 2004, Dr. King administered the Halsted-Reitan test battery which includes the original version of the Wechsler, the Wechsler Adult Intelligence Scale (WAIS). Dr. King testified that he noticed Clemons was much more indifferent in his attitude during the more recent testing. EH at 784. During the testing, Clemons did not appear to be motivated to give his best effort and even claimed that the “right side” of his body was going down to the point that he was paralyzed. EH at 784-85. Dr. King stated that he had not seen anything in Clemons’s medical history that indicated Clemons suffers from temporary paralysis in his right side. EH at 786. On the WAIS, Clemons obtained a full-scale IQ score of 67. Because the WAIS is considered an easier test than the WAIS-III, Dr. King subtracted seven points from the results of the WAIS so that those scores would equate with the results of the WAIS-III. EH at 792-93. Therefore, Clemons’s full-scale IQ score on the WAIS is 60 as compared with the full-scale IQ of 77 that Clemons received three years previous on the WAIS-III. Dr. King stated that without some intervening event such as a stroke, physical problem, or serious disease it is difficult to account for a 17-point drop in a full-scale IQ score. EH at 793. Dr. King concluded that Clemons was malingering in an effort

to score lower on the WAIS that was given in 2004.⁴ Dr. King's overall assessment is that Clemons functions in the "borderline range of intellectual ability." EH at 819.

Dr. Golden, the psychologist hired by Clemons's present counsel to perform a psychological evaluation, administered the Stanford-Binet Intelligence Scale-Fourth Edition to Clemons on October 23, 2003.⁵ EH at 133. Dr. Golden testified that he gave this particular intelligence test because it is a better measure of intelligence for a person who is mentally retarded. EH at 133-37. Dr. Golden did not support this conclusion, however, with literature from any journals. Clemons achieved a full-scale IQ score of 58 on the Stanford-Binet administered by Dr. Golden. EH at 13. However, Dr. Golden stated that because the Stanford-Binet uses a "slightly different scoring system" from the Wechsler test, Clemons's scores should be adjusted upward by three, thus giving Clemons a full-scale IQ score of 61. EH at 139. Dr. Golden then stated that this score was "probably an overcorrection." Id. Dr. Golden then performed another calculation:

Probably a better estimate of the Binet IQ is to average these four scores together [verbal reasoning-62; abstract visual reasoning-62; quantitative reasoning-59; short term memory-68), which actually

⁴ Dr. King also concluded that Clemons was malingering on all of the tests that were administered in 2004 which will be discussed in the second part of this order.

⁵ Dr. King stated that the Standford-Binet was "the original IQ test developed" in the early 1990's. EH at 770. He stated that the test is not used much anymore with the exception that it is still frequently used with small children. Id.

gives you a score of sixty-six overall as his IQ. And this is the more comparable score to what we are working on with the WAIS.

EH at 139 and 140. Dr. Golden gave no justification on why these additional calculations were necessary to derive Clemons's full-scale IQ score.

Dr. King testified that he was not aware of any information that requires a psychologist to scale an IQ score that is attained on the Stanford-Binet test. EH at 823-24. In fact, Dr. King stated that "[t]he Stanford-Binet Intelligence Scale as Revised uses norms like other tests, and you come up with an IQ score based on those norms and that's the IQ score." EH at 824. During the evidentiary hearing, Clemons presented no evidence to support Dr. Golden's assertion that it is necessary to scale scores upward that are obtained from the administration of the Stanford-Binet Intelligence Test.

As can be seen above, Clemons's IQ scores vary widely from a low of 51 on the WAIS-R given at the Butner Correctional Facility in fall 1992 to a high of 84 on the BETA-II, apparently administered by the Alabama Department of Corrections sometime in 1991. The evidence demonstrates that when Clemons puts forward effort, he consistently scores in the 70-80 range on intelligence tests. These scores place him in the borderline range of intellectual functioning and establish that he is not mentally retarded. The testing revealed that Clemons scored below 70 three times, twice as a part of the latest round of testing when Clemons was presumably aware of the Court of Criminal Appeals's remand on the mental retardation issue. In the fall of 1992, Clemons scored a 51 on the WAIS-R, a score which was discounted by the test

administrator because it was inconsistent with the 84 score that Clemons achieved on the BETA-II the previous year. R32 Vol. 7 at 1323. The psychologist at Butner stated that a person scoring a 51 on an intelligence test would possibly have to be institutionalized and not be able to take care of basic needs. *Id.* Despite Clemons's score of 51, the psychologist at Butner found that Clemons was functioning in the borderline range. R32 Vol. 7 at 1325.

During the most recent round of testing, Clemons scored below 70 on tests administered by Dr. Golden and Dr. King. Clemons obtained a 58 on the Stanford-Binet administered by Dr. Golden who offered cryptic explanations in an effort to demonstrate that a 58 really meant that Clemons scored a 66. Dr. King stated that he was unaware of any reason why the final score on a Stanford-Binet becomes another score. Clemons was offered the chance to present rebuttal evidence and never refuted Dr. King's statement. The court finds that Clemons received a 58 full-scale IQ on the test administered by Dr. Golden and that Dr. Golden offered incredible reasons in an effort to make the score appear more consistent with Clemons's other scores. Dr. King, during the most recent round of testing, administered the original version of the Wechsler as a part of a neuropsychological test battery and obtained a full-scale IQ score of 67. Dr. King then scaled the score to a 60 to make the score equivalent to a score derived on the WAIS-III because the WAIS is an easier test than the WAIS-III. EH at 792. Again, despite being given the opportunity to present rebuttal evidence, Clemons never refuted Dr. King's statement that the WAIS should be scaled down if the score is to be given a WAIS-III equivalent score.

Therefore, the Court finds that Clemons does not

satisfy the criteria to establish mental retardation under the intellectual functioning element. The evidence demonstrates that when Clemons puts forward some effort he consistently scores in the 70-80 range on intelligence tests. Further, the evidence demonstrates that when Clemons malingers he consistently scores in the 50-60 range. Clemons has failed to establish that he meets the criteria to establish “significantly subaverage general intellectual functioning.” Because Clemons has not established this criteria, he is not mentally retarded.

Notwithstanding the above finding that Petitioner is not mentally retarded, the Court also addresses the adaptive functioning element of mental retardation.

As previously stated, the state appellate courts have looked to various factors in examining whether a criminal is mentally retarded and therefore exempt from the death penalty. Perkins, 851 So. 2d at 456; Smith, 2003 WL 1145475, *9; Stallworth, 868 So. 2d at 1182. Among these factors are: employment history, the ability to have interpersonal relationships, being extensively involved in criminal activity, post-crime craftiness on the part of the criminal, and being able to use community resources. The record demonstrates that all of the above-mentioned factors apply to Clemons and establish that he is not mentally retarded.

Even though Clemons went to jail when he was 19 years old: and therefore did not have much of an opportunity to hold many jobs, the record demonstrates that he was still able to hold a few jobs. The Butner report indicates that “[Clemons] has held a variety of unskilled positions, none lasting more than a few months.” R32 Vol. 7 at 1317. Clemons’ s most

notable job was as a delivery driver for Domino's Pizza. Daryl Pritchett, the manager who employed Clemons, testified at the first Rule 32 hearing that this job requires an individual to have a valid driver's license.

R32 Vol. 36 at 304-05. Clemons's grandfather had purchased a car for Clemons so that he could work at Domino's. R32 Vol. 36 at 300. Although Pritchett said that Clemons returned more pizzas than other delivery drivers, he recalled that if Clemons was familiar with the neighborhood he would not have trouble delivering the pizza. R32 Vol. 36 at 307. Pritchett said that a delivery driver was expected to be able to make change out of the "bank" that was provided to them at the beginning of the shift without the benefit of a calculator. R32 Vol. 36 at 309. Pritchett admitted that sometimes Clemons would "come up short" when all of his receipts were reconciled at the end of the evening. Id. Clemons's work performance was satisfactory, however, but he just stopped coming to work after a month or two, R32 Vol. 36 at 306.

The lack of an employment history is perhaps better explained by Clemons's lack of desire rather than inferior adaptive functioning. As the psychologist at Butner Correctional Facility stated:

In addition to outright illegal behavior, Mr. Clemons has never chosen to support himself or be responsible for his own needs. He has lived with relatives, even as an adult, has not maintained employment, and has spent his time engaged in illegal behavior, substance abuse, and promiscuous sexual activity.

R32 Vol. 7 at 1325. If Clemons has a lack of

employment history, this Court finds the records introduced during the Rule 32 proceedings establish it is due to a lack of motivation on his part to find work.

Clemons had the ability to form interpersonal relationships with women, a factor the appellate courts have ruled has relevance in examining whether a criminal defendant is mentally retarded. Smith, 2003 WL 1145475, *9. The Butner report indicates that Clemons had a number of relationships with women. Clemons stated that he had numerous relationships with women and one serious relationship. R32 Vol. 7 at 1317. Clemons stated that he fathered at least two children but because he had been with so many women, he did not remember the names of the women who bore his children. *Id.*

Clemons's post-crime conduct supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime, another factor indicating Clemons does not have substantial deficits in adaptive functioning. After being placed under arrest, Clemons gave a statement to the FBI. Supp. R.-Exhibits Vol. 4 at p. 1(unnumbered pages).⁶ In the statement, Clemons in a clever way minimized his criminal culpability and even attempted to establish that he was defending himself when he killed Agent Althouse. Clemons stated that on the day of the crime, he was picked up by Kenny Reid and Dedrick Smith who both had guns and were talking about taking cars at gunpoint. *Id.* As they were riding around looking for cars, Clemons told them, "if you're going to take cars, take me home." *Id.*

⁶ "Supp.R.-Exhibits" is a reference to the four volume supplemental record to the trial transcript containing the numerous documentary exhibits that were admitted at trial. These volumes are unnumbered.

They saw a black Camaro at a convenience store and Reid and Smith told Clemons to take the car.

Id. at p. 2. When Clemons hesitated, they taunted him. Id. As Clemons exited the car, they threw a gun for him to use. Id. As Clemons approached the car, he noticed a white male in the passenger seat talking on a cell phone. Id. When Clemons pointed the gun at Agent Althouse and said he was taking the car, Althouse dropped the phone and stated, “okay, sure.” Id. Clemons stated that Agent Althouse then smirked and pulled a gun from his “rear area” and appeared as if he was going to shoot Clemons. Id. After Clemons observed Agent Althouse draw the gun, Clemons “poured” his gun, meaning that he fired a number of rounds. Id. This statement reflects Clemons’s criminal sophistication in that he attempted to make himself look like a follower and, at the same time, contend he killed only in self defense.⁷

Other facts presented at Clemons’s trial demonstrate that Clemons’s statement contained numerous false statements. A week before the murder, Herman Shannon testified that Clemons came to his house and asked if anyone had a gun. R. 1423.⁸ Shannon gave Clemons a gun and testified that it was the same gun Clemons was in possession of

⁷ Dr Embry, the forensic pathologist who performed an autopsy on the victim’s body, stated that one gunshot wound was in the left side of Agent Althouse’s chest, below his arm pit, and the exit wound from that bullet was in the front right side of his chest. R. 1574. The second gunshot wound was in Agent Althouse’s back. Id. This testimony indicates that Agent Althouse was attempting to get out of the car while he was being shot, a fact inconsistent with drawing a gun as Clemons’s statement indicates.

⁸ “R” is a reference to the 9-volume trial transcript. “C” is a reference to the clerk’s record of the trial transcript.

immediately after the crime occurred. R. 1423. Shannon's testimony indicates that Clemons acted with premeditation by obtaining a gun a week before he carried out the carjacking. Kenny Reid testified that on the night of the crime they were traveling down Highway 280 when Clemons told Smith to pull into the Chevron gas station. R. 1327-28. Clemons, referring to a car parked at the gas station, yelled "that's it, right there." R. 1329. Smith let Clemons out and parked at the Wendy's next door to the gas station. R. 1330. soon thereafter, Reid heard two gunshots and then several more rounds of shots and saw Clemons drive through a red light at a high rate of speed.

R. 1331-32. Reid said that when he saw Clemons later that night, Clemons instructed him not to talk because he had killed a DEA man. R. 1335. Leon Johnson, who was at the house where Clemons drove immediately after the murder, stated that Clemons said he would kill him if he talked to the police. R. 1449. These facts demonstrate that Clemons was not an unwitting follower due to his low intelligence but rather that he had a deliberate plan to carjack a car.

Another factor relative to adaptive functioning is being extensively involved in criminal activity. Smith, 2003 WL 1145475, *9. There was evidence presented at trial that indicated Clemons carjacked cars on three separate occasions at gunpoint. R. 1478-80, 1493-99, 1503-08. In all of these crimes, Clemons committed the forcible taking of the car without any assistance. Clemons's ability to repeatedly engage in illegal behavior refutes the notion that he had significant limitations in adaptive behavior.

Finally, the state courts have indicated that being able to use community resources is relevant in

determining adaptive functioning. In Stallworth, 868 So. 2d at 1182, the Court of Criminal Appeals indicated that a person qualifying for food stamps is evidence of adequate adaptive skills. After Clemons killed Agent Athouse, he soon fled the Birmingham area and left for Cleveland, where he had family. Clemons was transported to Cleveland on a Greyhound Bus, which is an indication that Clemons could use the community resource of public transportation.

All of the above various factors refute Clemons's contention that he has significant limitations in adaptive behavior. Two of the psychologists that have examined Clemons have stated that he does not have significant limitations in adaptive functioning.

Dr. King stated the following: In addition, by history, Mr. Clemons had a driver's license, he worked some places for a year at a time. He was able to matriculate through school to the tenth grade, even if he stopped at that point. He has literacy levels that seem to vary by whoever is giving him the test and under what circumstances, but clearly with me he was able to recognize words and spell words, rather sophisticated words, at about a high school level with ninety-eight, ninety-six scores.

EH at 836. Dr. Grant, who was hired by Clemons's attorneys to perform an evaluation before the federal trial, found that Clemons was a hardened criminal who demonstrated adaptive skills in prison that refuted any notion that he was mentally retarded:

Data from Jefferson County Jail personnel indicate that Mr. Clemons is currently housed on a violent floor with twenty-two other violent criminals.

Individuals with low IQ's in this setting tend to be victimized by other inmates, who steal food off their trays, their money, and their candy (the Defendant arrived at the interview carrying candy). Defendants in this setting who are mentally slow, typically get into fights or have to be put in protective custody on the medical unit. Mr. Clemons' survival on a violent unit may attest to his true ability to function.

R32 Vol. 7 at 1298-99. Clemons has not demonstrated that he has significant limitations in adaptive functioning.

The third element to prove mental retardation is that significantly subaverage intellectual functioning and significant deficits in adaptive behavior must occur before the age 18. Ex parte Perkins, 851 So. 2d at 456; Ex parte Smith, 2003 WL 1145475, at *9. Clemons was first administered an intelligence test when he was six and a half years old, scoring a 77 on the test which placed him in the borderline range of intelligence. Clemons was apparently not administered any more intelligence tests until he was past age 18. The Alabama Supreme Court has ruled that scores above 70 place a defendant above the cut-off to establish significantly subaverage intellectual functioning.

Ex parte Perkins, 851 So. 2d at 456; Ex parte Smith, 2003 WL 1145475, at *9. Clemons likewise did not produce any evidence of significant deficits of adaptive functioning before age 18.

For the foregoing reasons, this Court finds that Clemons is not mentally retarded.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

The Court of Criminal Appeals also remanded for this Court to decide whether Clemons's trial counsel were ineffective during the penalty phase for failing to develop and present mitigating evidence concerning his alleged "limited mental capacity." Clemons, 2003 WL 22047260, at *4. Specifically, the Court of Criminal Appeals directed this Court to allow Dr. Charles Golden, a neuropsychologist, to testify regarding his findings which testimony was disallowed in the first Rule 32 hearing. The Court of Criminal Appeals further directed this Court to examine this claim bearing in mind recent United States Supreme Court decisions in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). This claim relates to Clemons's assertion, made in Issue III of his second amended Rule 32 petition, that he suffered head injuries during his childhood at or near birth and that those injuries caused brain damage and, thereby, affected his mental capacity. R32 Vol. 4 at 623-35.

To further facilitate the review of this claim and out of an abundance of caution, this Court, over the State's objection, granted Clemons's motion for a brain imaging scan and ordered the State to make arrangements to transport Clemons to a test administration site. On February 4, 2004, a positron emission tomography (PET) scan was performed on Clemons at Knollwood Hospital, a part of the University of South Alabama, in Mobile. Clemons's expert witness, Dr. Joseph C. Wu - the "Clinical Director" of the Brain Imaging center at the University of California at Irvine - traveled from California to Mobile to perform the scan.

At the remand hearing, Dr. Golden testified about Clemons's intellectual and emotional deficits, and that these deficits have been present since Clemons was in the first grade, when testing revealed that Clemons had an IQ of 77. Dr. Wu, a psychiatrist, performed a PET test on Clemons and testified that the results of Dr. Golden's testing are consistent with, and corroborate, Dr. Golden's diagnosis of brain damage.

The State offered two rebuttal witnesses, Dr. King, a psychologist, and Dr. Helen Mayberg, a neurologist. Dr. King, who performed two different rounds of psychological testing on Clemons, testified regarding Clemons's cognitive and executive functioning. Specifically, Dr. King stated that Clemons was in the "borderline range of intellectual ability" and that he exhibited "poor judgment relative to an average functioning individual." EH at 819. Regarding the neuropsychological testing that he performed, Dr. King stated that his "ultimate findings were that [Clemons] malingered through and dissembled through a number of the tests, so it's difficult to draw any conclusions from those neuropsychological findings." EH at 837. Furthermore, Dr. King, in discounting that Clemons had ever sustained a brain injury, stated that Clemons had no history of "any traumatic injury, ... no history of a cerebral vascular accident, ... no history of any kind of neuropathic process like brain tumor or anything like that." EH at 837-38.

Dr. Mayberg testified that Clemons's brain scan "is a normal study. I don't see any brain abnormalities." EH at 566. Dr. Mayberg also called into question the methods that Dr. Wu used to make a visual comparison between Clemons's brain scan image and the scans of Dr. Wu's normative database that consists

of 56 persons. Specifically, she stated that Dr. Wu used different scaling procedures that ensure that Clemons's brain scan image will look different from Dr. Wu's normal database. EH at 569-70. Dr. Mayberg sited that it was "silly" to believe that a doctor can use a PET scan to diagnose a brain injury twenty plus years after the alleged head injury occurred. EH at 540-41. Furthermore, Dr. Mayberg noted that the generally accepted uses of PET scans for diagnosing ailments associated with the brain are to diagnose brain tumor, temporal lobe epilepsy, and evaluation of someone with "progressive cognitive impairment" such as dementia associated with Alzheimer's disease. EH at 522. In particular, Dr. Mayberg stated that there is a typical and replicated scan pattern to diagnose the above-mentioned maladies while there is no scientific literature that supports being able to use a PET scan to diagnose a brain injury that allegedly occurred twenty plus years previous to the administration of the PET scan.

A. The Applicable Law

The Court of Criminal Appeals remanded this case with a specific directive to allow the presentation of evidence regarding the claim that Clemon's trial counsel were ineffective during the penalty phase for failing to develop and present mitigating evidence concerning Clemons's alleged "limited mental capacity." Clemons, 2003 WL 22047260, *4. The Court first discusses the applicable law and summarizes the evidence presented at the remand hearing and then addresses the specific claim.

The United States Supreme Court set forth the standard governing claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668

(1984). To prevail on a claim of ineffective assistance of counsel, a Rule 32 petitioner must demonstrate that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. In a capital case, this two- part test applies to claims of ineffective assistance of counsel during the sentencing phase, as well as the guilt phase of the trial, because a "capital sentencing proceeding... is sufficiently like a trial in its adversarial format and in the existence of standards for decision ... that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Strickland, 466 U.S. at 686-87 (internal citation omitted).

The standard for judging counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. There is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994)("It is important to

note that judicial scrutiny of an attorney's performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls."). range of constitutionally because there is such a wide acceptable performance, a petitioner seeking to rebut the presumption of adequate performance must overcome a high hurdle:

The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992)(citation omitted). Thus, in order to show that counsel's performance was unreasonable, the petitioner must establish that no competent counsel would have taken the action that his counsel did take. See Holladay v. Haley, 209 F.3d 1243, 1253 n.6 (11th Cir. 2000) ("A tactical decision is ineffective only if it was so patently unreasonable that no competent attorney would have chosen it.")(citation omitted).

Furthermore, an attorney's performance is to be evaluated from his perspective at the time of the trial, rather than through the prism of hindsight. Strickland, 466 U.S. at 689. "The widespread use of the tactic of attacking trial counsel by showing what 'might have been' proves that nothing is clearer than

hindsight - except perhaps the rule that we will not judge trial counsel's performance through hindsight." Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995)(en bane). See, e.g., Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."); Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992)("Most important, we must avoid second-guessing counsel's performance. As is often said, Nothing is so easy as to be wise after the event.")(citation omitted). "To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled." Chandler v. United States, 218 F. 3d 13 05, 1313 (11th Cir. 2000) (en banc) (quotation omitted). With these principles in mind, this Court examines the claim whether trial counsel "rendered ineffective assistance by not developing and presenting evldence concerning his limited mental capacity[.]" Clemons, 2003 WL 22047260, *4.

B. Trial Counsel and Their Investigation

Clemons was represented at trial by Mickey Johnson and Roger Bass. Johnson's deposition was entered into evidence at the first Rule 32 hearing. Although a notice of deposition was filed for Roger Bass prior to the first Rule 32 evidentiary hearing being held, Clemons's present counsel never deposed Mr. Bass, who is now deceased. Mr. Johnson was not called as a witness at the remand hearing; therefore, it is instructive to revisit his testimony regarding his investigation into presenting evidence at the penalty phase. Because Johnson was not called as a witness at

the remand hearing, the court is not privy to any consideration that trial counsel may have given to hire a neuropsychologist. If the record is incomplete or unclear about counsel's actions in a particular area, the Court is to presume that trial counsel "exercised reasonable professional judgment." Chandler, 218 F.3d at 1314 n.15.

Trial counsel's investigation into mitigating evidence was hampered by Clemons's family who were uncooperative and even hostile to trial counsel. Indeed, Clemons's family's meddlesome ways began before Johnson and Bass were appointed to represent Clemons. Bob Williams, Clemons's first lawyer, was forced to file a motion to withdraw from the case by Clemons's family. In the motion to withdraw that Williams filed he noted the following:

In addition, the Defendant relies on family members to act as surrogate decision-makers in this case. Without fail he affirms whatever they consider to be in his best interest.

These relatives have expressed their own specific and apparently unalterable agenda as to exactly how this case is to be prepared and tried, which is in direct conflict with the defense strategies developed by this Office.

Consequentially, they have become uncooperative and bellicose. Due to their controlling influence over the defendant, the attorney-client relationship and the preparation for this case has been substantially impeded.

R32 Vol. 6 at 1135 {quoting from clerk's record of trial transcript). Williams noted that Clemons's family participated in drafting a request to have the public

defender's office dismissed as counsel.

Johnson faced the same obstacles that caused Williams to withdraw. During his investigation, Johnson discovered that certain members of Clemons's family were combative and difficult. R32 Vol. 33 at 6463-64. The family members displayed a distrust of Johnson and at times would even insult him and, presumably, Roger Bass. *Id.* The family members that were contacted by trial counsel were Clemons's aunts who lived in Birmingham and one who lived in Ohio along with Clemons's mother and grandmother. R32 Vol. 6 at 1124-25. Anytime that Johnson brought up the necessity of preparing for the penalty phase, the aunts became very hostile because they would not accept that Clemons could be convicted. R32 Vol. 33 at 6466. Presumably because of his difficulties with the family members, Johnson was never able to develop a relationship of trust with Clemons. R32 Vol. 33 at 6338.

Based upon the investigation that he was able to conduct, Johnson developed a strategy of presenting evidence that Clemons had a difficult life and was law abiding until he fell in with the wrong crowd. R32 Vol. 33 at 6469-70.

To that end, Johnson planned to present the testimony of Clemons's grandmother - who he characterized as "a fine lady" - to testify as to Clemons's difficult upbringing and the effect it had on Clemons getting in with the wrong crowd. R32 Vol. 33 at 6469-70. As a part of this strategy to humanize Clemons, Johnson also wanted Clemons to apologize and admit his guilt and beg for mercy. R32 Vol. 33 at 6470.

These plans went out the window, however, when

Clemons's uncle, Michael Clemons, testified against Clemons during the guilt phase. Immediately before the uncle testified, Clemons jumped up and began yelling that he had already been convicted of this murder in federal court - a fact that had been kept from the jury by order of the Court.

R. 1060-61. In addition, Clemons indicated that he desired to fire his trial counsel and that he did not want to attend the trial any further. *Id.* After Clemons's outburst, Clemons's family members quit attending the trial and their already hostile attitude became even more hostile. As Mr. Bass recounted to the Court during trial, one of Clemons's aunts who he knew as "Betty," called him after Clemons's outburst and made an implied threat against Bass and Johnson if they continued representing Clemons. R. 1259. After the conviction, Johnson made efforts to contact Clemons's grandmother to come and testify at the penalty phase but Clemons's aunts said the grandmother could not testify because she had to work. R32 Vol. 33 at 6475-76. In their misguided attempt to assist Clemons in obtaining a mistrial, Clemons's family members prevented trial counsel from presenting mitigating evidence on Clemons's behalf.

Trial counsel investigated Clemons's mental health in an effort to present such evidence at the penalty phase. Johnson had available four different psychological evaluations that had been done before Clemons's federal trial. The reports from all four evaluations noted that Clemons had malingered in an effort to feign mental illness. R32 Vol. 7 at 1281 ("I am strongly suspicious of malingering especially in regard to his supposed psychosis."); R32 Vol. 7 at 1324, 1299 (overall conclusions in both reports were that Clemons

was malingering). Johnson recalls that he talked with Dr. Grant, a psychiatrist, who had performed an evaluation before Clemons's federal trial. Johnson recalls talking to Dr. Grant about testifying and he recalls Dr. Grant stating that his testimony would not be helpful. R32 Vol. 33 at 6477-78. In addition, if he called Dr. Grant the State on cross examination could have inquired into Dr. Grant's opinion that Clemons malingered during the evaluation. R32 Vol. 33 at 6480-81. None of the psychologists who evaluated Clemons recommended to Johnson that Clemons be evaluated by a neuropsychologist. R32 Vol. 33 .at 6478, 6479-80. Faced with all of these prospects, trial counsel decided on the strategy to humanize Clemons.

C. Evidence Presented at the Remand Hearing

At the remand hearing, four expert witnesses testified. Clemons called Dr. Charles Golden, a neuropsychologist, and Dr. Joseph Wu, a psychiatrist who is the director of a brain imaging center housed at the University of California at Irvine. In rebuttal, the State called Dr. Glen King, a psychologist, and Dr. Helen Mayberg, a neurologist who is employed at Emory University in the Department of Psychiatry.

This order will briefly summarize the main points that each of these witnesses made.

Dr. Charles Golden is a professor of psychology and the head of the neuropsychology program at Nova Southeastern University in Fort Lauderdale, Florida. EH at 9. Dr. Golden stated that "neuropsychology is the study of the relationship between brain function personality and cognitive functioning." and behavioral EH at 10. Dr. Golden is board certified in

neuropsychology by the American Board of Professional Psychology. EH at 5. Dr. Golden reached two diagnoses. One was that Clemons had a cognitive disorder not otherwise specified, which he called a catch- all diagnosis used for an individual “with a brain injury or brain dysfunction of some kind that doesn’t rise to the level of dementia or deliria,” which he stated Clemons doesn’t have. The second was mild mental retardation. EH at 20 and 21. Dr. Golden gave Clemons tests from the Luria- Nebraska test battery and concluded, based on the results of those tests, that Clemons has “frontal lobe dysfunction.” EH t 51. The tests that Dr. Golden gave that are designed to detect deficiencies in the frontal lobes are the Wisconsin card Sort Test, the short form of the Categories Test, and the Trail Making Test. EH at 103. Dr. Golden stated that “the presence of brain injury ...[to the frontal lobes] can make someone more susceptible to the suggestions of others, can make them not realize the consequences of their behavior.” EH at 193. Dr. Golden also concluded that Clemons participated in criminal activities because he wanted to fit in with friends who were also committing criminal acts. EH at 194-95. Dr. Golden recommended to Clemons’s present counsel that a PET scan be done because the test results on the testing that he performed pointed toward a “brain injury.” EH at 175.

On cross-examination, Dr. Golden revealed that when he testifies in criminal cases it is always on behalf of criminal defendants and never on behalf of the prosecutor.

EH 1at 201-02. He has testified on behalf of criminal defendants across this country including the following states Florida, Alabama, Maryland, California, Hawaii, and Nebraska. EH at 202. In

addition to testifying on behalf of criminal defendants, Dr. Golden has testified for capital petitioners in a post-conviction setting 6-10 times. EH at 202. Dr. Golden charged \$250 an hour for his work in this case and on the day of his testimony had already billed approximately \$25,000 for his work in this case. EH at 203. His bill presumably grew larger because he stayed at the hearing for three additional days after his testimony to assist Clemons's present counsel in their examination of Dr. King. EH at 288, 506, 725. Dr. Golden, perhaps revealing some bias, stated that he viewed Clemons as his "client."

EH at 204. Regarding the tests that Dr. Golden gave that were sensitive to frontal lobe functioning, Dr. Golden did not: testify as to the specific results of the Wisconsin Card Sort test and he stated that Clemons was on the cut-off for brain impairment on the short form of the Categories test. EH at 231-32.

Dr. Joseph Chong-Sang Wu is an associate professor at the University of California at Irvine (UC-Irvine) and the "clinical director" of the Brain Imaging Center located at that university. EH at 292. Dr. Wu is a psychiatrist whose "professional focus is on the use of brain PET scans in the study of neural psychiatric disorders." Id. Dr. Wu is board certified in the field of psychiatry. EH at 294. PET scans are a relatively new diagnostic tool that neuroscientists use to measure the glucose metabolic rates of different parts of the brain. EH at 547-51. This is done by injecting the patient with F-deoxyglucose ("FDG"), which is mixed with trace amounts of radioactivity, and then taking axial slice images at six millimeter intervals and reconstructing those images with the aid of a computer. EH at 542-43. A computer also takes the numerical data and converts the data into pixels to

make a color display of the brain image. The different uptake rates of the glucose metabolism can then be compared against those rates in patients without abnormalities known as a normal control group. EH at 551-58.

Dr. Wu stated that Clemons's brain scan pattern is consistent with a brain injury. EH at 327. Dr. Wu diagnosed Clemons with "metabolic hypofrontality" which he described as a pattern of brain metabolism in which "metabolic activity in the frontal lobe area relative to other reference regions, such as the occipital lobe area, is lower than it should be, lower than normal." EH at 328. Dr. Wu made this determination by visually examining Clemons's brain scan and comparing it to the normal control group consisting of 56 people that he has accumulated at UC-Irvine. EH at 343-44, 350-51. Dr. Wu called this method of visually comparing the subject's brain scan with the brain scans of the normal control group a "qualitative interpretation." The other comparison method is a quantitative evaluation "where one measures the level of activity and compares it statistically" to a normative control group. EH at 344.

Dr. Wu was then asked about articles which he contends support the concept that there is a correlation between a PET scan showing decreased glucose metabolism in the frontal and temporal lobes and neuropsychological testing that is indicative of brain impairment. EH at 383-84. Dr. Wu stated that the pattern he saw on Clemons's brain scan is correlated by the results of the Wisconsin Card Sort test administered by Dr. Golden. Dr. Wu stated that Clemons's brain scan pattern "is consistent with an abnormal frontal lobe function and consistent with ... a history of traumatic brain injury." EH at 414.

On cross examination, Dr. Wu conceded that in criminal cases he always testifies on behalf of the criminal defendant. EH at 435. Dr. Wu also made the stunning admission that, with the exception of one case, he found a brain abnormality in every criminal case where he was asked to do a PET scan or interpret a PET scan. EH at 436. Dr. Wu charged \$250 an hour for his work in this case and, on the day he testified, expected his bill was approximately \$10,000. EH at 437-38. He presumably charged an additional fee (beyond the \$10,000) because he stayed one more day after his testimony concluded to assist Clemons' s present counsel in cross examining Dr. Mayberg. Dr. Wu admitted that he was not a neurologist, radiologist, or nuclear medicine specialist. EH at 442. Dr. Wu also conceded that he had never been published in two publications, the Journal of Nuclear Medicine and the Journal of Medical Technology, that he stated "are widely read in the field of nuclear medicine." EH at 443.

Dr. Wu stated that he flew from California to Mobile to perform the PET test on Clemons even though there are doctors at Knollwood Hospital who could have performed the test. EH at 449-50. Dr. Wu said that he could compare Clemons's brain scan with the scans that he obtained at UC- Irvine even though the PET machines at UC-Irvine and Knollwood Hospital are much different. EH at 453. Dr. Wu admitted that the PET machine at UC-Irvine is over ten years old and is a machine that can only take pictures of the head. EH at 453. The machine at Knollwood Hospital is a combination PET/CT system that is only two years old and is used primarily to detect or diagnose cancer. EH at 465. Dr. Wu admitted that the attenuation correction is different in the two

machines. EH at 465-66.

Dr. Wu testified that he obtained his normal database that consists of 56 people over the course of the last 5-10 years at UC-Irvine. Dr. Wu admitted that he did not perform extensive psychological screening to ensure that none of his normals had neurological problems. Dr. Wu stated that at least 5% of his normal data base will have decreased metabolism in the frontal lobe area. EH at 457.

After Dr. Wu compiled his normal data base, a computer scientist performed a normalization process so that all of the 56 brain scans would be the same size and shape. EH at 456. Dr. Wu then had the computer scientist create an average of the 56 people in his normal control group and he displays that one scan as an average of the normal control group. EH at 456. Dr. Wu displays his normal control group in the scaling procedure known as average of the whole brain. [sic] EH 454. He defined this scaling procedure as an "... average across individuals at a given pixel on a given slice the numerical average and then do this for each pixel or each slice, and we obtain an average." EH at 455. In other words, in the scaling procedure known as average of the whole brain, the computer takes all of the glucose metabolic rates and averages them together to obtain an average value.

All of the colors are then displayed in a ratio that is relative to the average value.

Dr. Wu admitted that the color scaling procedure used by the machine at Knollwood Hospital to display the scan one used by the PET machine at UC-Irvine. At Knollwood Hospital, the data images created by the computer are displayed relative to the maximum pixel in that

particular image or “region displayed to the maximum.” EH at 468. In other words, each image is displayed by colors that are all relative to the location (or pixel) that is metabolizing the greatest amount of glucose.

Dr. Wu stated that the medical technician at Knollwood Hospital provided him with a CD-ROM that contained Clemons’s brain scan images in a file format known as DICOM which is an acronym for Digital Imaging and Communications in Medicine.⁹ Dr. Wu agreed that the DICOM file format was developed by the American College of Radiology to enable digital communication between diagnostic equipment and systems from various manufacturers. EH at 462. Dr. Wu also agreed that if a data image of a brain scan is in the DICOM file format the numeric values of glucose metabolic rates can be obtained. EH at 463.

Despite having Clemons’s brain images displayed in the file format that would have allowed Dr. Wu to make statistical comparisons to his normal control group, he had the medical technician at Knollwood Hospital convert Clemons’s brain scan images in a file format known as JPEG which is an acronym for Joint Photographic Experts Group. EH at 463. Dr. Wu agreed that the JPEG file format is a compression mechanism designed for compressing full-colored images. EH at 463. Dr. Wu agreed that a photographic image converted to a JPEG file format can be compressed up to 100 times. EH at 464. Dr. Wu agreed that an image compressed using JPEG compression loses data from the raw or native image that cannot be recovered. EH at 463. Dr. Wu also agreed that a

⁹ The transcript erroneously states this acronym as DIACOM.

digital scan image may not be a pixel-by-pixel equivalent of the original scan image. EH at 464-65.

Dr. Wu conceded that the articles he referenced during his direct examination to support the notion that a PET scan can be used to diagnose brain trauma actually are all case studies where the subject has suffered a severe or documented closed head injury and lost consciousness or was in a coma. EH at 479-80, 480-81, 481-82, 485, 485-86, 486-87. Dr. Wu stated that he had not seen any hospital records that show Clemons suffered a brain injury. EH at 475. When asked whether he had any information that Clemons had suffered any neurobehavioral symptoms as the result of an alleged head injury, Dr. Wu testified that Clemons had behavioral problems while serving in the Army. EH at 477-78. Dr. Wu then acknowledged that he talked to Clemons during a break in the remand hearing and was told that Clemons had not served in the Army. EH at 499.

Dr. Wu admitted that the findings in a case study of 20 persons who had suffered a mild to moderate closed head injury with altered consciousness showed that the frontal lobes were not usually affected. EH at 482-85. This same case study demonstrated that when the frontal lobes were affected by a closed head injury, the glucose metabolic rates in the frontal lobes were typically higher than the rate in a normal control group, and not lower. EH at 483-85. Dr. Wu conceded that Clemons' s brain scan pattern is different than the brain scan patterns documented in the case study of the 20 persons that sustained a documented head injury. EH at 482.

Dr. Wu stated that the journal articles that support his assertion that there is a correlation between poor

performance on the Wisconsin Card Sort test and deficits in the! frontal lobes of the brain as exhibited by a PET scan do have different circumstances from Clemons's situation. EH at 487-88. The persons in the articles all sustained a head injury and are patients who are motivated to do their best on neuropsychological testing. Id. Dr. Wu stated that he is aware of the reports that Clemons typically malingers on psychological tests and that he perhaps had a motivation to do poorly on these tests. Id. Furthermore, he acknowledged that he had not seen any hospital records that demonstrate Clemons ever had a brain injury. EH at 475.

Dr. Wu conceded that he did not do a statistical (or quantitative) analysis in this case even though he has done that kind of analysis in previous cases. EH at 458-59, 491. Dr. Wu stated that when he writes articles in peer-reviewed journals he supports his conclusions by stating the numeric values of the metabolic rates in the different parts of the brain. EH at 459. Dr. Wu conceded that he did not do a quantitative analysis in this case even though he could have done so if he had left the data images in the DICOM file format. EH at 463, 493.

Dr. Glen King is a clinical and forensic psychologist who is board certified by the American Board of Professional Psychology in the area of clinical psychology. EH at 727. Dr. King stated that he has performed 1800-2000 forensic psychological evaluations in his career. EH at 733. He has testified in criminal cases over one hundred times and, in those cases, about 40-50% of the time, he testified on behalf of the defendant. EH at 734. Dr. King has found a criminal defendant insane in about 6-7% of his forensic evaluations. EH at 734-35. Dr. King testified that he

has performed over 300 neuropsychological assessments and performed a neuropsychological test battery in a forensic setting 20-25 times. EH at 739.

Dr. King testified that he performed two rounds of testing on Clemons, one in 2001 and the other in 2004. In 2001, Dr. King gave Clemons the following tests: Wechsler Adult Intelligence Scale - Third Edition (WAIS-III) the Wide Range Achievement Test (spelling and reading portions), and the Minnesota Multiphasic Personality Inventory - Second Edition (MMPI-II). EH at 756. In 2004, Dr. King administered all of the tests in the Halsted-Reitan neuropsychological test battery. EH at 755. Dr. King testified that Clemons was much more indifferent during the 2004 round of testing and did not appear to be motivated or giving his best effort. EH at 784. This conclusion is supported by Clemons scoring a full-scale IQ of 77 on the WAIS-III given in 2001, EH at 770, and a full-scale equivalent score of 60 on the WAIS given in 2004. EH at 792. However, Dr. King stated that he believed that Clemons malingered on the MMPI-II that was given in 2001. EH at 781.

Dr. King's overall assessment of Clemons's cognitive and executive functioning was that Clemons was in the "borderline range of intellectual ability" and that he exercised "poor judgment relative to an average functioning individual." EH at 819. Although the results of the testing in 2004 showed that Clemons was in the severely impaired range of functioning, Dr. King testified that the results were not consistent with Dr. King's observation of Clemons. EH at 819. Dr. King testified that people with this type of impairment index score have had documented evidence of a stroke, traumatic brain injury, or a brain tumor. EH at 818-19. Dr. King concluded that the results of the Halsted-

Reitan neuropsychological test battery were affected by Clemons's malingering. EH at 837. As a result,

Dr. King did not make any findings based upon the round of testing he administered in 2004 other than Clemons was attempting to feign mental illness or demonstrate that he had some neuropsychological deficits. EH at 837-38. Even assuming Clemons had any brain impairment, Dr. King testified it would not have affected his ability to appreciate the criminality of his conduct. EH at 838.

On cross examination, Dr. King disagreed that there would be a test/retest effect when he gave the WAIS-III three months after Dr. Ackerson gave the WAIS-R because they are different tests that do not contain many overlapping items. EH at 866. Dr. King did not agree that Clemons had suffered brain injuries that caused brain damage, explaining as follows:

I have trouble with characterizing it that way and the reason is because damage by itself suggests that something was integrated and well-functioning before it was damaged. So, when you talk about damage, that suggests that somebody's brain, if that's what we are talking about, was well functioning and somehow it got damaged. And I see no evidence of that in this case.

EH at 882. Dr. King's conclusion is supported by the fact that Clemons, when he gives effort on intelligence tests, consistently scores in the 70's-80's. Dr. King ultimately concluded that Clemons is not "brain damaged." EH at 894.

Dr. Helen Mayberg is a medical doctor who is presently employed at Emory University in the

Department of Psychiatry and is a professor of psychiatry and neurology. EH at 512. Dr. Mayberg is board certified in neurology by the American Board of Psychiatry and Neurology. EH at 513-14. Dr. Mayberg testified that the generally accepted uses of a PET scans [sic] are the following: to detect cancer in the body, evaluate a brain tumor, evaluation of patients with temporal lobe epilepsy, and evaluation of someone with “progressive cognitive impairment” such as dementia associated with Alzheimer’s disease. EH at 522.

Dr. Mayberg testified that it is not generally accepted in her field to use a PET scan to diagnose a brain injury twenty plus years after the alleged injury or incident occurred. Specifically, Dr. Mayberg stated the following:

...you can’t come back twenty-five years later, and in this case where there isn’t even documentation of a clear head injury, and think that you’re going to use a PET scan twenty-five years later and extrapolate back that whatever I see on the PET scan now must somehow be related to something that happened at age five. I mean, it is impossible to use that technology to do that. So not only is it not generally accepted, there is no - there is not even a paper you can point to in the literature to work backwards that way. And I think in this case, the big problem is there is no documentation of a head injury with which to anchor the opinion.

EH at 540-41. Dr. Mayberg testified that a PET

scan offers a snapshot of how the brain is functioning at the time of the scan and therefore no inferences can be made on how the brain was functioning a week before the scan. EH at 542-43.

Dr. Mayberg was shown Petitioner's Exhibit 40, and she identified it as a copy of Clemons's PET scan. EH at 558. Dr. Mayberg testified that Clemons's brain scan is displayed in color and black and white data images. EH at 558-59. Dr. Mayberg testified that Clemons's brain scan was displayed "to the maximum pixel of the whole study." EH at 559. Dr. Mayberg testified that displayed to the maximum pixel is as follows:

...You then instruct the computer to display it for you so you can look at the inside and the outside, and it's produced with tomography. I mean, tomography is slices. Okay. You give that, the instruction, right at the time at Knollwood. You then are having to look at the pictures. And so what does the computer do, because this is all actually numbers that have been reconstructed into these pictures. So it has to decide how does it know what pixel to assign what color. Well, what it does is it goes through all the slices it has, this huge matrix of information, big volume, right, of a particular size. It goes through every line in this big queue, and it looks for the counts. And each pixel has got different counts. And it goes through, and it finds the one that is the maximum of every single pixel in the study. That's called the maximum pixel. That is now, by

convention, assigned the top, the brightest color.

EH at 559-60. Dr. Mayberg's expert opinion is that Clemons's brain scan "is a normal study. I don't see any brain abnormalities." EH at 566.

Dr. Mayberg testified that Dr. Wu's normal data base group is displayed in copies of brain scans that were labeled Petitioner's Exhibit 39. EH at 561-62. Dr. Mayberg testified that Dr. Wu's normative group's brain scans are displayed to the whole brain average, which is a different scale display from the one displayed in Clemons's brain scan. EH at 564-65. Dr. Mayberg defined the display scale of whole brain average as the following:

So it's as if the big picture has every pixel in that, it's been determined with the average value is for all the pixels in the brain. And you, in essence, divide the entire picture by the average of the whole brain, and you create a new picture.

EH at 564. Therefore, there is no dispute between Dr. Wu and Dr. Mayberg that Clemons's brain scan was displayed in the scaling procedure called region to the maximum pixel and Dr. Wu's normal data base brain scans are displayed in region to the whole brain average.

Dr. Mayberg testified that Dr. Wu used unreliable scientific methods in comparing Clemons's brain scan to Dr. Wu's normal data base because they are displayed in different scaling methods. Dr. Mayberg in the relevant part testified as follows:

But most importantly is the display as they [the normal control group] have been scaled to the average of the whole brain, which

means that the scaling in the appearance of them or any one of the people that contributed to that is, by definition, going to look totally different than someone who is actually displayed to the image maximum [as Clemons was]. That's not a fair comparison.

So if the basis of saying that Mr. Clemons is different from - is abnormal and that he has frontal lobe abnormalities and, to prove it, look at him next to a set of normal controls, and Mr. Clemons displayed the same.

And I know that he wasn't displayed the same, because the data that led to that construction is Mr. Clemons only displayed to the image maximum. EH at 569-570.

Dr. Mayberg offered a hypothetical example of why it is not scientifically reliable to make a visual comparison of brain scans displayed in two different scaling procedures. Dr. Mayberg testified as follows:

Another way to think about it is if you actually use numbers. say the actual activity in the frontal lobe is a five and the maximum activity in the brain is a ten, so that the frontal lobe relative to the hottest activity would be about half the value, which means that, on a color scale, it will be in the middle. It will look very different. [Dr. Mayberg is describing the scaling procedure of region displayed to the maximum pixel].

But say the average of the brain is also around five, and suddenly you divide the entire image by five. [Dr. Mayberg is describing the scaling procedure of region displayed to the whole brain average]. Now, five compared to five is about equal, whereas five compared to ten is like half. Of course, they are going to look different in terms of when you are looking at them.

EH at 592. Dr. Mayberg testified that if you displayed one person's brain scans in the two different scaling procedures described above, those brain scans would look different. EH at 590. Dr. Mayberg testified that if you make a visual comparison between two different brain scans then they have to be displayed in the same scaling procedure. EH at 588.

Dr. Mayberg also questioned the reliability of any findings based upon displaying data images in JPEG files.

Dr. Mayberg testified that data images in a DICOM file format are in their original or native format. EH at 580. Dr. Mayberg testified that if a file format is in its original format then "you can choose to display it to image maximum, you can make a calculation to figure out the average." EH at 580. Dr. Mayberg testified that data images in the JPEG file format have been compressed and lose any scientific reliability because that format "removes data." EH at 580. Dr. Mayberg concluded that a comparison study using a brain scan in a JPEG file format is "unreliable" and "invalid." EH at 581-82.

Dr. Mayberg testified that making visual comparisons of brain scans made on two different PET scan machines impacts the reliability of the findings. Dr. Mayberg stated that the machines have "different inherent resolutions" and that they have different "attenuation correction." EH at 607-09. Dr. Mayberg concluded by stating that "if we are going to look at pictures [of brain scans], we should be looking at pictures on the same machine." EH at 609.

Dr. Mayberg testified that even if Clemons has low metabolism in his frontal and temporal lobes that does not mean anything significant about how his brain is

functioning. EH at 610-11. Furthermore, Dr. Mayberg testified that Clemons's brain scan does not state anything significant about how his brain was functioning at the time of the crime. EH at 610-11. Specifically, Dr. Mayberg stated as follows:

But ordinarily if you are coming to the table with a PET scan de novo now trying to make any inferences to an uncharacterized neurologic or psychiatric condition in the past is, and even well characterized and say I know what someone's PET scan would have been like in the past, is absolutely impossible.

EH at 611. Dr. Mayberg testified that any frontal and temporal lobe abnormalities that Clemons may (or may not) have provide no insight into his state of mind at the time of the crime. EH at 615.

On cross examination, Dr. Mayberg stated that she drew the line on the use of PET scans "when the qualification is where has the scientific literature shown reliability to use a scan in an individual to confirm a diagnosis." EH at 637. Dr. Mayberg disagreed that someone with a low IQ has a "cognitive deficit." EH at 661. Dr. Mayberg stated that someone who scores in the low 70's on IQ tests should not necessarily be characterized as having a "cognitive deficit," but rather that they have "low intelligence." EH at 661. Dr. Mayberg also testified that in her visual examination of Clemons's brain scan not all of the images show that Clemons's brain is less active in the front than in the back. EH at 669-70. Dr. Mayberg further testified that none of the black and white images demonstrate that Clemons's frontal lobes are less active. EH at 770.

Dr. Mayberg testified that there is no consistent scan pattern for a moderate brain injury. EH at 677.

Dr. Mayberg testified that the literature that poor performance on the Wisconsin Card Sort test correlates with decreased frontal lobe activity as shown on a PET test relates to testing of persons with schizophrenia and “in the context of head injury where there is actually brain abnormalities.” EH at 687. Dr. Mayberg agreed that in case studies of people with structural lesions or as she termed it “big holes in the frontal lobe” there is a correlation with poor performance on the Wisconsin Card sort test and low metabolism in their frontal lobes as demonstrated by a PET test. EH at 695-99.

Dr. Mayberg agreed that a PET scan can be used to diagnose “focal neurological findings” in persons who have sustained a head injury “within a week or so” of the PET scan. EH at 707. Dr. Mayberg stated she had not seen any medical records documenting that Clemons had a head trauma due to a closed head injury. EH at 711-13. Dr. Mayberg stated that the standard of practice does not allow a doctor to diagnose a head or brain injury twenty plus years after the injury occurred. EH at 714-15.

D. Analysis of the Claim of Ineffective Assistance of Counsel

This Court first addresses whether the PET scan and Dr. Wu’s testimony interpreting the scan meets the standards for admissibility of scientific evidence. Second, assuming Dr. Wu’s testimony is admissible, the Court addresses whether it proves trial counsel was ineffective at the penalty phase. Third, the Court addresses whether trial counsel was ineffective for not having a neuropsychological evaluation performed to investigate Clemons’s alleged “limited mental capacity.” Clemons, 2003 WL 22047260, *4.

Finally, the Court considers the United States Supreme court's decisions in Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), in reviewing Clemons's claim that his death sentence is "unauthorized as a letter of law." Id. at *4.

1. Evidence relating to the PET scan

Before addressing the admissibility of the PET scan and Dr. Wu's testimony, this part of the ineffectiveness claim is due to be denied for two separate reasons. First, there is no claim in the Rule 32 petition that trial counsel was ineffective for not having a PET scan performed on Clemons and then to present testimony from an expert who interpreted the scan. Rule 32.3 of the Alabama Rules of Criminal Procedure places the burden on the petitioner to plead and prove "by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Because no claim related to a PET scan was ever raised in Clemons's Rule 32 petition, this claim is not preserved for appellate review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition"). Although this Court allowed Dr. Wu's testimony out of an abundance of caution because the case was on remand, any claim or contention related to Clemons's brain scan is denied because it was not pleaded in the Rule 32 petition.

Second, this claim is denied because there was not a PET scan machine in Alabama at the time of Clemons's trial in 1994. Trial counsel cannot be held ineffective for not having a PET scan administered to Clemons when there was not the availability of such a

test in Alabama. The University of South Alabama (Knollwood Hospital) did not obtain a PET machine until June 26, 2002. *See Respondent's Exhibit 3*. The University of Alabama at Birmingham did not obtain a PET machine until 2001. *See Respondent's Exhibit 4*. This claim fails on the very basic reality that there was not a PET scan machine in Alabama at the time of Clemons's trial in 1994.

Now the Court turns to whether the PET scan and Dr. Wu's testimony interpreting the scan meets the standards for admissibility of scientific evidence. "In Alabama, the standard for determining the admissibility of scientific evidence other than DNA evidence is that set forth in Frye v. United States, 293 F. 1013 {D.C. Cir. 1923}." Minor v. State, 2004 WL 1909380, *17 (Ala. Crim. App. 2004). "Under the Frye standard, expert testimony concerning a scientific or medical principle will be admissible only when the proponent of the evidence establishes that the principle has achieved general acceptance in the scientific field to which it belongs." Hoosier v. State, 612 so. 2d 1352, 1353 (Ala. Crim. App. 1992). In other words, the Frye standard requires that the generally the proponent of scientific evidence to establish theory and method used by the expert witness were accepted within the relevant scientific community. Clemons clearly failed to meet his burden of demonstrating compliance with the Frye test.

As the Court best understands Clemons's contention, it is that a PET scan can be used to diagnose a brain trauma or injury even if the event precipitating such an injury occurred thirty years before the administration of the PET scan. Clemons's Rule 32 petition asserts that Clemons has "poor executive functioning because he suffered a brain

injury at or near birth.¹⁰ R32 at 632. Because Clemons was born on September 28, 1971, see R32 at 1314, and Dr. Wu performed a PET test thirty three years later in 2004, the Court has to assume that Clemons is asserting a PET scan can be used to determine whether he sustained a brain injury or trauma at or near the time of his birth which occurred 33 years before the administration of the PET brain scan.

In order for Dr. Wu's testimony to be admissible, Clemons has to demonstrate that the use of PET scan imaging to diagnose brain trauma or injury from a non-specific event that occurred thirty plus years from the administration of the brain scan is generally accepted in the field of brain imaging and neurology. Dr. Wu's overall conclusion is that Clemons's brain scan pattern "is consistent with an abnormal frontal lobe function and consistent with ... a history of traumatic brain injury." EH at 414. However, none of the journal articles mentioned during Dr. Wu's testimony state that a PET scan can be used to diagnose a non-specific brain injury that occurred 33 years before the administration of the brain scan.

Dr. Wu conceded that the articles used during his direct examination to support the notion that a PET scan can be used to diagnose brain trauma actually are all case studies where the subject has suffered a severe or documented closed head injury and lost

¹⁰ Clemons has not offered any evidence to support the theory that he suffered a brain injury at or near birth. To the extent that Clemons has offered non-specific testimony that his mother drank during her pregnancy with him, there is no medical documentation demonstrating that Clemons was born suffering from the effects of fetal alcohol syndrome. Indeed, Clemons does not make that assertion.

consciousness or was in a coma. EH at 479-80, 480-81, 481-82, 485, 485-86, 486-87. Moreover, none of these articles support using a PET scan to diagnose a brain trauma or injury 33 years after a severe closed head injury.

In addition, Dr. Wu had to concede that one of the journal articles disproved his testimony that decreased metabolism in the frontal lobes is the consistent pattern of one suffering from a brain injury or trauma. Dr. Wu admitted that the findings in a case study of 20 persons who had suffered a mild to moderate closed head injury with altered consciousness showed that the frontal lobes were not usually affected. EH at 482-85. This same case study demonstrated that when the frontal lobes were affected by a closed head injury, the glucose metabolic rates in the frontal lobes were typically statistically higher (i.e., two standard deviations above the average) than the rate in a normal control group, and not lower as Dr. Wu found was present in Clemons's brain scan. EH at 483-85. Dr. Wu conceded that Clemons's brain scan pattern is different than the brain scan patterns documented in the case study of the 20 persons that sustained a documented head injury. EH at 482.

Dr. Mayberg testified that it is not generally accepted in the field of nuclear medicine and neurology to use a PET scan to diagnose a brain injury twenty plus years after the alleged injury or incident occurred. EH at 540-41. Dr. Mayberg testified that a PET scan offers a snapshot of how the brain is functioning at the time of the scan and therefore no inferences can be made on how the brain was functioning a week before the scan. EH at 542-43. Indeed, Dr. Mayberg stated that the results of a PET scan can be affected by what

a person is doing during the administration of the radioactive chemical or by how the subject is feeling that day. Dr. Mayberg testified that there is no consistent scan pattern for a moderate brain injury. EH at 677. Dr. Mayberg testified that the literature that poor performance on the Wisconsin Card Sort Test correlates with decreased frontal lobe activity as shown on a PET test relates to testing of persons with schizophrenia and “in the context of head injury where there is actually brain abnormalities.” EH at 687.

The Frye test requires the proponent of scientific evidence to establish that the theory and method used by the expert witness were generally accepted within the relevant scientific community. Clemons clearly failed to meet his “burden of demonstrating compliance with the Frye test.” Prewitt v. State, 460 so. 2d 296, 302 (Ala. Crim. App. 1984). In order to establish general acceptance of the use of PET scans to diagnose brain trauma from a non-specific event that occurred thirty plus years ago, Clemons has to show substantial agreement among a cross-section of the relevant scientific community. Clemons has to demonstrate a consensus in the field, which Dr. Wu’s testimony did not. This Court’s review of the testimony of Doctors Wu and Mayberg and the references to the pertinent medical journals mentioned at the remand hearing reveals that no one (with the exception of Dr. Wu) in the neurology and brain imaging community supports the use of PET scans to diagnose brain injury or brain trauma from a non-specific event that occurred thirty plus years before the administration of the brain scan. Therefore, Dr. Wu’s testimony is inadmissible because it does not meet the Frye test.

Even if Dr. Wu’s testimony is admissible, it does not prove that Clemons’s trial counsel were ineffective.

This Court is quite skeptical of Dr. Wu's testimony and wholeheartedly agrees with the sentiment of other courts who have examined Dr. Wu's testimony. In excluding Dr. Wu's testimony that was very similar to the testimony he gave in this Court, a California appellate court found the opinion of Dr. Waxman, the neurologist called by the State, to be more credible. People v. Protsman, 105 Cal.Rptr.2d 819 (2001)(unpublished opinion). The Court stated that experts in the field "had not accepted the use of PET scans for detecting or evaluating brain traumas at a time remote from the injury." Id. at 822. The Court credited the State's neurologist's testimony that "Dr. Wu's use of PET scan imaging to purportedly diagnose head trauma in people who were walking and functioning was not acceptable." Id. In another case, a federal district judge, after considering the testimony of Dr. Wu, ruled that "the Court had the uneasy feeling that Dr. Wu's testimony was so flawed that it was listening to a hired gun anxious to make the PET scan the instrument of truth." Jackson v. Caderon, 1997 WL 855516, *73 (C.D. Cal. 1997)(unpublished order).

Dr. Wu conceded that the method he used to determine that Clemons's brain scan was abnormal was to visually compare it to the brain scans of his normal control group. EH at 493. However, he conceded that Clemons's brain scan was displayed using a different scaling procedure from the one he uses to display his normal control group. EH at 454, 460, 468. As Dr. Mayberg testified, Dr. Wu used unreliable scientific methods to make his visual comparison. Dr. Mayberg explained that if you displayed one person's brain scans in the two different scaling procedures, those brain scans would look different. EH at 590. Dr. Mayberg testified that if you make a visual

comparison between two different brain scans then they have to be displayed in the same scaling procedure. EH at 588.

Another reason why Dr. Wu's testimony fails to establish ineffective assistance of counsel is because his methods in using particular computer file formats were unreliable. Dr. Wu was given Clemons's brain scan images in the DICOM file format that allowed him to make a statistical comparison and to display Clemons's brain image in the same scaling procedure that he uses to display his normal control group. Instead, Dr. Wu asked the medical technician at Knollwood Hospital to display Clemons's brain scan images in the JPEG file format which does not allow for any manipulation of the data. In addition, as Dr. Mayberg explained, data images in the JPEG file format have been compressed and lose any scientific reliability because that format "removes data." EH at 580. Dr. Mayberg concluded that a comparison study using a brain scan in a JPEG file format is "unreliable" and "invalid." EH at 581-82. Clemons did not provide any rebuttal to Dr. Mayberg's testimony despite being given the opportunity to do so. Because it does appear that Dr. Wu used invalid methods to arrive at his opinions, the Court finds that trial counsel were not ineffective for not presenting his testimony.

Even assuming Dr. Wu's methods were not invalid and unreliable, his testimony still does not prove ineffective assistance of counsel. Dr. Wu's overall conclusion was that Clemons' brain scan was abnormal because of decreased metabolism in the frontal and temporal lobes. EH at 328. However, Dr. Mayberg testified that Clemons's brain scan "is a

normal study. I don't see any brain abnormalities.”

EH at 566. The Court of Criminal Appeals has stated that when the “evidence concerning the [Rule 32 petitioner’s] mental condition was conflicting, we do not conclude that counsel rendered ineffective assistance by not presenting this evidence during the penalty phase. Taylor v. State, 2004 WL 1909278, *22 (Ala. Crim. App. 2004). This Court concludes in the face of conflicting evidence it cannot find that trial counsel was ineffective.

Finally, this part of the ineffectiveness claim is rejected because there is nothing in the record that demonstrates trial counsel had any indication he should have a brain scan performed on Clemons by Dr. Wu. “To prove that he was prejudiced by counsel’s failure to investigate and to produce a certain type of expert [Rule 32] petitioner must demonstrate a reasonable likelihood that an ordinarily competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced.” Elledge v. Dugger, 823 F.2d 1439, 1446 (11th Cir. 1987), opinion withdrawn on a different issue on denial of rehearing by, Elledge v. Dugger, 833 F.2d 250 (11th Cir. 1987). This court is not prepared to say that a reasonable investigation required trial counsel to find a PET scan expert. There were no indications in any of Clemons’s mental health evaluations that such a test should be performed. Additionally, in 1994, because there were no PET scan machines in Alabama, it was impossible to have such a test performed. Furthermore, it can be viewed that Dr. Wu is a “hired gun,” as indicated by his testimony that in criminal cases he always testified on behalf of criminal defendants and in every case but one he found a brain abnormality. EH at 435-36. Although hiring

Dr. Wu produces a virtual certainty that he will testify that a criminal defendant has a brain abnormality, this fact only produces the very unremarkable fact that trial counsel can always find an expert who will testify to something that is possibly helpful to a criminal defendant. Additionally, it is impractical to believe that trial counsel would have been approved funds to hire an expert like Dr. Wu who charged well over \$10,000 for his work in this case. This Court finds that a reasonable investigation for mitigating evidence does not include presenting the testimony of a PET scan expert.

2. Evidence relating to neuropsychological Testing

The Court now turns to whether trial counsel were ineffective for not having a neuropsychological evaluation performed to investigate Clemons' s alleged "limited mental capacity." Clemons, 2003 WL 22047260, *4. As previously trial counsel's investigation into mitigating evidence was hampered by Clemons' s family who were uncooperative and even hostile to trial counsel. Despite this, trial counsel developed a strategy of presenting evidence that Clemons had a difficult life and was law abiding until he fell in with the wrong crowd. R32 Vol. 33 at 6469-70. To that end, trial counsel planned to present the testimony of Clemons' s grandmother to testify as to Clemons' s difficult upbringing and the effect it had on Clemons joining the wrong crowd. R32 Vol. 33 at 6469-70.

As a part of this strategy to humanize Clemons, trial counsel also wanted Clemons to apologize and admit his guilt and beg for mercy. R32 Vol. 33 at 6470. The United States Supreme Court states the following

in regards to trial counsel making strategic choices after conducting a reasonable investigation:

...strategic choices made after thorough investigation of law and facts relevant are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. This Court finds that the record demonstrates trial counsel made a strategic decision after considering all of his options, including having a mental health evaluation performed, to humanize Clemons. The fact that Clemons's grandmother and Clemons refused to testify after Clemons's outburst does not make trial counsel's decision unreasonable.

Clemons presented testimony at the remand hearing from Dr. Golden, a neuropsychologist psychological evaluation on Clemons, who performed a psychological evaluation on Clemons.

Dr. Golden's overall conclusion was that Clemons had a cognitive disorder not otherwise specified, which he called a catch-all diagnosis used for an individual

“with a brain injury or brain dysfunction of some kind that doesn’t rise to the level of dementia or deliria,” which he stated Clemons does not have. EH at 20. Dr. Golden gave Clemons’s tests from the Luria- Nebraska test battery and concluded, based on the results of those tests, that Clemons has “frontal lobe dysfunction.” EH at 51. Dr. Golden further concluded that, because of these conditions, Clemons was more “susceptible to the suggestions of others,” impulsive, and not aware of the consequences of his behavior. EH at 193, 199.

Dr. Golden’s testimony fails for several reasons to establish ineffective assistance of counsel, perhaps most notably because his overall conclusions about Clemons are wrong. Contrary to Dr. Golden’s conclusion that Clemons was a dull-witted follower, Clemon’s post-crime conduct supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime. This finding is perhaps best supported by examining Clemons’s statement to the FBI. Supp.R.-Exhibits Vol. 4 at pp. 1-5. In the statement, Clemons stated he was picked up by Kenny Reid and Dedrick Smith who both had guns and were talking about taking cars at gunpoint. Id. at p. 1. As they were riding around looking for cars, Clemons told them, “if you’re going to take cars, take me home.” Id. at p. 1.

They saw a black Camara at a convenience store and Reid and Smith told Clemons to take the car. Id. at p. 2. When Clemons hesitated, they taunted him. Id. As Clemons exited the, car, they threw a gun for him to use.

Id. Clemons stated he only fired his gun after Agent Althouse drew his gun’. Id.

Other facts presented at Clemons's trial demonstrate that Clemons's statement contained numerous false statements. A week before the murder, Herman Shannon testified that Clemons came to his house and asked if anyone had a gun. R. 1423. Shannnon [sic] gave Clemons a gun and testified that it was the same gun Clemons was in possession of immediately after the crime occurred. Id. Shannon's testimony indicates that Clemons acted with premeditation by obtaining a gun a week before he carried out the carjacking.

Kenny Reid, who was in the car with Clemons right before the murder occurred, testified that it was Clemons who told the driver to pull into the Chevron gas station.

R. 1327-28. Clemons, referring to a car parked at the gas station, yelled "that's it, right there." R. 1329. Smith let Clemons out and parked at the Wendy's next door to the gas station. R. 1330. Soon thereafter, Reid heard two gunshots and then several more rounds of shots and saw Clemons drive through a red light at a high rate of speed.

R. 1331-32. Reid said that when he saw Clemons later that night, Clemons instructed him not to talk because he had killed a DEA man. R. 1335. Leon Johnson, who was at the house where Clemons drove immediately after the murder, stated that Clemons said he would kill him if he talked to the police. R. 1449. These facts demonstrate that Clemons was not a dull-witted follower but rather that he had a deliberate plan to carjack a car and that he was willing to silence anyone who talked to the police. In addition, Clemons's facile attempt to allege "self-defense" is disproved by the pathologist's testimony that showed

the two gunshot wounds indicated Agent Althouse was attempting to exit the car while he was being shot. R. 1574.

Other facts disproving Dr. Golden's conclusions are that Clemons repeatedly engaged in similar criminal activity. There was evidence presented at trial that indicated Clemons carjacked cars on three separate occasions at gunpoint. R. 1478-80, 1493-99, 1503-08. In all of these crimes, Clemons committed the forcible taking of the car without any assistance. Clemons's ability to repeatedly engage in illegal behavior refutes the notion that he was a follower that never acted on his own criminal instincts.

The second reason that Dr. Golden's testimony does not establish ineffective assistance of counsel is that trial counsel conducted a reasonable investigation into presenting mental health testimony. Trial counsel had available four different psychological evaluations that had been done before Clemons's federal trial. The reports from all four evaluations noted that Clemons had malingered in an effort to feign mental illness. R32 Vol. 7 at 1281 ("I am strongly suspicious of malingering especially in regard to his supposed psychosis."); R32 Vol. 7 at 1299, 1324 (overall conclusions in both reports were that Clemons was malingering). Trial counsel testified at the first Rule 32 evidentiary hearing that he talked with Dr. Grant, a psychiatrist, who had performed an evaluation before Clemons's federal trial. Trial counsel recalls talking to Dr. Grant about testifying and he recalls Dr. Grant stating that his testimony would not be helpful. R32 Vol. 33 at 6477-78. In addition, if he called Dr. Grant the State could have inquired into Dr. Grant's opinion that Clemons malingered during the evaluation. R32 Vol. 33 at 6480-81.

In fact, the only psychologists who have performed evaluations of Clemons and concluded that he was not malingering were Dr. Golden and Dr. Ackerson, the two psychologists hired by Clemon's present counsel. Dr. King, who administered a neuropsychological test battery in 2004 as a part of the remand proceedings, found that his results indicated that Clemons was malingering. EH at 837. Dr. King's findings are consistent with all of the psychological evaluations performed before Clemons's trial. Because of Clemons's history of malingering, trial counsel cannot be held ineffective because there has been no evidence presented that shows Clemons would have cooperated with a psychologist in 1994.

The third reason that Dr. Golden's testimony did not establish ineffective assistance of counsel is that his testimony that Clemons is "brain damaged" is incredible. Dr. Golden's conclusions are based upon the results of testing that are dubious at best considering Clemons's past and present history of malingering. Moreover, Dr. Golden seems to use the results of the tests that he gave as evidence of brain dysfunction even though the only basis for inferring brain disease is the socially unacceptable act that Clemons committed. Dr. Golden's testimony that Clemons's "brain damage" explains this crime is implausible. In fact, there is no evidence that supports the notion that Clemons is "brain damaged." Clemons's intellectual functioning has been consistent over time, beginning with the intelligence test that he took when he was six years old. Clemons borderline intellectual functioning, which Dr. Golden seems to equate with someone being brain damaged, see EH at 140, is not the reason that he committed this murder nor does it explain his other criminal acts.

Finally, this part of the ineffectiveness claim is rejected because seemingly hiring a “hired gun” such as Dr. Golden to perform a mental health evaluation does not establish trial counsel did not conduct a reasonable investigation. Dr. Golden revealed that when he testified in criminal cases it is always on behalf of criminal defendants and never on behalf of the prosecutor. EH at 201-02. In addition, it is impractical to believe that any court would authorize funds of \$25,000-\$30,000 to hire Dr. Golden, which is the amount that Clemons’s present counsel paid him for his work in this case. Although hiring Dr. Golden produces a virtual certainty that he will testify that a criminal defendant has “brain damage,” this fact only produces the very unremarkable fact that an expert can always be found who will testify to something to something that is possibly helpful to a criminal defendant. This court finds that a reasonable investigation for mitigating evidence does not include presenting the testimony of a neuropsychologist, especially when none of the psychologists who had evaluated Clemons made such a recommendation.

E. Wiggins and Williams

In the final part of this order, the court considers the United States Supreme Court’s decisions in Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), in reviewing Clemons’s claim that his death sentence is “unauthorized as a matter of law.” Clemons, at *4 n. 8. Before addressing the reasons why those cases can be distinguished from this case, it is important to remember what the Eleventh Circuit stated in rejecting the claim that Williams v. Taylor imposed a duty to investigate for mitigating evidence.

Specifically, the Eleventh Circuit stated the following: We understand Williams to create no mechanistic rule of law at all for investigation or for presentation of evidence in capital cases. See generally Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) (1). It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. 11); Crawford-El v. Britton [sic], 523 U.S. 574, 118 S.Ct. 1584, 1590 (1998) (“There is, of course, an important difference between the holding in a case and the reasoning that supports that holding.”) Chandler v. U.S., 218 F.3d 1305, 1317 n. 21 (11th Cir. 2000). In other words, these cases turn on their own facts and Williams or Wiggins do not command the outcome of this case.

The additional “mitigating” evidence presented by Clemons stands in stark contrast to evidence presented in Williams v. Taylor. In Williams, 529 U.S. 362, 120 S.Ct. 1495 (2000), the Supreme Court stated that the evidence which was not presented included: “documents prepared in connection with Williams commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin.” Id., 529 U.S. at 370, 120 S.Ct. at 1501. In addition, there was evidence that Williams had received commendations for helping to crack a prison drug ring and for returning a prison’s guard’s wallet, and testimony from prison officials who described Williams as being nonviolent. The United States Supreme Court, in finding trial counsel ineffective at the penalty phase, noticed that trial

counsel did not present evidence describing Williams's nightmarish childhood because they incorrectly believed state law barred access to such records. *Id.* In contrast, Clemons offered evidence in this remand hearing of two expert witnesses who were paid approximately \$40,000 to offer dubious evidence that Clemons is "brain damaged."

In addition, this case does not present the situation like the one in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), especially when considering that trial counsel had a plan to present mitigating evidence that would humanize Clemons. For example, the evidence the jury did not hear was the defendant's long history of severe physical and sexual abuse at the hands of his alcoholic mother and various foster parents. That abuse included going for days without food, his hospitalization for physical injury, and repeated rapes and gang-rapes.

Wiggins, 539 U.S. at ___, 123 S.Ct. at 2533. The abuse occurred throughout his childhood, teenage years, and even into early adulthood and was documented in medical, school, and social services records. *Id.* The United States Supreme Court described the mitigating evidence that was not presented at trial as the defendant's "excruciating life history." *Id.* at 123 S.Ct. at 2543. All that was offered in mitigation in *Wiggins* was that the defendant had no prior convictions. *Id.* at 123 S.Ct. at 2533.

This case is not *Wiggins* or *Williams*. Even though trial counsel was hampered in his investigation by Clemons's family, they settled upon a strategy of presenting evidence that Clemons had a difficult life and was law abiding until he fell in with the wrong crowd. To that end, trial counsel planned to present

the testimony of Clemons's grandmother to testify as to Clemons's difficult upbringing and the effect it had on Clemons getting in with the wrong crowd. As a part of this strategy to humanize Clemons, trial counsel also wanted Clemons to apologize and admit his guilt and beg for mercy. As previously stated, trial counsel did not present this testimony because Clemons and his family refused to come to court after they both caused an outburst in the courtroom. In addition, trial counsel investigated for mental health testimony by contacting one of the psychiatrists who had examined Clemons before the federal trial but were told the testimony would not be favorable. Furthermore, Clemons's history of malingering on mental health evaluations would have been brought out if any mental health professional would have testified.

Clemons has not established by a reasonable probability that the balance of aggravating and mitigating circumstances did not warrant a death sentence.

For all of the reasons stated above, this Court denies Clemons's claims raised as a result of the remand in this cause.

DONE and ORDERED this 28th day of October, 2004.

s/ D. Al Crowson
D. Al Crowson
Circuit Judge

APPENDIX J

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION**

EUGENE MILTON	)	
CLEMONS, II,	)	2:10-cv-02218-LSC
	)	
Petitioner,	)	
	)	
v.	)	
	)	
KIM T. THOMAS,	)	
Commissioner, et al.	)	
	)	
Respondents.	)	

ORDER

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by Petitioner Eugene Milton Clemons, II (“Clemons”), a death row inmate at Holman Correctional Facility in Atmore, Alabama. The only claim that remains pending before this Court is Clemons’s claim that he is mentally retarded¹ and,

¹ Although the clinical field now uses the term “intellectually disabled” rather than “mentally retarded,” the Court will use the latter terminology in keeping with that used by the state and federal authorities, the parties, and the experts at the time of Clemons’s hearing on this issue.

therefore, ineligible for the death penalty, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 321, 122 S. Ct. 2422, 2442 (2002) (holding that under the Eighth Amendment “death is not a suitable punishment for a mentally retarded criminal”). After conducting an evidentiary hearing, the Alabama courts denied Clemons’s *Atkins* claim on the merits. This Court’s review is thus circumscribed by the parameters of 28 U.S.C. § 2254(d). If Clemons is mentally retarded, then *Atkins* will require that his death sentence be vacated. The Court is currently reviewing the record and briefs of the parties, including Clemons’s motion for an evidentiary hearing, in preparation for final adjudication of this matter.

The Court is of the opinion that the Eleventh Circuit’s reasoning in its recent unpublished decision of *Smith v. Campbell*, 620 F. App’x 734 (11th Cir. 2015), has some applicability and bearing on this case. Because Respondent has not had the opportunity to distinguish or otherwise discuss that opinion, Respondent is hereby ORDERED to do so in a written brief filed with this Court within fifteen (15) days from entry of this Order.

Further, in the interest of court administration and for planning purposes, the Court hereby ORDERS both parties to respond in writing to the following inquiry:

If this Court were to find, pursuant to 28 U.S.C. § 2254(d)(1) and/or (2), that the Alabama court’s decision rejecting Clemons’s *Atkins* claim was either “contrary to . . . clearly established Federal law,” or “involved an unreasonable application of clearly established Federal law,” or unreasonably determined the facts in light of the evidence presented in that court, can and should this Court find that Clemons is mentally retarded based

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solely on the record that was before the Alabama courts and thus render an opinion directing the Alabama courts to vacate Clemons's death sentence and resentence him to life without the possibility of parole, or must the Court grant Clemons an evidentiary hearing to determine *de novo* whether he is mentally retarded?

Responses shall be filed with this Court no later than fifteen (15) days from the date of entry of this Order. Further, unless a party believes that this Court cannot legally grant such relief, each party is hereby DIRECTED to submit a proposed order that would appropriately direct the Alabama courts to vacate Clemons's death sentence and resentence him to life without the possibility of parole.

DONE AND ORDERED ON JANUARY 13, 2016.

s/ L. Scott Coogler

L. SCOTT COOGLER

UNITED STATES DISTRICT JUDGE

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APPENDIX K



IN THE EIGHTEENTH JUDICIAL CIRCUIT
COURT, SHELBY COUNTY, ALABAMA

EUGENE MILTON CLEMONS, II,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

**PETITION FOR RELIEF FROM JUDGMENT
PURSUANT TO RULE 32 OF THE
ALABAMA RULES OF CRIMINAL
PROCEDURE**

Petitioner Eugene Milton Clemons II (#Z570), presently incarcerated on death row at Holman State Prison in Atmore, Alabama, petitions this Court for relief from his unconstitutionally obtained conviction and death sentence. In support of this Petition, Mr. Clemons states the following:

PROCEDURAL HISTORY

1. Mr. Clemons was indicted in Shelby County on March 12, 1993 on two counts of capital murder in violation of ALA. CODE §§ 13A-5-40(a)(2) & (a)(5).

2. On September 25, 1994, Mr. Clemons was convicted of one count of capital murder. Later that day, the jury returned a unanimous death recommendation.

3. On November 7, 1994, the Court sentenced Mr. Clemons to death after finding one aggravating factor and two mitigating factors.

4. The Alabama Court of Criminal Appeals affirmed Mr. Clemons's conviction and sentence on December 20, 1996. It denied Mr. Clemons's request for rehearing on January 17, 1997. *Clemons v. State*, 720 So. 2d 961 (Ala. Crim. App. 1997).

5. The Supreme Court of Alabama affirmed the judgment of the Court of Criminal Appeals on January 16, 1998. It denied Mr. Clemons's request for rehearing on August 21, 1998. *Clemons v. State*, 720 So. 2d 985 (Ala. 1998).

6. Mr. Clemons filed a timely petition for writ of *certiorari* to the United States Supreme Court

on November 19, 1998. The Supreme Court denied the petition on January 25, 1999. *Clemons v. Alabama*, 119 S. Ct. 907 (1999).

7. This timely petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure followed.

GROUND SUPPORTING THE PETITION FOR RELIEF

8. As described below, violations of Mr. Clemons's fundamental constitutional rights deprived him of a fair and impartial trial. He is entitled to both a new trial and sentencing hearing to fairly--and constitutionally--determine his culpability for the crime for which he was convicted.

I. COUNSEL WAS INEFFECTIVE DURING THE PRETRIAL STAGE OF MR. CLEMONS'S TRIAL.

9. Bob Williams and William R. Hill, Jr. of the Public Defender's Office initially represented Mr. Clemons. Mr. Clemons sought new counsel after his relationship with Messrs. Williams and Hill deteriorated when he raised concerns about their competency. The Court subsequently appointed Mickey L. Johnson and Rodger D. Bass.

10. Messrs. Williams, Hill, Johnson, and Bass (collectively "Trial Counsel") did not render reasonably effective assistance of counsel during pretrial proceedings thereby denying Mr. Clemons's his rights pursuant to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the Alabama Constitution; and Alabama law. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. Trial Counsel Failed To Investigate Adequately the Charges Against Mr. Clemons.

11. Trial Counsel must adequately investigate the charges against a capital defendant to prepare an effective defense. *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) (“At the very heart of effective representation is the independent duty to investigate and prepare [the client’s case].”). Counsel must investigate every avenue, challenge each assertion by the State, and rigorously examine and test the State’s case. *Strickland*, 466 U.S. at 691; *see also Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (holding trial counsel was ineffective by failing to interview all potential alibi witnesses).

12. Trial Counsel conducted little independent investigation of the case. They met with Mr. Clemons on only a few occasions prior to trial and failed to establish a relationship of trust essential to adequate representation. Moreover, counsel did not sufficiently interview Mr. Clemons’s family, defense witnesses, prosecution witnesses, or expert witnesses.

13. Because of their inadequate investigation, Trial Counsel did not discover and use for Mr. Clemons’ s defense information concerning, *inter alia*, Mr. Clemons’s capacity to waive his constitutional rights and his ability to stand trial. Mr. Clemons’s defense was severely prejudiced as a result of this failure because, without full information, Trial Counsel abandoned these otherwise meritorious defenses.

B. Trial Counsel Failed to Present, Adequately Argue, and Obtain Favorable Rulings on Numerous Pretrial Motions.

14. Trial Counsel failed to argue and obtain favorable rulings regarding various pretrial motions, did not adequately oppose various motions by the State, and did not raise several crucial issues during pretrial proceedings. These failures hindered Mr. Clemons's defense and resulted in the admission of extremely prejudicial and otherwise inadmissible evidence.

15. Trial Counsel failed to brief and argue adequately:

- a. Motions to dismiss based on double jeopardy and Ala. Code § 15-3-8;
- b. A motion to exclude involuntary admissions and confessions;
- c. A motion for change of venue; and
- d. An application for youthful offender status.

16. Trial Counsel failed to present an adequate opposition to the State's motion to consider collateral crimes.

17. During pretrial proceedings, counsel neglected to:

- a. Seek a fully sequestered voir dire and demonstrate the necessity for individual voir dire; and

- b. Seek a continuance after accepting the representation less than three months before trial which gave counsel insufficient time to investigate the case and prepare an adequate defense.

II. TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF MR. CLEMONS'S TRIAL.

18. Trial Counsel did not render reasonably effective assistance of counsel during the guilt phase of Mr. Clemons's trial. Consequently, Mr. Clemons was denied effective assistance of counsel in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the Alabama Constitution, and Alabama law. *See Strickland*, 466 U.S. 668.

A. Trial Counsel Presented No Defense Case.

19. Trial Counsel offered no evidence on Mr. Clemons's behalf. Although Mr. Clemons was facing the most serious and irrevocable punishment available, counsel called no witnesses and offered no tangible evidence. The State presented a virtually unchallenged case. The jury, faced with only the district attorney's theory of Agent Althouse's murder, not surprisingly chose to convict Mr. Clemons. The prejudice caused by Trial Counsel's nonfeasance, in light of the many possible defenses available to Mr. Clemons, is self-evident.

B. Trial Counsel Failed to Challenge Adequately the State's Investigation and Presentation of the Case.

20. Mr. Clemons's counsel failed to challenge the State's investigation and presentation of its case, inadequately cross-examined State witnesses, and neglected to object to irrelevant and prejudicial evidence introduced by the State. As a result, the jury was allowed to consider significant inculpatory evidence that properly was excludable.

21. Trial Counsel was ineffective in challenging the admissibility of evidence introduced by State witnesses. Counsel made few objections and, on the rare occasions when objecting, offered little if any legal or factual support.

22. Trial Counsel failed to object to the admission of gory, irrelevant photographs of the victim. (Tr. 1121-30.)

23. Trial Counsel did not object when the State failed to establish a chain of custody for many of the State's exhibits.

24. Trial Counsel did not object when the State offered inadmissible hearsay evidence to prove Mr. Clemons's alleged motive. (Tr. 1410, 1424-25, 1439, 1445-46.)

25. Trial Counsel allowed the State to use Exhibit 67, a "mug shot"-like photograph of Mr. Clemons, for purposes of in-court identification. (Tr. 1257-58.) As discussed *infra*, the use of a single-photo array is unconstitutional because it is unduly suggestive and corrupts the identification process.

Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *Fitchard v. State*, 424 So. 2d 674,676 (Ala. Crim. App. 1982).

26. Trial Counsel failed to object when the district attorney referred during closing argument to facts not in evidence. (Tr. 1641, 1664-66, 1746-47.)

27. Counsel failed to object to the district attorney's improper, highly inflammatory closing argument, which, *inter alia*, encouraged the jury to weigh Mr. Clemons's rights against the rights of the victim (Tr. 1739-40) and to consider nonstatutory aggravating factors (Tr. 1740- 48).

C. Trial Counsel Failed to Procure Necessary Expert Assistance.

28. A defendant has a constitutional right to expert assistance with his defense. *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

29. Trial Counsel failed to procure testimony by a forensics expert concerning the significance of the lack of physical evidence linking Mr. Clemons to the crime.

30. Trial Counsel failed to procure the services of a juristic psychologist or other expert experienced with jury selection. Such services would have been particularly useful in this case because the extensive pretrial publicity likely caused the venire to form preconceptions concerning Mr. Clemons's guilt.

31. Trial Counsel failed to offer testimony of a mental health expert concerning Mr. Clemons's

history of mental, behavioral, and emotional problems and the role such problems played in the offense.

D. Trial Counsel Failed to Object to Improper Jury Instructions.

32. The Court issued several erroneous jury instructions. *See infra* Section XVII. Counsel did not object to such improper instructions.

E. Trial Counsels' Ineffectiveness Stemmed, in Part, from Their Inadequate Compensation.

33. At the time of Mr. Clemons's trial, Alabama law authorized compensation well below market rates for court-appointed attorneys for indigent clients. ALA. CODE § 15-12-21 (1994). Trial Counsel received only forty dollars for each hour in court and twenty dollars per hour for out-of-court preparation.

34. This inadequate and statutorily limited compensation violated the separation of powers doctrine, constituted a taking without just compensation, deprived Mr. Clemons effective assistance of counsel, and violated the Due Process and Equal Protection Clauses. *Bailey v. State*, 424 S.E.2d 503, 508 (S.C. 1992); *Makemson v. Martin Cnty.*, 491 So. 2d 1109, 1115 (Fla. 1986); *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987); *Walthrop v. State*, 506 So. 2d 273, 275 (Miss. 1987).

**III. TRIAL COUNSEL WAS INEFFECTIVE
DURING THE PENALTY PHASE OF MR.
CLEMONS'S TRIAL.**

**A. Trial Counsel Failed to Investigate
Mitigating Factors.**

35. An attorney has a duty to conduct a reasonable investigation for possible mitigating evidence, including an investigation of the defendant's background. *See Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988). "Failure to investigate the possibility of mitigating evidence is, per se, deficient." *Ex parte Land*, 1999 WL 588215, at 7 (Ala. 1999) (citing *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)).

36. In *Middleton*, the Eleventh Circuit articulated the steps for properly analyzing a claim of ineffective assistance for failure to investigate and present mitigating evidence:

First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Funchess v. Wainwright*, 772 F.2d 683, 689-90 (11th Cir.1985). If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to

determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

849 F.2d at 493.

37. A defendant is denied effective assistance when trial counsel fails to investigate mitigating evidence of the defendant's mental history. *See, e.g., Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995) (finding ineffective assistance when counsel failed to request records from psychiatric hospital where defendant had been committed for a three years and when counsel was on notice of potential psychiatric problems); *Stephens v. Kemp*, 846 F.2d 642, 653 (11th Cir. 1988) (stating "professionally reasonable representation" requires more of an investigation into mitigating evidence of defendant's mental history than a reliance on court ordered psychiatrist's written evaluation concerning the defendant's competency and overall mental condition).

38. In this case, Trial Counsel provided ineffective assistance by failing to investigate potentially mitigating circumstances, including, among other things, mental and physical abuse of Mr. Clemons at a very young age by parents and others, drug and alcohol abuse in his family, his parents' divorce, and his history of mental and cognitive problems. Trial Counsel's failure to investigate these issues constitutes ineffective assistance.

B. Trial Counsel Failed to Present Mitigating Evidence.

39. Counsel need not present all available mitigating evidence so long as the decision results from counsel's "reasonable strategic judgment." *See Jackson v. Herring*, 42 F.3d 1350, 1366 (11th Cir. 1995); *see also Strickland*, 466 U.S. at 690-91 (stating "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary"). "[R]easonable strategic judgment" requires counsel to "gather enough knowledge of the potential mitigation evidence to arrive at an 'informed judgment' in making that decision." *Jackson*, 42 F.3d at 1367.

40. Likewise, Trial Counsel's performance is deficient when counsel fails to present mitigating evidence of low intelligence or abuse. *See Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (holding assistance was ineffective when counsel failed to present readily available evidence of defendant's mental retardation, head injury, socioeconomic background, and reputation as a good father and worker); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985) (holding assistance was ineffective when counsel failed to present evidence that the husband-victim drank and was abusive, the defendant had no prior record and had a good reputation as a wife and mother, and she and her children had moved away from the husband-victim due to abuse).

41. In this case, Trial Counsel failed to present *any* mitigating evidence, even evidence that required no investigation such as Mr. Clemons' work with his church, his positive employment history, and

his desire to have a family. Because Trial Counsel failed to present mitigating evidence in the form of defendant's own testimony, a claim for ineffective assistance arises.

IV. COUNSEL WAS INEFFECTIVE DURING POST-TRIAL PROCEEDINGS.

42. The Court appointed William F. Mathews to represent Mr. Clemons during post-trial motions. Mr. Mathews filed a bare-boned Motion for New Trial, but later missed the deadline for filing Mr. Clemons's appellate brief.¹

43. Mr. Mathews did not render reasonably effective assistance of counsel during post-trial proceedings. Consequently, Mr. Clemons was denied effective assistance of counsel in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; the Alabama Constitution; and Alabama law. *See Strickland*, 466 U.S. 668.

44. Upon information and belief, Mr. Mathews has been disbarred for, *inter alia*, neglecting court-appointed representations of indigent clients.

45. Mr. Mathews failed to conduct an adequate investigation concerning Mr. Clemons's trial. He met Mr. Clemons only once before arguing the Motion for New Trial and failed to establish a relationship of trust essential to the representation. Further, Mr. Mathews did not interview witnesses,

¹ He eventually filed a brief, but only in an attempt to be paid for his services.

trial counsel, the prosecution, jurors, or Mr. Clemons's family.

46. Mr. Mathews was ill-prepared for the motion hearing. For example, on the day of the hearing, Mr. Mathews had not yet reviewed the transcript of Mr. Clemons's suppression hearing--a key to one of Mr. Mathews's primary arguments for a new trial.

47. Mr. Mathews failed to brief and argue adequately the Motion for New Trial. While Mr. Mathews raised thirty-three arguments, each was perfunctory with little if any legal or factual support. He neglected to raise numerous bases for a new trial, including, for example, prosecutorial misconduct.

48. Mr. Clemons was seriously prejudiced by Mr. Mathews's ineffective assistance because Mr. Clemons was unable to raise numerous meritorious grounds for a new trial.

V. THE COURT ERRED IN PERMITTING MR. CLEMONS TO STAND TRIAL IN LIGHT OF HIS INCOMPETENCY.

49. The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also Edgerson v. State*, 302 So. 2d 556 (Ala. Crim. App. 1974); *Agan v. Dugger*, 835 F.2d 1337, 1338 (11th Cir. 1987). In *Edgerson*, for example, the court held "a criminal defendant must have an understanding of the proceedings against him and an

ability to communicate with his attorney in preparing his defense before he may be proceeded against criminally.” 302 So. 2d at 562.

50. In this case, Mr. Clemons was not competent to stand trial under the standards articulated by the United States Supreme Court and Alabama courts. Mr. Clemons did not, at the time of his trial, have “sufficient” ability to consult with his lawyer with a reasonable degree of understanding. The trial record demonstrates Mr. Clemons could not--and did not--communicate with trial counsel. He ignored his lawyers and was unable to communicate with them. Moreover, Mr. Clemons did not have a rational or factual understanding of the proceedings against him. For these reasons, the Court erred by requiring Mr. Clemons to stand trial.

**VI. THE COURT ERRED BY FAILING TO
HOLD A *PATE* HEARING TO
DETERMINE MR. CLEMONS’S
COMPETENCY TO STAND TRIAL.**

51. Courts must conduct a hearing on the defendant’s competency to stand trial whenever there is a “reasonable and bona fide doubt” as to the defendant’s competence. *Janezic v. State*, 723 So. 2d 725, 728 (Ala. 1997); *see also Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975); *Agan v. Dugger*, 835 F.2d 1337 (11th Cir. 1987). Indeed, “evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, [and] even one of these factors standing alone may, in some circumstances, be sufficient.” *Drope*, 420 U.S. at 180.

If, during a later phase of the trial (even after a verdict is rendered), a “reasonable and bona fide doubt” as to the defendant’s competence to stand trial arises, the court must hold a hearing to determine whether the defendant was, or continues to be, competent to stand trial. *See Janezic*, 723 So. 2d at 729 (requiring a hearing when “facts that question the defendant’s competency become available after a verdict has been reached”). If the court finds a reasonable and bona fide doubt regarding a defendant’s competency to stand trial, the defendant is constitutionally entitled to a jury trial on the issue of mental competency to stand trial. *See Ex parte LaFlore*, 445 So. 2d 932 (Ala. 1983).

52. When the trial record reveals a reasonable and bona fide doubt as to the defendant’s competency to stand trial, Alabama appellate courts have found that the trial court’s failure to conduct a competency hearing is error. *See, e.g., Janezic*, 723 So. 2d at 725; *Wagner v. State*, 489 So. 2d 623, 631 (Ala. Crim. App. 1985). In *Janezic*, for example, the court remanded the case to the trial court for a new competency hearing when the only psychologist testifying about the defendant’s competency to stand trial later stated the defendant’s psychological condition had deteriorated significantly during the course of the trial. 723 So. 2d 725. In *Wagner*, moreover, the court found, upon reviewing the trial transcript, the facts before the trial judge raised reasonable and bona fide doubt as to the defendant’s competency to stand trial. 489 So. 2d at 629.

53. In this case, the trial transcript reveals a reasonable and bona fide doubt regarding Mr. Clemons’s competency to stand trial. Mr. Clemons’s behavior at trial, including his comments to the jury,

his attempts to fire his counsel, and his refusal to participate in his defense, raise such a doubt. Whether Mr. Clemons was incompetent prior to trial, or whether his competency deteriorated during trial, is of no moment. Once the Court witnessed Mr. Clemons's odd, self-destructive behavior, it was required to convene a hearing at which defense counsel could raise and thoroughly discuss Mr. Clemons's competency to stand trial. The Court's failure to halt the trial and undertake a competency hearing constitutes reversible error.

**VII. THE COURT ERRONEOUSLY
EXCLUDED MR. CLEMONS FROM THE
GUILT AND SENTENCING PORTIONS
OF HIS TRIAL.**

**A. A Capital Defendant Cannot be
Excluded From Trial.**

54. A person charged with a felony has a fundamental right to be present at every stage of trial. U.S. CONST. amends. V, VI, XIV; *see also* ALABAMA CONST. art. I, § 6; *Neal v. State*, 257 Ala. 496, 59 So. 2d 797 (1952). This right derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

55. While a defendant may waive the right to be present in a noncapital case, *see Illinois v. Allen*, 397 U.S. 337 (1970), the Supreme Court has ruled a capital defendant must be present at all crucial stages of trial. *Diaz v. United States*, 223 U.S. 442, 455 (1912); *Lewis v. United States*, 146 U.S. 370, 372 (1892); *Hopt v. Utah*, 110 U.S. 574, 579 (1884).

56. Due process requires courts to balance the defendant's right to a fair and reliable trial, the severity of the possible punishment, and the court's interest in preserving courtroom decorum. *Cf. Allen*, 397 U.S. 337. In noncapital cases, the balance favors the court because the potential punishment is less severe and unreliable results can be remedied. However, when the potential punishment is death, the balance must favor the defendant. Because there is no opportunity to remedy an unreliable verdict after the penalty is enforced, due process requires courts to take all reasonable measures necessary to ensure reliability, including employing reasonable alternatives to removing an obstreperous defendant (e.g., binding and gagging).

57. The Court violated Mr. Clemons's constitutional right to be present at trial when it ordered him removed from the courtroom. As a result, Mr. Clemons was unable to assist in his defense or confront witnesses against him. The prejudice caused by his removal is self-evident.

B. Under *Illinois v. Allen*, Mr. Clemons's Conduct Did Not Warrant Removal.

58. Even if *Allen* were applicable to capital defendants, Mr. Clemons's behavior did not warrant removal his from the courtroom.

59. *Allen* does not provide judges unfettered discretion to remove defendants from the courtroom for single incidents of minor misbehavior. At most, *Allen* authorizes removal after repeated "disorderly,

disruptive, and disrespectful” behavior by a defendant. 387 U.S. at 343.

60. Mr. Clemons’s “misbehavior” during trial was trivial. He stood at his chair and notified the court that he wanted to fire his attorneys. (Tr. at 1060-62.) He neither swore nor acted disrespectful to the court. He did not threaten the court, throw papers, or express an intent to disrupt the proceedings. His minor disruption, stemming from distrust of his legal counsel and layman’s confusion concerning the propriety of two trials on seemingly duplicative charges, simply cannot be equated to the defendant’s behavior in *Allen*. The Court erred by removing Mr. Clemons from the courtroom under purported authority of *Allen*.

VIII. THE COURT ERRONEOUSLY ALLOWED MR. CLEMONS TO WAIVE HIS RIGHT TO BE PRESENT.

61. Even if Mr. Clemons’s initial removal from the courtroom was constitutionally permissible, the Court’s acceptance of his subsequent waiver of the right to be present was not.

62. After Mr. Clemons’s initial removal from the courtroom, he repeatedly refused to return despite pleas from the Court, Trial Counsel, and various court officials. (Tr. 1229-35, 1238-45, 1563-64, 1727-30.) Both the Court and Trial Counsel recognized Mr. Clemons’s continued absence was voluntary. (Tr. 1246, 1255-57.)

63. Under Supreme Court precedent, “an accused . . . charged with a capital offense [i]s incapable of waiving the right [to presence].” *Diaz v. United States*, 223 U.S. 442, 455 (1912). Thus, the

Court erred by allowing Mr. Clemons to remain in his jail cell, under the mistaken belief *Allen* permits capital defendants to waive presence. (Tr. 1256.)

64. Even if Mr. Clemons could waive his right to be present, the Court did not conduct the necessary inquiry to determine whether Mr. Clemons's waiver was knowing, intelligent, and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Given Mr. Clemons's incompetence (*see supra* Section V), any "waiver" would not pass muster under *Johnson*.

IX. THE COURT FAILED TO ADVISE MR. CLEMONS OF HIS RIGHT TO SELF-REPRESENTATION.

65. The Sixth Amendment provides both a right to assistance of counsel and a right to self-representation. *Faretta v. California*, 422 U.S. 806, 823 (1975). Invoking one constitutes a de facto waiver of the other. *Id.* at 835.

66. When a defendant invokes the right of self-representation, the court has a duty to inquire whether the defendant "knowingly and intelligently" relinquishes the right to counsel. *Id.* This inquiry must be an on-the-record discussion sufficient to determine whether the defendant understands the choice between proceeding *pro se* or with assigned counsel, the advantage of having trained counsel, and the risks associated with self-representation. *United States v. Torres*, 140 F.3d 392, 401 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 595 (1998).

67. Mr. Clemons discharged Trial Counsel in open court, thereby waiving his right to counsel. (Tr. 1060-64.) This waiver necessarily invoked Mr.

Clemons's right of self-representation. Nevertheless, the Court failed to conduct a sufficient *Faretta* inquiry because it did not inform Mr. Clemons of the absolute right to self-representation, explain the meaning of standby counsel, or identify the risks of self-representation. (Tr. 1065-66.)

X. THE COURT ERRED BY FORCING COUNSEL ON MR. CLEMONS.

68. The right to assistance of counsel includes a “correlative right to dispense with a lawyer’s help.” *Adams v. United States*, 317 U.S. 269, 279 (1942). Forcing an attorney on an unwilling client violates the Sixth Amendment because it not only diminishes the quality of the attorney-client relationship (and hence the quality of the legal representation) but also makes the defendant question the intrinsic fairness of the legal system. *Faretta*, 422 U.S. at 834.

69. The right to self-representation may be circumscribed if a defendant engages in “serious and obstructionist misconduct” while representing himself. *Id.* at 834 n.46. However, there is no similar limitation on the right to discharge counsel.

70. Mr. Clemons repeatedly and unequivocally fired Trial Counsel. (Tr. 1060-64, 1229-35, 1238-45, 1563-64, 1727-30.) By requiring Trial Counsel to continue the representation, over the vocal protests of both counsel and Clemons, the Court violated Mr. Clemons’s Sixth Amendment right to discharge counsel. *Adams*, 317 U.S. at 279. The result was disastrous: Trial Counsel abandoned the defense

selected by Mr. Clemons and instead chose to offer *no* defense in either the guilt or sentencing phases.

XI. MR. CLEMONS'S SUCCESSIVE FEDERAL AND STATE CONVICTIONS CONSTITUTE DOUBLE JEOPARDY.

71. The Fifth and Fourteenth Amendments to the United States Constitution prohibit punishing a defendant more than once for the same crime. Similarly, Alabama Code § 15-3-8 prohibits successive prosecutions for a single crime.

72. Mr. Clemons was tried and convicted in federal court for the murder of Douglas Althouse; he was tried and convicted by the State for the same crime. Because the offense at issue in both courts was the same (i.e., murder), Mr. Clemons's successive prosecutions are not authorized by the common doctrine of dual sovereignty. *See Heath v. Alabama*, 474 U.S. 82, 89 (1985) (holding the doctrine of dual sovereignty is applicable only when "by one act [a defendant] has committed two offenses").

XII. THE COURT ERRED BY DENYING MR. CLEMONS'S APPLICATION FOR YOUTHFUL OFFENDER STATUS.

73. The Court denied Mr. Clemons's application for youthful offender status based on the recommendation contained in a prehearing investigation report. The information in the report was inaccurate, unreliable, and highly prejudicial. In addition, the report did not afford sufficient weight to Mr. Clemons's borderline mental retardation and minimal prior contacts with the criminal justice system.

74. In capital cases, courts must take special precautions to ensure reliability and due process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Here, the Court deprived Mr. Clemons of due process by considering unreliable information when ruling on his application for youthful offender status.

**XIII. THE COURT ERRONEOUSLY ADMITTED
STATEMENTS MADE BY MR. CLEMONS
WHILE IN CUSTODY.**

75. Every defendant has an absolute right to remain silent during custodial interrogation. U.S. CONST. amends. V, XIV. The police must fully inform a defendant of this right and the right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966). Custodial interrogation may not proceed unless a defendant freely, knowingly, and unequivocally waives these rights. *Id.* In addition, no statement made by a defendant during custodial interrogation may be admitted into evidence unless, under the totality of the circumstances, it appears the statement was voluntary. *Johnson v. Zerbst*, 304 U.S. 458 (1937).

76. Under these standards, the Court erred by admitting statements made by Mr. Clemons during custodial interrogation by four officers of the Federal Bureau of Investigation because:

a. Mr. Clemons did not waive his Fifth and Fourteenth Amendment rights to silence and counsel before making inculpatory statements. (Tr. 1162.)

b. FBI officers offered Mr. Clemons inducements for his confession (e.g., a promise to “make

[Mr. Clemons's] cooperation known" to prosecutors and law enforcement officials). (Tr. 1172-74.)

c. Mr. Clemons was not competent to waive his Fifth and Fourteenth Amendment rights.

d. Based on the totality of the circumstances (including Mr. Clemons borderline mental retardation and learning disabilities, his problems understanding language, his prior head injuries, and the coercive environment of the interrogation room), Mr. Clemons's statements were not voluntary.

XIV. THE COURT ERRED BY ADMITTING EVIDENCE OF PRIOR BAD ACTS AND BAD CHARACTER EVIDENCE TO PROVE MR. CLEMONS'S GUILT.

77. Generally, evidence of prior bad acts or bad character is inadmissible to prove the elements of an offense or to buttress inferences created by other evidence. *Ex parte Cofer*, 440 So. 2d 1121, 1123-24; MCELROY'S ALABAMA EVIDENCE § 26.01(1) (4th ed. 1991). Exceptions to this rule are narrowly drawn, especially in capital cases. *Aaron v. State*, 596 So. 2d 29 (Ala. Crim. App. 1991) (holding evidence of defendant's prior bad acts was inadmissible to show intent to kill victim).

78. During the guilt phase of the trial, the State called numerous witnesses to testify about other crimes allegedly committed by Mr. Clemons. (Tr. 1475-1548.) Mr. Clemons had not been tried (much less convicted) of these crimes, yet the Court allowed the State to introduce evidence about them to convince the jury Mr. Clemons had killed Agent Althouse.

79. In a pretrial motions hearing, the State argued evidence of prior bad acts by Mr. Clemons was admissible to prove identity. However, there were more differences than similarities between the prior bad acts and the murder of Agent Althouse. Moreover, the State offered an abundance of other evidence to prove identity, including two eyewitnesses and numerous other persons who testified that Mr. Clemons had talked to them about Althouse's death.

80. Evidence of prior bad acts and bad character generally is inadmissible because it tends unduly to prejudice the trier of fact. Here, the jury was allowed to consider unsubstantiated bad act and bad character evidence, which necessarily influenced their verdict in both the guilt and sentencing phases.

**XV. IN-COURT IDENTIFICATION OF MR.
CLEMONS FROM A CUSTODIAL
PHOTOGRAPH WAS
UNCONSTITUTIONAL.**

81. The State called three victims of prior carjackings to identify Mr. Clemons as their purported assailant. Because the Court had excluded Mr. Clemons from his trial, the State showed each witness a "mug shot"-like photograph of Mr. Clemons (State's Exhibit 67) and asked whether the man in the photograph was the same person who had taken their cars. None previously had identified Mr. Clemons in a line-up, photo array, or prior proceeding. Not surprisingly, each identified Mr. Clemons as their assailant.

82. The single photograph array offered by the State virtually assured the identification of Mr.

Clemons by these witnesses. Identification based on a single photograph array is unduly suggestive, conducive to misidentification, and, consequently, unconstitutional. *Brazwell v. State*, 369 So. 2d 25, 29 (Ala. Crim. App. 1979); *Fitchard v. State*, 424 So. 2d 674, 676 (Ala. Crim. App. 1982).

83. Even if using a single photograph array to identify an absent defendant were not per se unconstitutional, the use of such procedure in Mr. Clemons's trial would be unlawful. Due process requires the exclusion of any unreliable identification testimony resulting from procedures that are "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967).

84. Under the test established by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972), the single photograph array used at Mr. Clemons's trial was suggestive and conducive to misidentification. The witnesses had little opportunity to view their assailants at the time of the crimes. (Tr. 1521-39, 1542-47.) The State did not show that the witnesses' degree of attention at the time of their alleged assaults was sufficient to provide an independent basis for identification. (Tr. 1522-28, 1534-35, 1546.) None of the witnesses had ever identified Mr. Clemons prior to his trial. Only one witness could express any certainty that Mr. Clemons was indeed his assailant. (Tr. 1538.) Finally, more than two years had elapsed between the carjackings and the witness' identification of Mr. Clemons. Thus, the totality of the circumstances indicate the witnesses could not reliably identify Mr. Clemons.

85. The admission of the identifications provided by the victims of three prior carjackings seriously prejudiced Mr. Clemons's defense. Without such unreliable evidence, the State had only Mr. Clemons's illegally obtained confession and the statements of purported co-conspirators to prove identity.

XVI. THE JURY WAS TAINTED BY EX PARTE CONTACTS AND INFLUENCES.

86. While the jury was sequestered at a hotel, an unidentified person awakened at least one juror in the early morning hours by clapping his hands and yelling, "Guilty, guilty, guilty." (Tr. 1263-65.) Despite this clearly prejudicial influence, the Court declined to inquire whether the event affected the jury. (Tr. 1271-75.)

87. An unidentified African-American man in his mid-twenties closely watched the jury while they were eating dinner at a restaurant. (Tr. 1266.) When the jurors left the restaurant, the man attempted to follow them. The bailiff became concerned when he noticed the man's license plate was covered with a rag. (Tr. 1267.) Although the Court heard the bailiff's testimony about this strange incident, it never inquired into the affect on the jurors.

88. Alabama law mandates a new trial if any extraneous influence *may have* influenced the jury's verdict. *Ex parte Troha*, 462 So. 2d 953 (Ala. 1984). The ex parte contacts with Mr. Clemons's jury may have generated fear among the jury and impermissibly tainted their deliberations. Mr. Clemons was deprived of a fair and impartial trial guaranteed by the Sixth

Amendment to the United States Constitution because the Court failed to grant a mistrial or ensure that no member of the jury was influenced by the contacts.

**XVII. THE COURT'S JURY INSTRUCTIONS
WERE ERRONEOUS.**

89. The Court's instruction concerning aggravating and mitigating circumstances was in error because the Court neglected to instruct the jury that the jury cannot impose the death penalty if the aggravating and mitigating circumstances are in equipoise. (Tr. 1764-65); *see Ex parte Stewart*, 659 So. 2d 122 (Ala. 1993).

90. The Court improperly instructed the jury that only one mitigating circumstance had been proven. (Tr. 1769-71.) This instruction left no room for the jury to consider other mitigating circumstances as provided by ALA. CODE § 13A-5-52.

**XVIII. THE COURT UNLAWFULLY LIMITED
THE JURORS' CONSIDERATION OF
MITIGATING CIRCUMSTANCES.**

91. Due process guarantees every defendant the right to full consideration of every mitigating circumstance in favor of life without parole and against death. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Under Alabama's capital sentencing statute, "a mitigating circumstance *shall* include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating

circumstances” offered by the defense. ALA. CODE § 13A-5-52 (emphasis added).

92. As discussed *supra* in Section XVII, the Court improperly limited the jury’s consideration to a single mitigating circumstance, Mr. Clemons’s age at the time of the offense. (Tr. 1756.) When the jury became confused about the mitigation instruction, the Court gave a reinstruction. During the reinstruction, the Court told the jury--twice--that only one mitigating circumstance had been proven. (Tr. 1769-71.) Although the Court recognized its instructions were in error (Tr. 1775), it never corrected the error and, not surprisingly, the jury quickly returned a unanimous death verdict.

XIX. THE STATE FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS UNDER *BRADY V. MARYLAND*.

93. The State is obligated to provide criminal defendants with all exculpatory evidence, including statements, impeachment evidence, and physical evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *see also Giglio v. United States*, 405 U.S. 150 (1972); *Ex parte Womack*, 541 So. 2d 47 (Ala. 1988). In a capital case, this obligation is heightened given the severity of the potential punishment. *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989).

94. Upon information and belief, the State failed to provide Mr. Clemons with crucial exculpatory and impeachment evidence. The investigation of Agent Althouse’s death was massive, involving more than five federal, state, and local law enforcement agencies. These authorities investigated a multitude of leads,

many of which pointed to suspects other than Mr. Clemons. For example, a “hotline” was set up to allow the public to provide tips concerning Agent Althouse’s death. Many tips implicated persons other than Mr. Clemons . In addition, the clerk at the convenience store where the shooting occurred reportedly told prosecutors that Mr. Clemons was not the person she saw shoot Agent Althouse. The State never gave Mr. Clemons’s counsel access to this crucial exculpatory information. These *Brady* failures prevented Mr. Clemons from preparing and presenting an effective defense, denying him his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law.

XX. PRETRIAL PUBLICITY MADE IT IMPOSSIBLE FOR MR. CLEMONS TO RECEIVE A FAIR TRIAL IN SHELBY COUNTY.

95. Extensive pretrial publicity made it impossible for Mr. Clemons to receive a fair trial in Shelby County.

96. The Fourteenth Amendment’s Due Process Clause protects a defendant’s Sixth Amendment right to be tried by “a panel of impartial, ‘indifferent’ jurors.” *Irwin v. Dowd*, 366 U.S. 717, 722 (1961). When pretrial publicity is pervasive, prejudicial, or inflammatory, a change of venue is necessary. *Rideau v. Louisiana*, 373 U.S. 723 (1963).

97. Publicity concerning Mr. Clemons’s case was pervasive, prejudicial, and inflammatory. Agent Althouse’s death, the massive investigation thereafter,

and Mr. Clemons's subsequent arrest were featured stories in newspaper, radio, and television reports throughout the Birmingham area. Mr. Clemons's federal trial, conviction, and sentencing and the pretrial proceedings in his state case also were prominently featured.

98. At least forty-six members of the seventy-one person venire were exposed to this extensive pretrial publicity. (Tr. 42-52.) The Court concluded, without questioning the individual members of the venire, that none would be influenced by the dramatic news reports they had seen in the months before Mr. Clemons's trial. (Tr. 52.) Nine of the venire who admitted seeing the news reports eventually were seated on the jury. (Tr. 52, 727-29.)

99. Given the pervasive and prejudicial publicity surrounding Mr. Clemons's case, he did not, indeed could not, receive a fair trial in Shelby County. The Court erred by denying Mr. Clemons's motion for a change of venue.

**XXI. IRRELEVANT AND PREJUDICIAL
EVIDENCE WAS INTRODUCED AT
TRIAL.**

100. Only relevant, probative evidence is admissible at trial. ALA. R. CRIM. P. 402; *Old Chief v. United States*, 519 U.S. 172 (1997). Otherwise relevant evidence may be excluded if its prejudicial effect outweighs its probative value. C. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 21.01(4).

101. Here, the State introduced thirteen gory photographs of Agent Althouse's body. (Tr. 1135.) These included close-ups of Agent Althouse's body

with his eyes open halfway and tubes protruding from his mouth, his bloody torso lying in a pool of blood, and similar scenes. (Tr. 1124-29.)

102. These photographs were not relevant to any issue in the case; it was undisputed that Agent Althouse had died of gunshot wounds. The pictures, however, were highly prejudicial because they suggested Agent Althouse died a painful, gory.

**XXII. ELIMINATION OF ALL JURORS
OPPOSED TO THE DEATH PENALTY
DENIED MR. CLEMONS A FAIR TRIAL.**

103. When death certifying a jury, courts may excuse potential jurors for cause only if the potential jurors express reservations about the death penalty which are so strong that their ability to decide the case in accordance with their oath would be substantially impaired. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

104. Here, the Court excused six persons who expressed reservations about the death penalty. (Tr. 204, 210, 235, 248, 347-48, 600-08.) Nevertheless, none had expressed reservations so strong they would not be able to decide Mr. Clemons's case in accordance with their oath. Because the Court's systematic exclusion of all potential jurors with reservations about the death penalty was not authorized by *Witherspoon*, the Court violated Mr. Clemons's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

**XXIII. THE COURT ERRED BY NOT STRIKING
FOR CAUSE JURORS WHO STATED
THEY WOULD AUTOMATICALLY VOTE
FOR THE DEATH PENALTY.**

105. Courts must strike for cause all potential jurors whose views in favor of the death penalty would prevent or substantially impair their performance in accordance with their oath as a juror. *Morgan v. Illinois*, 504 U.S. 719 (1992).

106. Two members of Mr. Clemons's venire stated they would vote automatically for the death penalty under certain circumstances. (Tr. 464-69, 550-51.) The Court committed reversible error by refusing to strike these jurors for cause despite their fixed views on the death penalty. *Witherspoon*, 391 U.S. at 520-21.

**XXIV. PROSECUTORIAL MISCONDUCT
DENIED MR. CLEMONS A FAIR TRIAL
AND SENTENCING DETERMINATION.**

107. The State offered inadmissible hearsay in an attempt to prove motive. The State argued Mr. Clemons carjacked Agent Althouse because Mr. Clemons wanted to get an engine for Dedrick Smith's car. To prove this purported motive, the State presented four witnesses, each of whom testified that Dedrick Smith said he needed a new engine. (Tr. 1410, 1424-25, 1438-40, 1445-46.) This testimony was inadmissible hearsay. Dedrick Smith did not testify at trial, and no exception to the hearsay rule was applicable. The admission of this evidence was highly prejudicial because it was the only evidence offered by the State to prove motive.

108. The State violated Mr. Clemons's Fifth, Sixth, Eighth, and Fourteenth Amendment rights and rights provided by Alabama law by arguing facts not in evidence to obtain a conviction and death sentence. Prosecutors are prohibited from arguing facts not in evidence. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Nevertheless, during both the guilt and sentencing phases of Mr. Clemons's trial, the district attorney frequently referred to facts not in the record. For example, the district attorney argued about the victim's character (Tr. 1641, 1664-66), Mr. Clemons's character (Tr. 1746-47), and the supposedly plush amenities available to Mr. Clemons if he were sentenced to life without parole (*id.*). None of these "facts" were supported by testimony or tangible evidence, and Mr. Clemons had no opportunity to challenge their validity. Each, however, was prejudicial to Mr. Clemons because they suggested Mr. Althouse's life was more valuable than Mr. Clemons's, and Mr. Clemons would lead a life of relative luxury if he were incarcerated.

109. The district attorney impermissibly implied a duty to impose death and expressed his personal opinion that Mr. Clemons deserved the death penalty. A prosecutor may not "imply to the jury that he or his office has already made the judgment that [a particular] case, above most other capital cases warrants the death penalty." *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990). Yet in Mr. Clemons's case, the district attorney instructed the jury that the only "fair" punishment was the same "punishment" suffered by Mr. Althouse. In fact, the prosecutor expressly violated the court's ruling in *Arthur* by stating "If ever there's a case for the death penalty, this is it." (Tr. 1740.) These statements caused

the jury to believe the district attorney's office already had decided the appropriate sentence and thereby reducing the jury's sense of responsibility for the death sentence. *Arthur*, 575 So. 2d at 1185; *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

110. The State impermissibly urged the jury to weigh Mr. Clemons's rights against the rights of the victim. (Tr. 1739-40, 1746.) This argument is "clearly improper." *McNair v. State*, 653 So. 2d 320, 337 (Ala. Crim. App. 1992).

111. The State argued nonstatutory aggravating factors to convince the jury to impose the death penalty. The jury may consider *only* statutory aggravating factors. *See Keller v. State*, 380 So. 2d 926 (Ala. Crim. App. 1979). Nevertheless, the district attorney urged the jury to consider nonstatutory factors such as the low price for which Mr. Clemons purportedly sold stolen cars, the need to send a "message" to society, and the fact that Agent Althouse was shot twice. (Tr. 1740, 1745-48.)

XXV. ELECTROCUTION--THE SOLE METHOD OF IMPOSING THE DEATH PENALTY IN ALABAMA--IS CRUEL AND UNUSUAL.

112. Alabama executes condemned prisoners by electrocution, a method that is cruel and torturous in violation of federal and state law.

113. The Eighth Amendment proscribes "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*, 429 U.S. 97, 102 (quoting *Trap v. Dulles*, 356 U.S. 86, 101 (1958)).

Section 15 of Alabama's 1901 Constitution likewise prohibits "cruel or unusual punishment."

114. Of the thirty-eight states that impose the death penalty, only Alabama and three others mandate death by electrocution. The majority rely on lethal injection, a less painful, more dignified, and more humane method of execution.

115. Following the particularly gruesome execution of Allen Lee Davis in Florida's electric chair in July 1999, the United States Supreme Court agreed to consider whether electrocution constitutes cruel and unusual punishment. *Bryan v. Moore*, 1999 U.S. LEXIS 7058 (Oct. 26, 1999) (granting stay of execution and writ of *certiorari*). The Court's ruling, anticipated by late-June 2000, may well outlaw Alabama's use of electrocution.

**XXVI. THE DEATH PENALTY AS IMPOSED BY
THE STATE OF ALABAMA IS
UNCONSTITUTIONAL BECAUSE IT IS
USED DISPROPORTION-ATELY
AGAINST AFRICAN-AMERICANS.**

116. Since the reintroduction of the death penalty in 1976, sixty-eight percent of persons executed by the State of Alabama were African-Americans. By comparison, African-Americans constituted only thirty-five percent of persons executed nationwide.

117. Racial prejudice permeates every step of the criminal process in Alabama--from deciding whom to target in a criminal investigation to determining which persons are given the death penalty and which receive life without parole. If Mr. Clemons were white

and Agent Althouse were black, statistics indicate there is little chance Mr. Clemons would have received the death penalty. Because racial prejudice contributed to the imposition of the death penalty in Mr. Clemons's case, he was deprived of his rights under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

**XXVII. AS A MATTER OF LAW, THE
EVIDENCE WAS INSUFFICIENT TO
SUPPORT MR. CLEMONS'S CAPITAL
MURDER CONVICTION AND DEATH
SENTENCE.**

118. The State failed to prove beyond a reasonable doubt each element of the offense with which Mr. Clemons was charged.

119. No forensic evidence linked Mr. Clemons to the crime. (Tr. 1054.) The only unequivocal "eyewitness" testimony came from witnesses who had been granted immunity or not charged in exchange for the testimony. Other purported identifications were dubious at best. Naylor Braswell, a trained law enforcement officer, identified Mr. Clemons solely based on Mr. Clemons's race and general size. Other witnesses identified Mr. Clemons only when presented with an unduly suggestive single photo array. Such weak, unreliable evidence is insufficient to support a capital conviction and death sentence. The State's failure to meet its burden of proof violates Mr. Clemons's rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under Alabama law.

CONCLUSION

120. Mr. Clemons was deprived of effective assistance of counsel during every portion of his trial, including pre- and post-trial proceedings. Counsel failed to investigate the crime, investigate mitigation, make critical objections, present crucial expert testimony, offer a defense during the guilt phase, and present a case for life without parole instead of the death penalty.

121. The Court committed constitutional violations mandating reversal of Mr. Clemons's conviction and death sentence.

122. The Stated committed constitutional violations mandating reversal of Mr. Clemons's conviction and death sentence.

123. Accordingly, the Court should hold a full evidentiary hearing conceding all claims raised herein or in any supplement to this Petition and should set aside Mr. Clemons's conviction and grant him a new trial.

PRAYER FOR RELIEF

124. For the foregoing reasons, any reason subsequently offered by amendment to this Petition, and any reason revealed during an evidentiary hearing, Mr. Clemons respectfully asks the Court to grant the following relief:

a. Conduct a full and fair evidentiary hearing that is recorded and transcribed, at which Mr. Clemons may offer proof concerning the

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allegations in this Petition and any amendments thereto;

b. Provide 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;

c. Issue an order relieving Mr. Clemons's of his unconstitutionally obtained conviction and death sentence; and

d. Grant Mr. Clemons any such additional relief as is just, equitable, and proper and federal and state law.

Respectfully Submitted,

s/ James. S. Christie, Jr.

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Dated: December 23, 1999

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I swear under penalty of perjury that, upon
information and belief, the foregoing is true and correct.

s/ James. S. Christie, Jr.
James S. Christie, Jr.

Executed on this 23rd day of December, 1999

SWORN TO AND SUBSCRIBED before me this
23rd day of December,

s/
Notary Public
Commission expires 9-19-02