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 A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICI CURIAE ALABAMA DISABILITIES ADVOCACY PROGRAM, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE NATIONAL HABEAS INSTITUTE, JUSTICE 360, AND THE CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI[1]

The Alabama Disabilities Advocacy Program (ADAP) is a not-for-profit organization designated as the protection and advocacy system under federal law for people with disabilities in Alabama. The mission of ADAP is to advocate for the human, civil, and legal rights of people with disabilities.

The National Association of Federal Defenders is a nationwide, non-profit, volunteer organization whose membership comprises attorneys and others who work for federal public and community defender organizations. Each year, federal defenders represent tens of thousands of individuals in federal courts across the country. Twenty-two of those offices include Capital Habeas Units that represent hundreds of individuals sentenced to death.

The National Habeas Institute (NHI) works to both develop and exemplify the standards for practicing habeas law. Central to NHI's mission is educating the public about the critical role of meaningful review in the federal courts despite the highly deferential standard imposed by the Antiterrorism and Effective Death Penalty Act of 1996. NHI provides education about habeas corpus to defense attorneys, investigators, paralegals, and law students nationwide, and

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than the amici, their members and counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties consented to amici's intent to file this brief at least 10 days prior to its due date.

both advises and directly represents habeas petitioners in cases around the country. NHI has a strong interest in ensuring uniformity and clarity of the legal standards applicable in habeas cases.

Justice 360 is a non-profit law firm whose mission is to promote fairness, reliability, and transparency in the criminal legal system for individuals facing the death penalty and juveniles facing death-in-prison sentences.

The Cornell Death Penalty Project is an undertaking of Cornell Law School, premised on the belief that when the government uses extreme criminal sanctions, it should do so with great care and reflection. The Project conducts empirical research and educates students and attorneys regarding issues related to capital punishment in the United States.

Amici collectively have extensive expertise in intellectual disability and the intricacies of capital habeas law.

SUMMARY OF ARGUMENT

The Eighth Amendment bars the execution of any person with intellectual disability (ID). In *Atkins v. Virginia*, this Court relied on the three-pronged ID definition set forth by the medical community: (1) significantly subaverage intellectual functioning—meaning an IQ of approximately 75 or less; (2) deficits in adaptive behavior; and (3) onset during the developmental

period.[2] At an *Atkins* hearing in 2004 before the Alabama Circuit Court, Clemons offered testimony from Dr. Charles Golden, who adhered to these clinical definitions and their associated guidelines and concluded that Eugene Clemons meets all three criteria for ID. The State offered testimony from Dr. Glen King, who did neither. Although the circuit court purported to apply the clinical guidelines when it adjudicated Clemons's *Atkins* claim,[3] it failed to adhere to them in several significant ways, and it made numerous unreasonable determinations of fact in light of the available evidence, to deny relief.[4]

In federal habeas, the Eleventh Circuit acknowledged that the circuit court's decision was inconsistent with *Hall v. Florida* and *Moore v. Texas*, but nevertheless denied relief.[5] While Amici contend that failing to apply *Hall* and *Moore* retroactively creates the

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[2] 536 U.S. 304, 308 n.3 (2002).

[3] Pet. App. I 157a–158a.

[4] The last reasoned state court decision on Clemons's *Atkins* claim was issued by the Court of Criminal Appeals of Alabama. *See Clemons v. State*, 55 So.3d 314 (Ala. Crim. App. 2003). However, the appellate court simply quoted the opinion of the circuit court, Pet. App. I 154–219a, which itself was a verbatim adoption of the proposed order drafted by attorneys in the Alabama Attorney General's Office, Pet. App. F. 68a, and then affirmed. This brief primarily discusses the decision of the circuit court.

[5] 572 U.S. 701 (2014); 137 S.Ct. 1039 (2017). The Eleventh Circuit opinion makes clear that the outcome of this case would be different if either *Hall* or *Moore* were applied retroactively. Pet. App. I 35a (stating that the circuit court's "approach today would be contrary to clearly established federal law—that is, contrary to *Moore v. Texas*").

inevitability that persons with ID will be executed, this case does not hinge on that issue. Clemons is entitled to relief because the state courts misapplied *Atkins* itself and, most importantly, made unreasonable determinations of fact in light of the evidence presented.

ARGUMENT

I. Clemons's reliable full-scale IQ scores are not divergent.

With respect to prong one—subaverage intellectual functioning—the circuit court concluded that Clemons's IQ scores are "remarkable in their divergence, ranging from a low of 51 to a high of 84."[6] In the court's view, the "evidence demonstrate[d] that when Clemons puts forward some effort he consistently scores in the 70–80 range on intelligence tests," but when he "malingers he consistently scores in the 50–60 range."[7] To reach this conclusion, the circuit court unreasonably relied on flawed and unreliable test results and discounted the overwhelming weight of the evidence demonstrating that Clemons's reliable IQ scores consistently fall within the ID range.

[6] Pet. App. I 160a.

[7] *Id.*

A. The circuit court made unreasonable findings related to three test scores.

i. The Beta-II.

First, in 1991, Clemons reportedly obtained a result of 84 on a Beta-II test. No evidence regarding the Beta-II was offered at the *Atkins* hearing, nor was it relied on by any testifying expert. Instead, the circuit court extracted it from a prior record in which a government psychologist noted that it is not equivalent to a measure of full-scale IQ. The psychologist recognized that it is "typically used as a screening," has a "wider range" of error, and is "more appropriately characterized as an estimate."[8]

This description was correct; the Beta-II is not a measure of global intelligence (i.e., full-scale IQ). It is a short-form test that takes only fifteen minutes to complete.[9] The clinical literature has long been clear that "only global measures of intelligence are acceptable for making a diagnosis of mental retardation."[10] Global intelligence includes "reasoning, planning, solving problems, thinking abstractly, comprehending

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[8] C.A. App. 1908–09.

[9] *Pruitt v. Neal*, 788 F.3d 248, 267 (7th Cir. 2015).

[10] Gilbert S. MacVaugh, III & Mark D. Cunningham, Atkins v. Virginia*: Implications and Recommendations for Forensic Practice*, 37 J. Psychiatry & L. 131, 144 (2009) (citing American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports (9th ed. 1992)); *see also* David Wechsler, The Measurement of Adult Intelligence 3 (1939); WAIS III WMS III Technical Manual 2 (David Tulsky, Jianjun Zhu & Mark Ledbetter eds. 1997) [hereinafter WAIS III Technical Manual].

complex ideas, learning quickly, and learning from experience."[11] A valid measure of full-scale IQ assesses global intelligence by examining a broad range of skills and components of general intelligence.[12] By contrast, the Beta-II is a nonverbal, group-administered test that even the test developers acknowledge should not be reported as full-scale IQ.[13] As a nonverbal test, the Beta-II relies heavily on an individual's reading skills[14] while excluding the "many different mental abilities"—including "abstract reasoning . . . perceptual skills, verbal skills, and processing speed"—that are measured by standard intelligence tests.[15]

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[11] American Association on Mental Retardation, Definition, Classification, and Systems of Supports 14 (10th ed. 2002) [hereinafter AAMR-10].

[12] WAIS III Technical Manual, *supra* note 10, at 2 (stating that "intelligence should be measured by both verbal and performance tasks, each of which measures ability in a different way and which can be aggregated to form a general, global construct").

[13] Robert M. Lindner & Milton Gurvitz, *Restandardization of the Revised Beta Examination to Yield the Wechsler Type of IQ*, 30 J. Applied Psychol. 649, 656–57 (1946) ("IQs as calculated by this revision of the Revised Beta Examination must be recognized as relative indices of the degree of intelligence. IQs determined by this method should always be labelled 'Beta IQ' and not simply 'IQ.' ").

[14] *See* George S. Baroff, *Establishing Mental Retardation in Capital Cases: A Potential Matter of Life and Death*, 29 Mental Retardation 343, 346 (1991).

[15] WAIS III Technical Manual, *supra* note 10, at 2–3 ("All of these abilities are valued to varying degrees by our society, and all relate to behavior that is generally considered intelligent in one way or another. None of the subtests by itself, however, was designed to assess the entire range of cognitive abilities."); Baroff, *supra* note 14, at 347 ("[T]o use the Revised Beta as a determiner

Moreover, group-administered tests, like the Beta-II, are inadequate for diagnosing ID.[16] Group-administered tests are pencil-and-paper, multiple-choice tests that are typically "self-administered," meaning the test-taker works through a test booklet without any interaction with the test administrator, who is not required to have any professional training.[17] These characteristics of group-administered tests make it impossible to collect any qualitative data because the tests "simply provide[] data on the number of questions answered correctly," rather than allowing a test administrator to determine why a particular response was chosen.[18] For these reasons, the Beta-II is not equivalent to full-scale measures such as the Wechsler Scales or the Stanford Binet and cannot be used to rule out ID.[19]

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of mental retardation is as inappropriate as measuring one's sense only through vision, ignoring hearing for example.").

[16] Denis Keyes et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 Mental & Physical Disability L. Rep. 529, 536 (1998) ("[G]roup-administered IQ tests . . . are inadequate tests to diagnose mental retardation.").

[17] *See* Alan S. Kaufman, *Tests of Intelligence, in* Handbook of Intelligence 449–50 (Robert J. Sternberg ed. 2000); John Fremer, *Group Tests, in* 1 Encyclopedia of Human Intelligence 508–11 (Robert J. Sternberg ed. 1994).

[18] Psychological Testing: Principles and Applications 289 (Kevin R. Murphy & Charles O. Davidshofer eds. 2005).

[19] Baroff, *supra* note 14, at 346 ("[R]eviews of the Revised Beta have been very critical.") (citing other sources); *Pruitt*, 788 F.3d at 253 (noting that the Revised Beta "is not an accurate test . . . is not well regarded in the field, and . . . is not well

In addition, the circuit court did not consider norm obsolescence,[20] nor did it consider the fact that the Beta-II has a very large standard error of measurement (SEM). Any test score "must always be considered in terms of the accuracy of its measurement."[21] The Beta-II has a much larger SEM (7.55) than tests like the Wechsler Scales or the Stanford Binet, producing a 95 percent confidence interval of 68.0 to 99.1 when applied to Clemons's obtained score of 84.[22] Thus, even ignoring its outdated norms, Clemons's score places him squarely within the ID range when the SEM is properly applied.

These facts could have been explained to the circuit court through expert testimony had the parties been aware of the court's intent to place such weight on the Beta-II results. However, the circuit court's

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accepted in the field as a general test of intelligence" and "severely overestimates" IQ by "20 to 30 points").

[20] The Beta-II was standardized in 1946, and as a result, was grossly out of date at the time it was administered to Clemons in 1991. *See* Lindner & Gurvitz, *supra* note 13. The 1946 restandardization was used in prisons at the time Clemons was tested. *See* Allan R. Barnes & Roderick L. Hall, *Reliability of the Revised Beta in a Correctional Setting*, 35 Int'l J. Offender Therapy and Comp. Criminology 182 (1991). Norm obsolescence is discussed in greater detail in section I.B. *infra*.

[21] AAMR-10, *supra* note 11, at 57 ("Errors of measurement as well as true changes in performance outcome must be considered in the interpretations of test results. This process is facilitated by considering the concept of standard error of measurement (SEM).").

[22] Barnes & Hall, *supra* note 20, at 183. Parameters of two SEM are required to obtain 95 percent probability. AAMR-10, *supra* note 11, at 57.

post-hearing decision to invoke the Beta-II *sua sponte* as the linchpin of its prong-one factual findings deprived Clemons of a fair opportunity to do so. It was an unreasonable determination of fact for the circuit court to use a badly out of date score on an unreliable screening test (which, even so, still places Clemons in the appropriate range) as a reason to deny relief.

ii. Partial, unstandardized administration of the WAIS-R.

Another score the circuit court relied on to create an illusion of score disparity (and thus malingering) was a purported score of 51 on a WAIS-R administered in 1992. The court's reliance on this test result was grossly misplaced because the record demonstrates that it was neither a complete nor a standard administration. The test was partially (and improperly) administered to Clemons during a treatment program to restore his competency to stand trial. During the testing process, Clemons was restrained in a seclusion unit. The examiner noted that the verbal, performance, and full-scale scores were all "*estimates*, based on an *unstandardized* administration of the Verbal subtests and *extrapolation* from two of the Performance subsets."[23]

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[23] C.A. App. 916–17 (emphasis added). The WAIS-R requires administration of five Performance subsets. *See* David Wechsler, Wechsler Adult Intelligence Scale-Revised 88 (1981); Alan S. Kaufman, *Amazingly Short Forms of the WAIS-R*, 9 J. Psychoeducational Assessment 4, 7 (1991).

From this partial and unstandardized administration of the WAIS-R, the examiner reported a score of 51, and then concluded Clemons must have malingered because "[t]he results of these testing procedures are inconsistent with Mr. Clemons' personal and educational history. He was reported to have passed the GED."[24] In fact, Clemons's self-report was unreliable, and evidence offered at the *Atkins* hearing established that he never obtained a GED.[25] It was therefore unreasonable for the circuit court to rely on this particular score as additional support for its "divergent results" conclusion because this was not a complete or reliable measure of Clemons's IQ.

iii. Original WAIS normed in 1954.

In February 2004, Dr. King administered the *original* WAIS to Clemons as part of the Halstead-Reitan neuropsychological test battery.[26] This test was normed in 1954 and was therefore 50 years out of date at the time of Dr. King's evaluation.[27] He claimed that his use of such an outdated test was appropriate because the

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[24] C.A. App. 924. The clinical guidelines strongly caution examiners against reliance on self-reported information because individuals with ID are often unreliable reporters who overstate their abilities. *See* AAMR *User's Guide: Mental Retardation: Definition, Classification, and Systems of Supports* 21 (10th ed. 2002) [hereinafter AAMR-10 User's Guide] ("[C]linicians should] [r]ecognize that self-ratings have a high risk of error.").

[25] C.A. App. 689.

[26] C.A. App. 1087.

[27] David Wechsler, Wechsler Adult Intelligence Scale Manual 10 (1955).

original WAIS was part of the Halstead-Reitan battery, but conceded that the original WAIS is "not really given for the IQ score."[28] Despite this concession, Dr. King reported the score and testified as if it were significant and reliable for purposes of assessing Clemons's intellectual functioning, contradicting himself and clear clinical guidelines that the most recent normative data should be used when assessing intelligence.[29]

At the state's invitation, Dr. King then testified that Clemons's score could be "converted" to yield a "rough estimate" of the score Clemons would have received on the WAIS-III had it been administered instead.[30] Dr. King obtained this "converted" score by subtracting seven points from Clemons's obtained score of 67.[31] Having performed this unexplained adjustment, Dr. King then observed that Clemons had scored a 77 on the WAIS-III three years before he scored a 67, or 60 as "converted," on the WAIS. This discrepancy, Dr. King claimed, could only occur as the result of "stroke or serious disease."[32] Dr. King concluded that because Clemons had suffered neither in the

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[28] C.A. App. 716.

[29] WAIS III Technical Manual, *supra* note 10, at 9 ("[P]eriodic updating of the norms is essential; otherwise average IQ scores will gradually drift upward and give a progressively deceptive picture of an individual's performance relative to the expected scores of his or her own age group.").

[30] C.A. App. 717.

[31] *Id.*

[32] *Id.* at 718.

intervening three years, his purportedly lower score on the WAIS could only be the result of "dissembling."[33] The circuit court unreasonably accepted Dr. King's factitious score (derived unscientifically from a grossly outdated instrument) as evidence of malingering.

The circuit court also attributed to Dr. King a justification for his score "conversion" that he did not actually provide. According to the circuit court, Dr. King "converted" Clemons's score on the WAIS "[b]ecause the WAIS is considered an easier test than the WAIS-III."[34] In fact, Dr. King nowhere said this and he did not otherwise provide any justification for his "conversion."[35] The circuit court readily scrutinized and refused to credit score adjustments by Clemons's expert,[36] even though these were clearly explained and consistent with the clinical literature.[37] When confronted with a score adjustment by the state's expert, however, the circuit court declined to apply any scrutiny at all.

B. Clemons's reliable measures of full-scale IQ satisfy prong one.

Because the circuit court unreasonably relied on the invalid scores discussed above, it failed to properly

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[33] *Id.*

[34] Pet. App. I 164a (citing C.A. App. 717–718).

[35] C.A. App. 717–718.

[36] Pet. App. I 167a.

[37] C.A. App. 463–465; *accord* Wayne Silverman et al., *Stanford-Binet and WAIS IQ differences and their implications for adults with intellectual disability*, 38 Intelligence 242 (2010).

consider the reliable IQ scores that are consistent with ID, as depicted in the following chart:

Date/Age	Test	Obtained Score	Norm adjusted
2/28/1979 (Age 6)	Stanford-Binet	77	72
11/8/2000 (Age 29)	WAIS-R	73	67
2/20/2001 (Age 29)	WAIS-III	77	76[38]
10/23/2003 (Age 32)	Stanford-Binet 4	58	53

In 1979, because of early academic troubles, Clemons was administered the Stanford-Binet and obtained a score of 77 (resulting in a diagnosis of mental retardation), which equates to a 72 when norm obsolescence is appropriately considered. Norm obsolescence reflects the fact that IQ scores do not remain constant over time.[39] An IQ score obtained near the end of a test's norming cycle will be artificially inflated whereas a result obtained close in time to the

[38] This score is inflated by practice effect.

[39] *See*, *e.g.*, James R. Flynn, *The Mean IQ of Americans: Massive Gains 1932 to 1978*, 95 Psych. Bull. 29, 36 (1984) (estimating that "Americans gained 13.8 IQ points from 1932 or 1978" at an average of approximately .33 points per year). These gains cause IQ test norms to become obsolete over time. *Id.* at 39; *see also* Tomoe Kanaya, et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society*, 58 Am. Psych. 778, 778 (2003).

normative data collection point will not.[40] Adjustments for norm obsolescence simply account for this scientific principle.

In 2000, Clemons obtained a full-scale IQ score of 73 on the WAIS-R.[41] This test was normed in 1981.[42]

Three months later, Dr. King administered the WAIS-III and reported a full-scale IQ score of 77.[43] This score is inflated by approximately five points because of the practice effect, which occurs when a test-taker takes an IQ test more than once in a short time period.[44] Practice effect can occur when the second test, such as a new version of the WAIS, is "similar, but not identical to, the first test administered."[45]

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[40] Norm obsolescence is recognized by courts and in clinical standards. *See*, *e.g.*, *Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010); *Holladay v. Allen*, 555 F.3d 1346, 1358 (11th Cir. 2009); AAMR-10, *supra* note 11, at 20–21 ("IQ scores have been increasing from one generation to the next in all 14 nations for which IQ data existed. . . . In cases where a test with aging norms is used, a correction for the age of the norms is warranted.").

[41] C.A. App. 944.

[42] David Weschler, Weschler Adult Intelligence Scale-Revised 88 (1981).

[43] C.A. App. at 1060.

[44] AAMR-10 User's Guide, *supra* note 24, at 21; *see also* Michael R. Basso et al., *Practice Effects on the WAIS-III Across 3- and 6-Month Intervals*, 16 Clinical Neuropsychol. 57 (2002) (describing increased test score when the WAIS-III was administered and re-administered to the same subjects in either 3- and 6-month intervals).

[45] James Ellis et al., *Evaluation of Intellectual Disability: Clinical Assessments in* Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1361 (2018); *see also* David Tulski et al., *Assessment of Adult*

Finally, in 2003, Dr. Golden administered the Stanford-Binet, Fourth Edition and reported a full-scale IQ score of 58, which he adjusted to 66 to make comparable to Clemons's scores on WAIS tests.[46] Although the circuit court characterized these adjustments as "cryptic" and found that they impugned Dr. Golden's credibility,[47] they are clearly supported by clinical literature.[48]

Importantly, Clemons was not believed to be malingering on any of these four tests. Clemons would have had no incentive to malinger at the age of six, when he was placed in special education. Malingering test results in 2000 and 2003 revealed that Clemons gave good effort,[49] and Dr. King found no evidence of malingering in 2001, stating that Clemons was

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Intelligence with the WAIS-III, *in* Handbook of Psychological Assessment 115 (3d ed. 2000) (stating that "many other factors, such as practice effect . . . may affect the score discrepancies across" administrations of the WAIS-R and the WAIS-III). Dr. King also made several scoring mistakes, which, when corrected, lower this score further. C.A. App. 774–781.

[46] C.A. App. 463.

[47] Pet. App. I 167a.

[48] AAMR-10, *supra* note 11, at 58 ("It is common clinical lore that the Stanford-Binet is a more challenging test."). *See also* Silverman, *supra* note 37, at 243 (discussing literature finding "that WAIS IQs of a group of adults with ID were higher than their Stanford-Binet IQs").

[49] *See* C.A. App. 490–491 (stating that Clemons was not malingering on the Structured Interview of Reported Symptoms (SIRS) malingering test administered by Dr. Ackerson); *id.* at 492–493 (stating that Clemons "performed normally across all of the trials" on a malingering test conducted by Dr. Golden).

"[c]ooperative and reasonably pleasant."[50] Thus, the circuit court's conclusion that Clemons malingered his IQ scores stemmed from multiple unreasonable factual determinations rather than reliable scientific principles.

II. The circuit court unreasonably ignored uncontested evidence of adaptive deficits.

The second prong of ID—deficits in adaptive functioning—requires significant limitations in at least two skill areas.[51] As the circuit court acknowledged, Alabama law recognizes that "impairments in adaptive behavior" must be "measured by appropriate standardized instruments."[52] Yet the circuit court ignored the only clinical instrument in the record as well as other evidence of adaptive deficits. Instead, the circuit court chose to apply "various factors" it discovered in three Alabama cases in which no *Atkins* hearing was ever conducted.[53] And nowhere in those cases was it stated that a court could rely exclusively on stereotype even when confronted with a full *Atkins* record containing a clinical measurement of uncontested validity.

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[50] *Id.* at 682.

[51] C.A. App. 248.

[52] Pet. App. I 159a.

[53] These cases involved the review of pre-*Atkins* trial records for the purpose of determining whether remand for resentencing in light of *Atkins* was required. *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002); *Ex parte Smith*, 213 So.3d 214, 224 (Ala. 2003) (refusing remand); *Stallworth v. State*, 868 So.2d 1128, 1183 (Ala. Crim. App. 2001) (same).

Nonetheless, the circuit court found that *Perkins*, *Stallworth*, and *Smith* permitted it to rely on five factors: employment history, interpersonal relationships, criminal activity, post-crime craftiness, and use of community resources.[54] The determinations of fact that resulted from this decision were, as a result, unreasonable.

Moreover, the circuit court failed to apply its selected anecdotal factors reasonably. For each of the five factors, the circuit court's tendentious presentation of precedent and its targeted omissions from the record resulted in unreasonable determinations of the facts.

i. Employment history.

The circuit court acknowledged that Clemons's "most notable job was as a delivery driver for Domino's Pizza," where he "returned more pizzas than other delivery drivers" and could not make correct change.[55] Uncontradicted testimony from his supervisor at Domino's indicated that "Clemons wanted to succeed, tried to work very hard, but . . . was just unable to do the job despite all his efforts."[56] But the circuit court ignored this evidence. Instead, it concluded that Clemons's employment record was attributable to a "lack of desire," citing a competency evaluation conducted a decade before *Atkins* was decided. This evaluation described

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[54] Pet. App. I 168a (citing *Perkins*, 851 So.2d at 456; *Smith*, 213 So.3d at 225; *Stallworth*, 868 So.2d at 1182).

[55] *Id*. at 168a–169a.

[56] C.A. App. 555.

Clemons as irresponsible and stated that he chose to live with relatives and engage in substance abuse and promiscuous behavior.[57] That same evaluation, which was never discussed by any expert at the *Atkins* hearing, elsewhere stated that Clemons "quit jobs rather than being fired" because "he was unable to work as fast as his employers required."[58] In attributing Clemons's inability to hold unskilled work to a "lack of desire," the court accepted as conclusive the state's suggestion that Clemons "is lazy and might not want to get a job," absent any evidence to that effect and in the face of clear evidence to the contrary.[59] The court's perfunctory citation to two irrelevant sentences in a psychological report that elsewhere confirms Clemons was unable to work as required was unreasonable in light of the record evidence.

ii. Interpersonal relationships.

This "factor," which the circuit court purportedly derived from *Smith*, is fundamentally at odds with the clinical consensus that existed for years prior to *Atkin*s and the state court proceedings in this case.[60] And, in

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[57] Pet. App. I 169a (quoting C.A. App. 926).

[58] C.A. App. 919.

[59] *See id.* at 554 ("Isn't that work history consistent with someone who is lazy and might not want to get a job?") (statement of Assistant Attorney General Henry Johnson).

[60] *See*, *e.g.*, James Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 13 n.29 (2003) ("[T]hat an individual possesses one or more [skills] that might be thought by some laypersons [to be] inconsistent with the diagnosis (such as holding a

fact, *Smith* simply observed, in a discussion of adaptive functioning, that the defendant had a long-term relationship with a woman he described as his "common-law wife."[61] The circuit court here noted Clemons's self-report that he had two children and one serious relationship, but unreasonably omitted language directly contradictory to its conclusion. The full passage from the report states:

> [C]lemons has never married. He reported having numerous relationships, one of which was serious. *He stated that she broke off the relationship because 'She said I wasn't normal.'* He stated that he had at least two children, but said he did not know their mothers' names, stating, 'There's been so many women I can't remember.'[62]

iii. Post-crime craftiness.

The circuit court also found in *Smith* the principle that "post-crime craftiness . . . indicates [that] the defendant is not mentally retarded" and concluded, on the basis of a statement Clemons gave the FBI after

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menial job, or using public transportation) cannot be taken as disqualifying."); Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) 44 ("No specific personality or behavioral features are uniquely associated with Mental Retardation."); Alan G. Kamhi & Judith R. Johnston, *Towards an Understanding of Retarded Children's Linguistic Deficiencies*, 25 J. Speech & Hr'g Res. 435, 444 (1982) (describing how language abilities of children with ID are comparable to those of unimpaired children).

[61] *Ex parte Smith*, 213 So.3d 214, 225 (Ala. 2003).

[62] C.A. App. 919 (emphasis added).

his arrest (and nothing else), "that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime."[63] In his statement, Clemons told the FBI that he asked to be taken home by his companions when he learned they wanted "to take cars," that he was taunted when he hesitated to initiate a carjacking, and that he shot the victim after the victim drew a gun.[64] The circuit court insisted that Clemons's statement to this effect was "crafty," "clever," and "reflect[ed] Clemons's criminal sophistication."[65] On no reasonable reading, however, could this *inculpatory* statement, which failed to establish even a colorable defense, be accepted as evidence of "criminal sophistication" outweighing Clemons's impaired adaptive functioning.

iv. Criminal activity.

Referring once more to *Smith*, the circuit court again discovered a general rule—that criminal activity is inconsistent with ID—where none exists.[66] The court in *Smith* mentioned specifically that the defendant "was involved in an interstate illegal-drug enterprise" and had been responsible for the distribution of drugs worth $27,000, facts presumably relevant as evidence of the defendant's organizational aptitude.[67]

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[63] Pet. App. I 160a, 170a.

[64] *Id.* at 170a–171a.

[65] *Id.*

[66] *Id.* at 172a.

[67] *Ex parte Smith*, 213 So.3d 214, 225 (Ala. 2003).

The circuit court in this case identified no comparable activity by Clemons but merely observed that "[t]here was evidence presented at trial that indicated Clemons carjacked cars on three separate occasions at gunpoint."[68] On that basis, the court concluded that "Clemons's ability to repeatedly engage in illegal behavior refutes the notion that he had significant limitations in adaptive behavior."[69] However, the circuit court took no account of uncontradicted testimony that "brain injured people can commit crimes, as can mentally retarded people."[70]

v. Use of community resources.

The circuit court unreasonably equated use of community resources with the ability to ride a bus.[71] That Clemons was once able to board a bus does not negate Dr. Golden's standardized assessment finding significant deficits in six unrelated areas of adaptive behavior (Home Living, Health and Safety, Leisure, Self-Direction, Social-Skills and Work).[72] It was unreasonable for the circuit court to rely so heavily on this single event when there was no evidence that

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[68] Pet. App. I at 172a.

[69] *Id.*

[70] C.A. App. 518 (testimony of Dr. Golden).

[71] Pet. App. I 173a.

[72] The clinical guidelines that the circuit court purported to follow require significant deficits in only two skill areas. Thus, even if Clemons had no deficits in the area of Community Use, there would have been no reasonable basis to conclude that he failed to satisfy the requirements of prong two.

Clemons's *typical behavior* involved the regular and appropriate use of community resources.[73]

In sum, the circuit court applied a litany of "factors" obtained by unsupported generalizations from cases in which ID was never litigated to facts selected tactically from the record. It entirely ignored, with no explanation or justification, the only clinically sound (and uncontradicted) evidence of adaptive functioning in the record. As a result, its conclusion that Clemons did not have deficits in adaptive functioning is unreasonable.

III. The record demonstrates prong three is satisfied.

With regard to the third criterion—onset during the developmental period—the circuit court concluded that Clemons "did not produce any evidence of significant deficits of adaptive functioning before age 18."[74] The record, however, shows that Clemons was diagnosed as "educable mentally retarded" as a child; had fallen three years behind by high school; was subject to "ridicule and humiliation" by his peers; failed twice to complete the tenth grade; and finally withdrew from school "because he was tired of the mental abuse."[75]

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[73] "[A]daptive behavior refers to typical and actual functioning and not to capacity or maximum functioning." AAMR-10 User's Guide, *supra* note 24, at 20.

[74] Pet. App. I 174a.

[75] C.A. App. 547, 688–89, 856, 909.

The circuit court assigned dispositive weight to a 77 IQ score obtained when Clemons was six, even though both experts agreed that Clemons's IQ was unlikely to have stabilized by then.[76] The circuit court attempted to justify this outcome by citing *Perkins* and *Smith*.[77] But, as the Eleventh Circuit has recognized, "[t]here is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an *Atkins* claim when the totality of the evidence (scores) indicates that a capital offender suffers significantly subaverage intellectual functioning."[78]

IV. Section 2254(d) is satisfied.

The standard set forth by 28 U.S.C. § 2254(d) is challenging, but not—when applied correctly—impossible to meet. This Court has found even a single unreasonable factual determination sufficient to satisfy 2254(d)(2).[79]

In *Brumfield v. Cain*, the Court pointed to two of the state court's "critical factual determinations" (that Brumfield's IQ score was inconsistent with ID and that

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[76] *Id*. at 517, 809–10.

[77] Pet. App. I 174a.

[78] *Thomas*, 607 F.3d at 756–57. Moreover, with 18 years of norm obsolescence, this obtained score of 77 actually falls well within the ID range. Kirk A. Becker, *A History of the Stanford-Binet Intelligence Scales: Content and Psychometrics*, *in* Stanford-Binet Intelligence Scales, Fifth Edition Assessment Service Bulletin No. 11 at 2 (2003).

[79] *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

he had presented no evidence of adaptive impairment) as unreasonable within the meaning of section 2254(d)(2).[80] Finding the record inconsistent with both of these factual conclusions, the Court declared them unreasonable:

> As we have observed . . . "[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." Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.[81]

There can be no dispute that Clemons would prevail under this Court's current precedent because the circuit court applied a strict IQ cutoff and focused heavily on Clemons's purported strengths.[82] However, Clemons can (and should) still prevail because the circuit court's decision was riddled with unreasonable factual determinations. The panel opinion in this case held Clemons to too high a burden as it ignored, overlooked, or minimized numerous objectively unreasonable factual findings. This was the same type of error

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[80] 576 U.S. 305, 314 (2015).

[81] *Id*. (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005) (finding the state court's conclusion that juror strikes were not race-based was unreasonable where the state court ignored evidence of the prosecutor's failure to strike similarly situated jurors who would have been ideal for the prosecution).

[82] *See Hall*, 572 U.S. 701; *Moore*, 137 S. Ct. 1039.

recognized and remedied in *Brumfield*, and similar circuit court cases.[83]

The Eleventh Circuit was not absolved of its obligation to engage in meaningful review. AEDPA "does not by definition preclude relief"[84]—especially when the circuit court denied relief to a person who is categorically exempt from the death penalty. The panel improperly applied AEDPA's limitation on relief given the significant number of unreasonable factual determinations in the circuit court order. Clemons was entitled to relief.

CONCLUSION

The Court should grant the petition and reverse the judgment below.

Respectfully submitted.

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[83] *See*, *e.g.*, *Pruitt*, 788 F.3d at 265–67.

[84] *Brumfield*, 576 U.S. at 314.

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