No. 20-1197

In the Supreme Court of the United States

EUGENE MILTON CLEMONS II,
Petitioner,

v.

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR NATIONAL ASSOCIATION OF SOCIAL WORKERS AS AMICUS CURIAE SUPPORTING PETITIONER

JOHN H. FLEMING
ANN GRUNEWALD FORT*
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, GA 30309-3996
(404) 853-8000
AnnFort@eversheds-sutherland.us

ANNE B. CAMPER
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First St. NE
Suite 800
Washington, D.C. 20001
(800) 638-8799

*Counsel of Record

Counsel for Amicus Curiae

March 31, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

The National Association of Social Workers (NASW) is a professional membership organization with 110,000 social workers in chapters in every State, the District of Columbia and internationally. Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education and enforces the *NASW Code of Ethics*.

NASW also develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW supports a system that ensures that criminal defendants, especially in death penalty cases, receive thorough mental health, psychosocial, and trauma assessments.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to and received timely notice of the filing of this brief.

[2] NASW Policy Statements: Capital Punishment and the Death Penalty, in *Social Work Speaks,* 29, 32 (11th ed. 2018).

SUMMARY OF ARGUMENT

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits the execution of offenders with intellectual disability.[3] 536 U.S. 304, 321 (2002). When Petitioner Clemons made a claim of intellectual disability under *Atkins,* the Alabama state court adopted as its legal test the clinical standards for diagnosing intellectual disability that prevailed at the time: a diagnosis of significant limitations in general intellectual functioning, significant limitations in adaptive skills, and onset before adulthood.

The evidence before that court established Mr. Clemons's diagnosis of intellectual disability under this standard: Mr. Clemons received a mental retardation diagnosis as a first grader, his IQ falls within the recognized range for intellectual disability, and the uncontested results of his adaptive functioning assessment establish significant limitations in six of the ten adaptive functioning areas when only two are necessary for an intellectual disability diagnosis. Yet

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[3] While the term "mental retardation," was used by the parties and the Court in *Atkins*, the preferred clinical term now is "intellectual disability." *See* Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 3 (11th ed. 2010) (hereinafter, "AAIDD Manual"). DSM-5 refers to "intellectual disability (intellectual developmental disorder)" to indicate that the condition is a mental disorder and a medical condition. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (hereinafter, "DSM-5"). Note also that Congress has enacted "Rosa's Law," which replaces the term "mental retardation" with "intellectual disability" throughout the U.S. Code and Code of Federal Regulations. Pub. L. No. 111-256, 124 Stat. 2643 (2010).

the state court inexplicably reached the opposite conclusion, and found he was eligible to be executed under *Atkins v. Virginia.*

This Court's decision in *Atkins* was grounded in the national consensus that the execution of those with intellectual disability undermines both "the penological purposes served by the death penalty" and "the strength of the procedural protections" guarded by this Court's capital jurisprudence. *Id.* at 317. That consensus reflects an understanding that offenders with intellectual disability have certain impairments — such as "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" — that make them less morally culpable and place them at a heightened risk of wrongful execution. *Id.* at 318, 320–21. These impairments are tied directly to the clinical definition of intellectual disability, which this Court recognized requires a diagnosis of significant limitations in general intellectual functioning, significant limitations in adaptive skills, and onset before adulthood. *Id.* at 308 n.3, 318.

The requirement of a comprehensive assessment of all three diagnostic factors – not a piecemeal, disjunctive assessment that stops if there is evidence of an IQ over 70, for example – remains constant in the mental health community. There is a unanimous consensus among the mental health professionals that accurate diagnosis requires clinical judgment based on a comprehensive, interdependent assessment of the

complex attributes of an individual human being under *all three* criteria. Contrary to the professional standards, the court reached its conclusion that Mr. Clemons had "failed to establish" his intellectual disability by concluding that his IQ scores over 70 meant he failed to prove his intellectual disability. The court did not consider the interplay among his IQ testing history, his significant adaptive functioning deficits, and the evidence of onset long before the age of 18.

When a capital defendant with Mr. Clemons's history scores above 70 on a standardized IQ test, a thorough evaluation of adaptive functioning is crucial to complete the analysis. Limitations in adaptive functioning among individuals with IQ scores in this range are what allow qualified professionals to make a clinically valid diagnosis of intellectual disability, or lack thereof.

As a matter of law, science and fact, the state court's failure to consider and address *all* the facts necessary to a comprehensive assessment of Petitioner's condition constitutes error on a scale that now threatens to take Petitioner's life.

ARGUMENT

Petitioner Clemons faces execution despite his proof of all three clinical and legal indicia of intellectual disability: comprehensive assessment of the clinical evidence establishes significant subaverage intellectual functioning, significant limitation in adaptive functioning, and that the condition manifested before the age of 18. In the first grade Mr. Clemons was tested and found "educable mentally retarded" (equivalent to "mild mental retardation"), conclusively demonstrating the onset of his intellectual disability prior to the age of 18. Mr. Clemons's first grade teacher reported that he had made little, if any progress, in both reading and math, while also demonstrating limitations in other areas, including writing, large motor skills, and following directions. Mr. Clemons left elementary school briefly in the second grade, then returned, only to continue underperforming academically, despite competing against children at least two years younger.

Over his lifetime Mr. Clemons's intelligence test scores ranged from 51 to 84, with the most reliable of those scores ranging from 53 to 76. After attempting to complete the tenth grade twice and failing to do so, Mr. Clemons withdrew from school, never attained a GED, and performed poorly at several relatively low-skilled jobs. As a pizza delivery driver, he frequently got lost in his own neighborhood and was unable to count change. In other jobs – at a grocery store, a gas station, and an ice-cream store – his employers called him "stupid" and told him to "[g]o home" because he was slow. On the Adaptive Behavior Assessment Scale-II ("ABAS-II") test, where a significant deficit in two

categories of adaptive functioning suffices to establish intellectual disability, Mr. Clemons was evaluated to suffer from statistically significant deficits in six of the ten categories of adaptive functioning: self-direction, social skills, work skills, home living, health and safety, and leisure.

The Alabama state court that concluded Mr. Clemons was not intellectually disabled under *Atkins v. Virginia* recited the standards accurately, yet inexplicably ignored all of this evidence. The National Association of Social Workers supports the grant of certiorari, to establish that only an actual evaluation of all of the data and evidence can satisfy a court's obligation to prevent the execution of intellectually disabled people.

I. There Is Unanimous Professional Consensus That the Diagnosis of Intellectual Disability Requires Comprehensive Assessment and the Application of Clinical Judgment.

As the Court recognized in *Atkins*, intellectual disability is not just low intelligence, but rather a diagnosis that requires a clinical assessment of a person's functioning in everyday life. *See* 536 U.S. at 308 n.3. The Court cited the intellectual disability definitions of the American Psychiatric Association ("APA") and the American Association on Mental Retardation (now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD")). *Id*. (citing *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed. 1992) and *Diagnostic and Statistical Manual of Mental Disorders* 41 (4th ed. 2000)). These diagnostic manuals,

along with their most recent revisions, reflect the continuing professional consensus regarding the diagnosis of intellectual disability.

The accepted clinical definitions[4] of intellectual disability include three criteria: (a) significant limitations in general intellectual functioning; (b) significant limitations in adaptive functioning; and (c) onset before adulthood. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* 27 (11th ed. 2010) (hereinafter, "AAIDD Manual"); Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 33 (5th ed. 2013) (hereinafter, "DSM-5").[5]

Although all three criteria must be present for diagnosis of intellectual disability, the criteria do not represent disjunctive or linear inquiries. The significant limitations in general intellectual functioning and adaptive functioning must be evaluated in conjunction with each other, and by a mental health professional exercising his or her clinical judgment.[6]

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[4] The AAIDD Manual and DSM-5 definitions of intellectual disability differ in some particulars not relevant to the question presented to the Court in this case. They agree about the central points made here.

[5] The Court in *Atkins* relied on earlier versions of both the AAIDD Manual and the DSM. The three criteria necessary for diagnosis remain unchanged. *See infra* 13-14.

[6] AAIDD Manual at 85 (clinical judgment "emerges directly from extensive data and is based on training, experiences, and specific

This evaluation cannot be limited to a review of IQ test scores because without further clinical assessment it cannot be known what impairments in adaptive functioning the person experiences, or what other clinical indicators of impaired general intellectual functioning exist. *See* DSM-5 at 37 ("The diagnosis of intellectual disability is based on both clinical assessment and standardized testing of intellectual and adaptive functions."); AAIDD Manual at 35 (emphasizing that "significant limitations in intellectual functioning is only one of the three criteria used to establish a diagnosis of [intellectual disability]"). Clinical judgment is rooted in objective criteria and multiple sources of data, including school records and behavioral rating scales.[7]

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knowledge of the person and his or her environment"); *see also* Robert L. Shalock & Ruth Luckasson, *Clinical Judgment* 1 (AAMR 2005) (clinical judgment is "characterized by its being systematic (*i.e.*, organized, sequential, and logical), formal (*i.e.*, explicit and reasoned), and transparent (*i.e.*, apparent and communicated clearly)" (cited in AAIDD Manual at 86)).

[7] Evaluation of adaptive functioning faces challenges including obtaining records and information from those with knowledge of the individual's functioning over time, and the potentially misleading nature of a defendant's functioning in the highly structured environment of a prison, where there is no need to make the types of decisions that are part of ordinary life outside of prison. *See* Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 114, 119 (2009) ("The ideal respondents are individuals who have the most knowledge of the individual's everyday functioning across settings. . . .").

A. Comprehensive assessment requires concurrent analysis of intellectual and adaptive functioning.

A comprehensive assessment must be "based on multiple data points" that "include giving equal consideration to significant limitations in adaptive behavior and intellectual functioning." AAIDD Manual at 28. Because adaptive skills — such as abstract thinking, social judgment, regulating emotion, and resisting manipulation by others — are crucial to an individual's ability to live independently and function within the boundaries of social norms, *see* DSM-5 at 33–34, the assessment of those skills is necessary to evaluate an individual's general intellectual functioning and to arrive at a valid overall diagnosis.

The existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability. Individuals are usually identified in the first instance as potentially having an intellectual disability by impairments in their adaptive behavior, such as difficulty functioning in everyday tasks.

Historically, individuals with intellectual disability were identified by their communities "because they failed to adapt socially to their environment." AAIDD Manual at 5. Then, with the development of the first standardized intelligence tests resulting in an IQ score in the early 1900s, there was a brief shift to reliance on IQ tests "as an efficient and objective means to distinguish individuals with [intellectual disability] from the general population." *Id.* at 43. Despite this initial embrace, however, "dissatisfaction with the IQ

score as the sole indicator of ID emerged over time," as scientists and professionals realized that IQ testing "only provided a narrow measure of intellectual functioning related to academic tasks . . . thus ignoring important aspects of intellectual functioning that included social and practical skills." *Id.* at 43–44.

The professional community then began developing the comprehensive, multi-criteria analysis that has been in use since the 1950s – decades before the state court's decision. Although impaired adaptive functioning has always been the most noticeable symptom of intellectual disability, the 1959 AAIDD Manual was the first diagnostic guide to provide a clinical definition for the concept of adaptive behavior, defining it as "the degree to which the individual is able to function and maintain himself independently" and "the degree to which he meets satisfactorily the culturally-imposed demands of personal and social responsibility." *Id.* at 44 (quotation marks omitted).[8] Adaptive behavior has been included in the diagnostic criteria for intellectual disability in each subsequent edition of the manual. *See id.* at 8 (summarizing the definitions used in each edition).

Similarly, since 1968 each edition of the DSM has defined intellectual disability as subaverage intellectual functioning that is either "associated with," "resulting in," or "accompanied by" impairments in adaptive behavior. *See id.* at 8–9 (summarizing the

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[8] At that time, the AAIDD was known as the American Association on Mental Deficiency, the predecessor organization to the American Association on Mental Retardation and the AAIDD.

definitions of DSM-II, DSM-III, DSM-III-R, DSM-IV, and DSM-IV-TR).

As diagnostic methods have been refined in each subsequent edition of these manuals, there has been a steady trend towards emphasizing the importance of clinical assessment of intellectual and adaptive functioning and decreasing reliance on IQ tests. In previous editions of the AAIDD and DSM manuals, this trend has been demonstrated by inclusion of the standard error of measurement (and resulting confidence interval) when using IQ tests as a means of assessing general intellectual functioning. *See id.* at 8–11.

B. Professional assessment of the individual's overall functioning, putting both intellectual and adaptive functioning into context in a single, comprehensive understanding of the individual, is central to the rationale of the *Atkins* decision.

The mental health profession clearly is concerned with evaluating the whole person in light of the overall impact of *all* deficits in both intellectual functioning and adaptive functioning. Adaptive functioning deficits put IQ scores into the context of an individual's ability to navigate life in society, and this understanding is reflected in the *Atkins* decision itself. When discussing the impairments that diminish the personal culpability of offenders with intellectual disability and place them at a special risk of wrongful execution, this Court highlighted several specific deficits: "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." *Atkins*, 536 U.S. at 318. The Court also noted that individuals with intellectual disabilities "often act on impulse rather than pursuant to a premeditated plan," and "in group settings they are followers rather than leaders." *Id.*

These criteria, related to impaired adaptive functioning, are especially important to the "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S. at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). Clinical deficits in communication, regulating emotion, and resisting manipulation by others can contribute to "the possibility of false confessions," "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation," less ability to serve as an effective witness and "give meaningful assistance to their counsel," and the risk that the demeanor of individuals with intellectual disability "may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. The importance of adaptive functioning to this Court's decision in *Atkins* thus underscores the need for a comprehensive assessment that includes these criteria in every capital case in which a defendant manifests or claims to have intellectual disability.

C. A system for identifying defendants with intellectual disability that does not view the individual's intellectual functioning in the context of the adaptive functioning evidence is based on a fundamental misunderstanding of the diagnostic criteria.

The state court structured its analysis as an inflexible legal test, where each factor was an isolated step, rather than as a diagnosis, requiring a comprehensive analysis of the complex experiences and abilities of an individual human being under all three factors. As a result, the court focused on Petitioner's IQ score as the gatekeeper, applying an inflexible upper limit that disqualified him from the diagnosis, regardless of the other factors. The court concluded that Clemons's IQ scores ranging between70-80 "place him in the borderline range of intellectual functioning and establish that he is not mentally retarded." Pet. App. 166a. Contrary to the professional standards, the court reached its conclusion that Mr. Clemons had "failed to establish" his intellectual disability without considering the interplay among the IQ testing history, the significant adaptive functioning deficits, and the evidence of onset long before the age of 18. This approach goes against the unanimous professional consensus by treating intellectual functioning and adaptive functioning as sequential and disjunctive inquiries, rather than complementary factors in a comprehensive inquiry into the condition of a particular human being.

Contrary to the state court's determination, the relevant clinical authorities all agree that an individual with an IQ score above 70 *may* properly be diagnosed with intellectual disability – *if* significant limitations in adaptive functioning also exist. AAIDD Manual at 35, 39–40. "For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Id.*; *see also* AAIDD Manual at 40 ("It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable.").

When a capital defendant with Mr. Clemons's history scores above 70 on a standardized IQ test, a thorough evaluation of adaptive functioning is crucial to complete the analysis. Limitations in adaptive functioning among individuals with IQ scores in this range are what allow qualified professionals to make a clinically valid diagnosis of intellectual disability, or lack thereof.

The facts of the instant case also provide a concrete example of why a comprehensive assessment is necessary. Mr. Clemons received a childhood diagnosis of mental retardation, was unable to succeed in school, and could not perform even the demands of low-skill jobs. He lost a job delivering pizza because he could not make change, and would get lost even in his own neighborhood. He had a range of IQ scores from 51 to 84, with the most reliable of those scores ranging from

53 to 76, where the clinical standards caution that an IQ score carriers a measurement error of +/- 5 points. Under the universally accepted clinical standards for diagnosing intellectual disability, the state court's determination that Mr. Clemons is not intellectually disabled cannot be considered valid.

II. Professional and Legal Standards Require Genuine Assessment of the Evidence – Not Just Lip Service to the Correct Standards.

The Alabama court started out on the right foot – its order recognized the proper professional standards that were in effect at that time. The court stumbled, however, when it inexplicably ignored the professional evidence to conclude that Mr. Clemons was not intellectually disabled.

A. The Alabama Court Had the Proper Professional Standards Before It When Evaluating Mr. Clemons's Intellectual Disability

As noted above, the legal test for intellectual disability in *Atkins* is also the clinical definition in use for many years before that decision: significant subaverage intellectual functioning; significant limitation in adaptive functioning; and the condition manifesting before the age of 18. *See* 536 U.S. at 318. The state court recognized the correct professional standards when assessing these factors.

1. Intellectual Functioning.

As Petitioner observed, the state court twice recognized that governing clinical standards did not

allow it to apply a strict IQ cutoff at 70 to determine intellectual disability, and also noted a standard error of measurement which is generally +/- 5. C.A. App. 247-248. In so finding, the state court relied on the record evidence, and the correct professional standards in effect at the time of his state court *Atkins* hearing – June of 2004:

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

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

DSM-IV-TR at 41–42; *see also* C.A. App. 768; C.A. App. 973.

The AAMR Manual (10th ed.) defines significant subaverage intellectual functioning "as approximately 70 to 75 [IQ], taking into account the measurement error," which, "[i]n effect, * * * expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error." *See* 2002 AAMR Manual (10th ed.) at 58–59; C.A. App. 772; C.A. App. 1973.

More importantly, an IQ score above this range does not rule out a diagnosis of intellectual disability. The relevant clinical authorities all agree that an individual with an IQ score above 70 *may* properly be diagnosed with intellectual disability – *if* significant limitations in adaptive functioning also exist. "For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score." AAIDD Manual at 35, 39–40.

2. Adaptive Functioning.

Similarly, the state court adopted the APA's clinical standard for assessing adaptive functioning, finding that an intellectual disability diagnosis turns on adaptive functioning *deficits*—regardless of strengths. According to the state court:

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

C.A. App. 248 (emphasis added); *see Atkins*, 536 U.S. at 309 n.3 (citing AAMR and APA definitions).

3. Age of Onset.

As to the final prong of the test for intellectual disability, the state court accurately adopted the

standard of both the AAMR and the American Psychiatric Association: the onset of the intellectual disability must occur before 18 years of age. DSM-IV-TR at 41; 2002 AAMR Manual (10th ed.).

B. The Alabama Court Inexplicably Failed to Apply Those Professional Standards When Evaluating the Evidence of Mr. Clemons's Intellectual Disability

1. Intellectual Functioning.

Even though both parties' respective experts agreed that there was no IQ cutoff at 70 (*see* C.A. App. 766–772, 824, 505–508), the Court of Appeals relied on the state court's finding that Mr. Clemons "consistently scores in the 70–80 range" to uphold that court's ultimate finding "that Clemons failed to show significantly subaverage intellectual functioning." Pet. App. 31a. Having found that Mr. Clemons's IQ might be as low as 70, the state court ought to have concluded that Mr. Clemons satisfied the substantial intellectual functioning deficit portion of the intellectual disability analysis, especially when it recognized a standard error of measurement of +/- 5 points, and the professional literature the court cited states that individuals with IQs of 75 (or even higher, if their adaptive functioning limits are significant) can be intellectually disabled. There is no intellectually honest way of concluding that Mr. Clemons did not satisfy this prong,

2. Adaptive Functioning.

After correctly stating the adaptive functioning standard, the state court failed to apply it. Inexplicably, the court failed even to mention the

substantial evidence of Mr. Clemons's adaptive functioning deficits in six of ten functional categories. We noted at the outset the importance of a comprehensive assessment of intellectual disability in arriving at an accurate diagnosis. Courts cannot ignore material evidence of the disability in order to conclude that the person does not suffer from it.

The only clinical instrument used to measure Mr. Clemons's adaptive functioning was the ABAS-II test, which measures functioning in the ten areas identified by the circuit court as clinically significant. *Compare Atkins*, 536 U.S. at 308 n.3 (2002) (enumerating clinically significant areas of functioning) *with* C.A. App. 1136 (evaluating ten areas of functioning named in *Atkins*). This test demonstrated that Clemons suffered statistically significant deficits in six of the ten categories of adaptive functioning; deficits in only two are required to satisfy the standard for intellectual disability. C.A. App. 511–515.

Neither the State nor its expert ever challenged the validity of these test results, yet the state court ignored the ABAS-II test results in their entirety, even though Dr. Golden testified that "in a forensic setting like this, the ABAS-II … is really the only test that is well designed" to assess adaptive functioning. The court chose instead to rely on Mr. Clemons's supposed adaptive functioning "strengths" even though that is not a consideration in assessing this factor in the intellectual disability assessment. C.A. App. at 514–515.

The state court relied upon clinically unsound speculation that comprised commentary by two

psychologists, Dr. Grant and Dr. King, neither of whom had ever evaluated Mr. Clemons for impaired adaptive functioning.

Dr. Grant had conducted an evaluation of Mr. Clemons "for the purpose of forming an opinion as to [Mr. Clemons's] competency to stand trial, mental responsibility for his alleged conduct, and his competence to waive his right to silence." C.A. App. 930. Because Mr. Clemons's adaptive functioning was of no concern to Dr. Grant during the evaluation, Dr. Grant could not, and did not, state that Mr. Clemons was *evaluated* to not have any adaptive impairment. Dr. Grant had also concluded from Mr. Clemons's "survival" in jail and the fact that he "arrived at the interview carrying candy" that Mr. Clemons was not being "victimized" like other "individuals with low I.Q.'s in this [jail] setting," despite having no basis for reaching such a conclusion. *Id.* at 939–940. Dr. Grant then concluded that Mr. Clemons had "demonstrated adaptive skills in prison that refuted any notion that he was mentally retarded." *Clemons v. State*, 55 So.3d 314, 331 (Ala. Crim. App. 2003). Not only is Dr. Grant's report inconsistent with the diagnostic framework adopted by the court, the AAMR, and the APA, but the state court's reliance on Dr. Grant's report while ignoring the results of the ABAS-II test is unreasonable because it fails to consider the full record before the court.

Dr. King testified at Mr. Clemons's trial that Mr. Clemons had no adaptive deficits. C.A. App. at 830, 761. Yet Dr. King admitted that he was unfamiliar with Mr. Clemons's academic record. *Id.* at 814–815.

For example, Dr. King was "not aware that [Mr. Clemons] was held back" in school, and was not aware of "how he did in classes. I think I just don't recall that, and I'm not sure that I saw it … I didn't have all of those [school documents] … I had some, but I did not have all of them." Id. at 815. Dr. King did not use any clinical instrument to assess adaptive functioning – he relied solely on interviews with Mr. Clemons and information provided by the State of Alabama. *Id.* at 773.

Further, Dr. King used speculative hindsight reasoning to reach his conclusion. He began by assuming that people with IQ test scores "in the fifties and sixties … cannot read or write" and have "[n]o work history." *Id.* at 830, 761. He then concluded that Mr. Clemons must not have adaptive impairments because he had worked for Domino's Pizza as a delivery driver and possessed a driver's license. *Id.* These assumptions are inconsistent with the diagnostic framework adopted by the court, the AAMR, and the APA.

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

The Court of Appeals found that this conclusion too was "not an unreasonable application of *Atkins*" when the state court did not have the benefit of *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039 (2017), which was yet to be decided. But this conclusion failed to account for the fact that the state had already determined for itself that the appropriate clinical standards governed. Its failure to apply those same standards was more than enough to render unreasonable its finding of fact that Mr. Clemons was not intellectually disabled, sufficient to support a claim for relief under AEDPA.

3. Onset Prior to 18.

After accurately noting that the onset of a criminal defendant's intellectual disability must occur before 18 years of age, the state court failed to apply the law that it had recited to the facts of Mr. Clemons's case.

The state court focused – improperly – on IQ score when assessing the evidence of intellectual disability arising during Mr. Clemons's childhood. Mr. Clemons had only been administered one intelligence test prior to the age of 18, scoring a 77. The state court concluded that Mr. Clemons was "in the borderline range of intelligence," Pet. App. 174a, noting that a score above 70 "place[s] a defendant above the cut-off to establish significantly subaverage intellectual functioning." *Id.*

However, the state court ignored Mr. Clemons's first grade diagnosis of "educable mentally retarded" (equivalent to "mild mental retardation"). This diagnosis demonstrates, beyond dispute, that his intellectual disability existed prior to the age of 18. C.A. App. at 774, 856; *see also* DSM-IV-TR at 41. The

court further ignored its prior statement that a strict cut-off score of 70 for a diagnosis of intellectual disability was inconsistent with existing clinical standards. Thus, the state court failed to apply the enumerated clinical standards it found governed to the relevant facts in reaching its conclusion that Mr. Clemons had not demonstrated the onset of his intellectual disability prior to the age of 18.

The record also demonstrated significant deficits of adaptive functioning before Mr. Clemons reached age 18, contrary to the state court's holding. Pet. App. 174a. The state court acknowledged that the AAMR's and the APA's clinical definitions required significant limitations in adaptive functioning in at least two of the specified skill areas. *Id.* at 157a–158a.

The court then ignored the evidence of Mr. Clemons's deficits prior to the age of 18:

- Deficits in functional academic skills:
  - Mr. Clemons's first-grade teacher reported that Mr. Clemons "[caught] on slowly" and "seem[ed] to be making little if any progress in both reading and math." C.A. App. at 868.
  - He was held back twice in elementary school and still earned D's and F's, despite competing against children two years younger than he. *Id.* at 543–547, 842–888.

- Deficits in functional communication skills:
  - In first grade he had "great difficulty in the use of written language," "reverse[d] letters or numbers," and had "poor writing skills." *Id.* at 868.

Deficits in other functional skills:

- Mr. Clemons was also evaluated, while in the first grade, to have "awkward large motor skills," *id.*,
- he "confuse[d] directions" as well as "left and right," *id.,* and
- he "[took] excessive time and [did] not complete anything." *Id.*

All of this evidence points to only one conclusion: Mr. Clemons demonstrated the intellectual and adaptive functioning deficits justifying a diagnosis of intellectual disability long before he reached the age of 18. Yet the state court ignored this evidence, even after reciting the standards that required assessing all of it. This failure is unexplained, and inexplicable.

C. When a Court Adopts a Standard, the Court Must Apply That Standard to the Facts.

The state court explicitly recognized the clinical standards established by the AAMR and the APA for a determination of intellectual disability, relying on the DSM-IV and the 1992 AAMR Manual, in addition to the AAMR's "most recent definition" of intellectual disability at the time. C.A. App. at 248.

When a court has determined the applicable standard and/or law to govern in a case, the court must then apply the standard to the facts of the case in order to reach its conclusion. *U.S. v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989) (requiring a court to "review the undisputed facts" and "apply the law to those facts" in order to reach a conclusion as to whether a criminal defendant's consent to a search was voluntary). Failure

to do so "certainly would qualify as a decision 'involv[ing] an unreasonable application of … clearly established Federal law.'" *Williams v. Taylor*, 529 U.S. 362, 407–408 (2000). As long as the "state court's application of that law is 'objectively unreasonable,'" a federal habeas court can set aside that state court's decision. *McDaniel v. Brown*, 558 U.S. 120, 132–133, 130 S. Ct. 665, 673 (2010).

This Court in *Atkins* afforded the States the flexibility to determine a criminal defendant's intellectual disability. The Alabama trial court adopted the applicable clinical standards as its governing standard. Thus, the "state court identifie[d] the correct governing legal principle from this Court's decisions but unreasonably applie[d] that principle to the facts of the prisoner's case" by entirely failing to apply its chosen legal standard to the facts in Mr. Clemons's case. *See Holland v. Jackson*, 542 U.S. 649, 652, 124 S. Ct. 2736, 2738 (2004). When the Alabama court concluded – in clear contravention of the facts – that Mr. Clemons is not intellectually disabled, the state court acted unreasonably under section 2254.[9]

* * * *

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief."

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[9] The state court's failure to adhere to the clinical standards it found applied was egregious. That the sentencing jury never heard any evidence of Mr. Clemons's cognitive impairment – even Alabama concedes he is at least "borderline mentally retarded" – renders the case tragic.

Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029 (2003). The diagnostic evidence established the three prongs of the intellectual disability assessment the Alabama court properly adopted: Mr. Clemons received a mental retardation diagnosis when in the first grade, his IQ falls within the recognized range for intellectual disability, and the uncontested results of the ABAS-II establish significant limitations in six of the ten adaptive functioning areas when only two are necessary for an intellectual disability diagnosis.

Mental health professionals assess individuals to identify intellectual disability, and to create programs and interventions to enable these individuals to achieve their highest possible level of functioning. It is simply inconsistent with decades of established professional standards to look the other way when, under the guise of "deference," federal courts permit a state court to discard the legally governing clinical standards, especially after acknowledging their applicability.

CONCLUSION

For all of these reasons, amicus urges this Court to grant the petition for certiorari.

Respectfully submitted,

JOHN H. FLEMING
ANN GRUNEWALD FORT*
EVERSHEDS SUTHERLAND
(US) LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, GA 30309-3996
(404) 853-8000
AnnFort@eversheds-sutherland.us

ANNE B. CAMPER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS
750 First St. NE
Suite 800
Washington, D.C. 20001
(800) 638-8799

**Counsel of Record*

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