

No. 20–1197
CAPITAL CASE

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 IN OPPOSITION

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**CAPITAL CASE
QUESTIONS PRESENTED
(Rephrased)**

1. The Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) provides that a state inmate has one year from the conclusion of his direct appeal to file a federal habeas petition, but the limitations period is tolled while a properly filed state postconviction petition is pending. Clemons’s counsel submitted a Rule 32 petition for postconviction relief in the state circuit court, but they mistakenly failed to pay the filing fee or submit a properly supported motion to proceed in forma pauperis. A Rule 32 petition is not considered properly filed until one of those two actions is taken. Realizing their mistake, his counsel resubmitted his petition along with a properly supported in forma pauperis motion, but by then, AEDPA’s statute of limitations had expired. Should this Court deny certiorari where the Eleventh Circuit correctly held that Clemons is not entitled to equitable tolling to obtain review of the time-barred claims in his habeas petition because his counsel’s failure to properly file his Rule 32 petition before AEDPA’s limitations period expired was the result of their negligence in failing to investigate and follow Alabama’s clear and unambiguous rules for properly filing a Rule 32 petition?

2. During his state postconviction proceeding, Clemons argued that he is intellectually disabled and, thus, ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2000), and the circuit court held an evidentiary hearing on his claim. Should this Court deny certiorari where the Eleventh Circuit correctly held that the Alabama Court of Criminal Appeals’s decision that he is not

intellectually disabled was neither contrary to nor an unreasonable application of then-existing clearly established federal law or based on an unreasonable determination of the facts?

RELATED CASES

Underlying Trial and Direct Appeal:

State of Alabama v. Eugene Milton Clemons II, CC–93–313, Circuit Court of Shelby County, Alabama.

Judgment Entered: October 11, 1994.

Clemons v. State, CR–94–0270, 720 So. 2d 961 (Ala. Crim. App. 1996), Alabama Court of Criminal Appeals.

Judgment Entered: December 20, 1996.

Rehearing Denied: January 17, 1997.

Ex parte Clemons, No. 1960904, 720 So. 2d 985 (Ala. 1998), Alabama Supreme Court.

Judgment Entered: January 16, 1998.

Rehearing Denied: August 21, 1998.

Clemons v. Alabama, No. 98–6933, 525 U.S. 1124 (1999) (mem.), United States Supreme Court.

Judgment Entered: January 25, 1999.

State Postconviction Proceeding (Rule 32) and Appeal:

Clemons v. State, CC–93–313.60, Circuit Court of Shelby County, Alabama.

Judgment Entered: February 19, 2002.

Clemons v. State, CR–01–1355, 55 So. 3d 314 (Ala. Crim. App. 2003), Alabama Court of Criminal Appeals.

Remanded with Instructions: August 29, 2003.

Clemons v. State, CC–93–313.60, Circuit Court of Shelby County, Alabama.

Judgment Entered: October 28, 2004.

Clemons v. State, CR–01–1355, 55 So. 3d 314 (Ala. Crim. App. 2003), Alabama Court of Criminal Appeals.

Judgment Entered: June 24, 2005.

Rehearing Denied: September 16, 2005.

Ex parte Clemons, No. 1041915, 55 So. 3d 348 (Ala. 2007), Alabama Supreme Court.

Writ Quashed in Part; Reversed and Remanded: May 4, 2007.

Clemons v. State, CR–01–1355, (Ala. Crim. App. 2007), Alabama Court of Criminal Appeals.

Judgment Entered: November 2, 2007.
Rehearing Denied: January 18, 2008.

Ex parte Clemons, No. 1070535, (Ala. 2010), Alabama Supreme Court.
Judgment Entered: August 13, 2010.

Successive State Postconviction Proceeding (Rule 32) and Appeal:

Clemons v. State, CC–93–313.61, Circuit Court of Shelby County, Alabama.
Judgment Entered: January 18, 2011.

Clemons v. State, CR–10–0772, 123 So. 3d 1 (Ala. Crim. App. 2012), Alabama Court of Criminal Appeals.
Judgment Entered: June 29, 2012.
Rehearing Denied: October 29, 2012.

Ex parte Clemons, No. 1120150, (Ala. 2013), Alabama Supreme Court.
Judgment Entered: March 22, 2013.

Clemons v. Alabama, No. 12–1478, 571 U.S. 828 (2013) (mem.), United States Supreme Court.
Judgment Entered: October 7, 2013.

Federal Habeas (2254) and Appeal:

Clemons v. Sharp, No. 2:10–cv–2218, United States District Court for the Northern District of Alabama, Southern Division.
Judgment Entered: March 17, 2015.

Clemons v. Thomas, No. 2:10–cv–2218, United States District Court for the Northern District of Alabama, Southern Division.
Judgment Entered: March 28, 2016.

Clemons v. Comm’r, Ala. Dep’t of Corr., No. 16–13020, 967 F.3d 1231 (11th Cir. 2020), Eleventh Circuit Court of Appeals.
Judgment Entered: July 30, 2020.

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STATEMENT OF THE CASE

A. Statement of the Facts

On the evening of May 28, 1992, Douglas Althouse, a special agent with the Drug Enforcement Administration, was scheduled to meet with a law enforcement officer in Hoover, Alabama to review several search warrants. *Ex parte Clemons*, 720 So. 2d 985, 987 (Ala. 1998). Jefferson County, Alabama sheriff's deputy Naylor Braswell shared an apartment with Althouse and agreed to accompany him to the meeting. *Id.*

At approximately 10:00 p.m., Braswell and Althouse left their apartment in Braswell's undercover car, a black model Z-28 Chevrolet Camaro. *Id.* On their way to the meeting, they stopped at a service station. *Id.* Braswell went inside the store while Althouse stayed in the car in the passenger seat. *Id.* While he was in the store, Braswell observed a man sitting in the driver's seat of his vehicle, pointing a gun at Althouse's head. *Id.* As he hurried out of the store, Braswell heard several shots and watched as Althouse fell out of the vehicle and fired several shots at the Camaro as the driver sped away. *Id.* Althouse died soon thereafter from gunshot wounds. *Id.*

The State's evidence revealed that Dedrick Smith told Clemons and several others that he needed a new engine for his Z-28 model Camaro. *Id.* On the night of Althouse's murder, Smith, Clemons, and Kenny Reed drove to a shopping center looking for a Camaro to steal. *Id.* As they were driving, Clemons saw Braswell's Camaro at the service station. *Id.* They stopped the vehicle, and Clemons, who was

armed with a gun, got out of the car. *Id.* After he shot Althouse, Clemons drove Braswell's Camaro to the house of one of his friends, Herman Shannon. *Id.* Once there, Clemons searched the car and found a shotgun and a bullet-proof vest with the word, "sheriff," on it. *Id.* Realizing that he had stolen a police vehicle, Clemons fled Alabama and traveled to his uncle's house in Ohio. *Id.*

Two days after Clemons murdered Althouse, agents with the Federal Bureau of Investigation arrested him in Cleveland, Ohio. *Id.* at 988. Clemons gave a statement to the agents in which he admitted shooting Althouse. *Id.*

B. The Proceedings Below

On September 25, 1994, a Shelby County, Alabama jury found Clemons guilty of the capital offense of murdering Althouse during a robbery in the first degree, in violation of Section 13A-5-40(a)(2) of the Code of Alabama. Doc. 56-33 at R. 6235.¹ The jurors unanimously recommended that he be sentenced to death. *Id.* at 6287-88. On October 11, 1994, the trial court followed the recommendation of the jury and sentenced Clemons to death. *Id.* at 6311-12.

Clemons's conviction and death sentence were affirmed on direct appeal. *Clemons v. State*, 720 So. 2d 961 (Ala. Crim. App. 1996), *aff'd*, 720 So. 2d 985 (Ala. 1998), *cert denied*, 525 U.S. 1124 (1999) (mem.). Clemons's conviction became final on January 25, 1999, the date on which this Court denied certiorari. Doc. 33 at 4.

On December 27, 1999, Clemons, through counsel, submitted his petition for postconviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, in the state circuit court. Doc. 28-1 at 2. But his counsel mistakenly

¹ Document numbers refer to the district court proceedings below.

failed to pay the filing fee or submit an in forma pauperis motion accompanied by a certified copy of his prison account along with the petition that they submitted on that date. *See* Ala. R. Crim. P. 32.6(a).

On January 28, 2000, Clemons's counsel resubmitted his Rule 32 petition along with a motion to proceed in forma pauperis and a certified copy of his prison account. Docs. 28–2, 28–4, 28–5. The clerk's office docketed that petition on the case action summary sheet as being filed on January 28, 2000. Doc. 28–3 at 2. The circuit court proceeded to act on Clemons's then-properly filed Rule 32 petition by granting his in forma pauperis motion and ordering the State to answer his petition.² *Id.*

Clemons's counsel then filed a motion that they styled, "Petitioner's Motion to Correct Clerical Error." Doc. 28–7. Therein, they moved the circuit court to enter an order "directing the Clerk to docket, as filed on December 27, 1999," the Rule 32 petition that they submitted on his behalf on January 28, 2000. *Id.* The circuit court heard argument on that motion and entered the following order on the case action summary sheet: "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." Docs. 28–3 at 5, 28–10.

After allowing Clemons to amend his Rule 32 petition twice and holding an evidentiary hearing, the circuit court denied his second amended Rule 32 petition. *Clemons v. State*, 55 So. 3d 314, 318 (Ala. Crim. App. 2003). The Court of Criminal

² Clemons's Rule 32 petition was timely under state law because the state limitations period for filing a postconviction petition at that time was two years, but it later was shortened to one year. *See Barbour v. State*, 903 So. 2d 858, 864 n.4 (Ala. Crim. App. 2004).

Appeals (“CCA”) remanded Clemons’s case to the circuit court with instructions to conduct an evidentiary hearing on several claims, including his claim that he is intellectually disabled and, thus, ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Id.* at 322. Pursuant to the CCA’s remand directive, the circuit court held a four-day evidentiary hearing on those claims and received post-hearing briefs. Having reviewed the evidence that was presented by the parties, the court denied relief on Clemons’s claims. Pet. App. 154a–219a.

On return to remand, the CCA affirmed the circuit court’s denial of relief on Clemons’s second amended Rule 32 petition. *Clemons*, 55 So. 3d at 348. But the Alabama Supreme Court granted certiorari and remanded his case to the CCA with instructions to address the merits of his ineffective-assistance-of-counsel claims. *Ex parte Clemons*, 55 So. 3d 348, 356 (Ala. 2007). In an unpublished memorandum opinion, the CCA again affirmed the circuit court’s denial of Clemons’s second amended petition, and the Alabama Supreme Court denied certiorari. Doc. 43–24 at Tab #R–30; Doc. 43–25 at Tab #R–32.

Clemons then simultaneously filed a successive Rule 32 petition in the state circuit court and a petition for writ of habeas corpus in the United States District Court. Doc. 1. Clemons successfully moved the district court to stay and hold in abeyance his habeas petition so that he could return to state court to litigate his successive petition. Doc. 7.

The state circuit court summarily denied Clemons’s successive Rule 32 petition. *Clemons v. State*, 123 So. 3d 1, 5 (Ala. Crim. App. 2012). The CCA

affirmed the circuit court's judgment, and the Alabama Supreme Court denied certiorari. *Id.* This Court denied certiorari. *Clemons v. Alabama*, 571 U.S. 828 (2013) (mem.).

After Clemons's litigation of his successive Rule 32 petition concluded, Respondents moved the district court to dismiss Clemons's untimely filed habeas petition. Doc. 25. Respondents argued that Clemons's petition was time-barred because AEDPA's one-year statute of limitations expired before he properly filed his state postconviction petition. *Id.* at 9–10.

Following briefing by the parties, the district court issued a Memorandum Opinion and Order of dismissal in which it held that all of the claims in Clemons's habeas petition are time-barred, with the exception of his *Atkins* claim. Pet. App. 40a–60a. The court thereafter entered a Memorandum Opinion and Order of dismissal in which it denied his *Atkins* claim and dismissed and denied his habeas petition. Pet. App. 61a–150a. The court declined to grant Clemons a certificate of appealability. *Id.* at 150a.

Clemons moved the Eleventh Circuit to grant him a certificate of appealability. The court granted a certificate of appealability as to two of his claims but otherwise denied his motion. After briefing and oral argument, the court of appeals affirmed the district court's judgment. Pet. App. 1a–35a (*Clemons v. Comm'r, Ala. Dep't of Corr.*, 967 F.3d 1231 (11th Cir. 2020)).

REASONS FOR DENYING THE PETITION

This Court should not grant certiorari on either of the questions presented by Clemons. His claim that the Eleventh Circuit's denial of his request for equitable tolling to obtain review of the time-barred claims in his habeas petition conflicts with *Holland* and creates a circuit split is meritless. Under AEDPA, a state inmate has one year from the conclusion of his direct appeal to file a federal habeas petition, but that period is tolled while a properly filed state postconviction petition is pending. His counsel submitted a Rule 32 petition for postconviction relief in the state circuit court, but they mistakenly failed to pay the filing fee or submit a properly supported motion to proceed in forma pauperis. A Rule 32 petition is not considered properly filed until the filing fee is paid or a properly supported in forma pauperis motion is filed. To correct their mistake, his counsel refiled his Rule 32 petition along with a properly supported in forma pauperis motion, but by that time, AEDPA's limitations period had expired. Applying *Holland*, *Maples*, and this Court's other precedents, the Eleventh Circuit held that Clemons is not entitled to the rare and extraordinary remedy of equitable tolling because it was his counsel's negligence in failing to investigate and follow Alabama's clear and unambiguous rules for properly filing a Rule 32 petition that caused his petition not to be properly filed until after the limitations period expired. That decision is correct and should not be disturbed.

Clemons's second claim—that the Eleventh Circuit erred in denying habeas relief as to his *Atkins* claim—likewise is unworthy of certiorari review. Clemons

takes issue with the wrong state court decision in his petition, arguing that the state circuit court's denial of his *Atkins* claim conflicts with this Court's precedents. But the CCA's decision affirming the judgment of the circuit court is the relevant decision for federal habeas purposes. And the Eleventh Circuit correctly held that the CCA's decision that he is not intellectually disabled was neither contrary to nor an unreasonable application of then-existing clearly established federal law or based on an unreasonable determination of the facts. This Court should, therefore, deny Clemons's petition.

I. The Eleventh Circuit correctly followed *Holland* and this Court's other precedents and did not create a circuit split in holding that Clemons is not entitled to the rare and extraordinary remedy of equitable tolling to obtain review of the time-barred claims in his habeas petition.

Clemons seeks certiorari review of the Eleventh Circuit's decision that he is not entitled to equitable tolling to obtain review of the claims in his habeas petition that are barred from consideration by AEDPA's statute of limitations. But Clemons spends much of his petition asserting that the Eleventh Circuit said things that it did not say. The Eleventh Circuit did not set forth a rule that "equitable tolling is not justified when a party relies on misinformation supplied by a State actor." Pet. 2. The court did not hold that Clemons is not entitled to equitable tolling because he was represented by counsel when AEDPA's limitations period expired, nor did the court so much as suggest that the doctrine of equitable tolling is reserved only for pro se petitioners. Pet. 10, 12, 17.

Instead, the Eleventh Circuit correctly held that his counsel's failure to properly file his Rule 32 petition for postconviction relief in the state circuit court before AEDPA's limitations period expired was the result of their negligence in failing to investigate and follow Alabama's clear and unambiguous rules for properly filing the petition. And because attorney negligence does not constitute an extraordinary circumstance warranting equitable tolling, the court correctly held that he is not entitled to that rare and extraordinary remedy to obtain review of the time-barred claims in his habeas petition.

Clemons's argument that the Eleventh Circuit's decision conflicts with this Court's precedents and creates a circuit split is based on a misunderstanding of the decision below. As such and because his equitable-tolling claim plainly is without merit, this Court should deny certiorari.

A. The Eleventh Circuit's decision does not conflict with *Holland* or this Court's other precedents.

Clemons argues that the Eleventh Circuit applied an unduly rigid approach and did not consider all of the relevant facts and circumstances in holding that he is not entitled to equitable tolling in conflict with *Holland v. Florida*, 560 U.S. 631 (2010). Pet. 12–15. That is not so. The Eleventh Circuit faithfully applied *Holland* and this Court's other precedents in resolving his claim.

AEDPA provides that a state inmate has one year from the conclusion of his direct appeal to file a federal habeas petition, but the limitations period is tolled “while ‘a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending.’” *Pace v. DiGuglielmo*,

544 U.S. 408, 410 (2005) (quoting 28 U.S.C. § 2244(d)); *see also Artuz v. Bennet*, 531 U.S. 4, 8 (2000) (“[A]n application is ‘*properly* filed’ when its delivery and acceptance are in compliance with applicable laws and rules governing filings. These usually prescribe, for example, the form of the document, the time limits upon its delivery, the court and office in which it must be lodged, and the requisite filing fee.”). “[T]he timeliness provision in the federal habeas corpus statute is subject to equitable tolling” in “appropriate cases.” *Holland*, 560 U.S. at 634, 645. Equitable tolling is an extraordinary remedy that will be applied “only sparingly.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990).

A habeas petitioner is not entitled to the rare and extraordinary remedy of equitable tolling unless “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 (quoting *Pace*, 544 U.S. at 418); *see also Lawrence v. Florida*, 549 U.S. 327, 336 (2007). “[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant’s delay are both extraordinary *and* beyond its control.” *Menominee Indian Tribe of Wisc. v. United States*, 577 U.S. 250, 257 (2016).

In *Holland*, the Court rejected as “too rigid” the Eleventh Circuit’s rule that “even attorney conduct that is ‘grossly negligent’ can never warrant tolling absent ‘bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer’s part.’” 560 U.S. at 649 (quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008)). The Court recognized that petitioners typically “must bear the

risk of attorney error” and that a garden variety claim of attorney negligence, “such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.” *Id.* at 650–52 (citation and quotation marks omitted). But the Court held “that, at least sometimes, professional misconduct that fails to meet the Eleventh Circuit’s standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling.” *Id.* at 651.

In his concurring opinion in *Holland*, Justice Alito agreed that the petitioner “alleged certain facts that go well beyond any form of negligence” and that the Eleventh Circuit’s rule was too stringent, but he criticized the majority opinion for failing to “do enough to explain the *right* standard” for determining when attorney misconduct constitutes an extraordinary circumstance. *Id.* at 654–55 (Alito, J., concurring in part and concurring in the judgment). He began by noting that the Court’s precedents “make it abundantly clear that attorney negligence is not an extraordinary circumstance warranting equitable tolling.” *Id.* at 655. He explained that “the principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of an attorney is constructively attributable to the client and thus is not a circumstance beyond a litigant’s control” and that this rationale “fully applies to other forms of attorney negligence.” *Id.* at 657. He further explained that the same rationale “plainly applies regardless of whether the attorney error in question involves ordinary or gross negligence.” *Id.*

Justice Alito concluded that there should be a distinction between attorney negligence, “however styled,” and “attorney misconduct that is not constructively attributable to the petitioner.” *Id.* at 659. He explained that the petitioner in *Holland* might be entitled to equitable tolling because he alleged facts showing that his attorney abandoned him, which, if true, would constitute an extraordinary circumstance that was outside of his control. *Id.* In reaching that result, he reasoned that “[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any sense of that word.” *Id.*

In *Maples v. Thomas*, the Court was presented with the question of when attorney misconduct constitutes an extraordinary circumstance that is beyond the petitioner’s control in the context of what a petitioner must show to establish cause to excuse a state-court procedural default. 565 U.S. 266, 282 (2012). The Court explained that Justice Alito’s concurrence in *Holland* “homed in on the essential difference between a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client” and agreed with and adopted his view that, “under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him.” *Id.* at 282–83. The Court held that the “distinction between attorney negligence and attorney abandonment” applies in cases involving equitable tolling and cases where a petitioner seeks to show cause to excuse a default. *Id.* 282 n.7.

Here, Clemons's conviction and death sentence became final on January 25, 1999, the date on which this Court denied certiorari on direct appeal. Pursuant to 28 U.S.C. § 2244(d)(1)(A), Clemons had one year from January 25, 1999, or until January 25, 2000, in which to file a timely federal habeas petition.

On December 27, 1999, Alabama attorney James S. Christie, Jr., who was then a partner in the Bradley Arant law firm, submitted Clemons's Rule 32 petition for postconviction relief in the state circuit court. Pet. App. 14a–15a; Doc. 28–1 at 2. Three attorneys who were associated with Winston & Strawn were listed as counsel for Clemons on that petition as well. Doc. 28–1 at 32. Clemons's counsel mistakenly failed to pay the filing fee or submit an in forma pauperis motion accompanied by a certified copy of his prison account along with the petition.

“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.” *Smith v. Comm’r, Ala. Dep’t of Corr.*, 703 F.3d 1266, 1270 (11th Cir. 2012). In particular, Rule 32.6(a) of the Alabama Rules of Criminal Procedure states:

A proceeding under this rule is commenced by filing a petition, verified by the petitioner or the petitioner's attorney, with the clerk of the court. . . . 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 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. . . . 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) (emphasis added).³

Realizing their mistake, Clemons's counsel resubmitted his Rule 32 petition along with a motion to proceed in forma pauperis and a certified copy of his prison account to the state circuit court on January 28, 2000. Docs. 28–2, 28–4, 28–5. By that time, AEDPA's statute of limitations had expired. The clerk's office docketed the petition on the case action summary sheet on the same day. Doc. 28–3 at 2. And the circuit court proceeded to act on Clemons's then-properly filed petition by granting his in forma pauperis motion and entering an order instructing the State to answer his petition. *Id.*

Clemons's counsel filed a motion that they styled, "Petitioner's Motion to Correct Clerical Error," on March 14, 2000. Doc. 28–7. Therein, they moved the circuit court to enter an order "directing the Clerk to docket, as filed on December 27, 1999," the Rule 32 petition that they submitted on January 28, 2000. *Id.* In support of that motion, they submitted an affidavit that was executed by Mr. Christie in which he averred that he called the state circuit court clerk's office to find out the filing fee for a Rule 32 petition. Doc. 28–12 at 3. He further averred

³ Similarly, the Appendix to Rule 32 states that "you may request permission to proceed in forma pauperis, in which event you must complete the declaration at the end of this form, setting forth information establishing your inability to pay the fees and costs or give security therefore. Your declaration must include financial information relating to the twelve (12) months preceding the filing of this petition."

that he spoke with a woman in the clerk's office, whom he did not identify, and "understood" from his conversation with her that the "petition did not need to be accompanied by a filing fee." *Id.* He accordingly did not pay the filing fee when he submitted Clemons's petition on December 27, 1999. *Id.*

The circuit court heard argument on the motion and entered the following order on the case action summary sheet: "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." Docs. 28–3 at 5, 28–10. On collateral appeal, the CCA held that Clemons's claim that the circuit court erred in denying that motion was meritless because "the petition that [his] counsel attempted to file on December 27, 1999, was not accompanied by a filing fee or a request to proceed in forma pauperis." *Clemons*, 55 So. 3d at 335.

In adjudicating Clemons's equitable-tolling claim, the Eleventh Circuit recognized that, in some cases, egregious attorney misconduct can constitute an extraordinary circumstance that warrants equitable tolling. Pet. App. 18a–19a. The court also recognized that "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." *Id.* at 19a.

The Eleventh Circuit correctly held that Clemons's counsel acted negligently by relying on the advice of an unknown person in the clerk's office that there is no filing fee for a Rule 32 petition because the instructions for properly filing a Rule 32 petition, as set forth in Rule 32.6(a) of the Alabama Rules of Criminal Procedure,

are “clear and unambiguous.” Pet. App. 18a, 20a. Had they conducted even a cursory review of that rule either before or after calling the clerk’s office, they would have known that the information that they purportedly received from that unknown person was manifestly wrong. *Id.* at 22a. They also would have known that the only way to properly file a Rule 32 petition without paying the filing fee was to submit a motion to proceed in forma pauperis accompanied by a certified copy of Clemons’s prison account. *Id.* at 21a.

In addition, if they had read the operative provisions of the Alabama Code, Clemons’s counsel would have learned that the minimum filing fee in civil cases filed in Alabama circuit courts was \$140 in 1999. Pet. App. 13a, 21a; *see also* 1999 Ala. Laws Act 99–427 (H.B. 53), Ala. Code § 12–19–71 (1999); *Ex parte Beavers*, 779 So. 2d 1223, 1224 (Ala. 2000) (“The docket fee for filing a petition for postconviction relief is \$140.00.”). Even assuming that the filing fee in Shelby County was higher than \$140 in 1999, for which there is no evidence in the record, the information in the Alabama Code would have alerted them that the person who allegedly told Mr. Christie that there is no filing fee for a Rule 32 petition had to be mistaken. *Id.* at 21a. And, if they had read the Alabama Code, they also would have learned that § 12–19–70(b), just like Rule 32.6(a) of the Alabama Rules of Criminal Procedure, provides an avenue for petitioners who cannot afford to pay the filing fee. *Id.* That section provides that “[t]he docket fee may be waived initially and taxed as costs at the conclusion of the case if the court finds that payment of the fee will constitute a substantial hardship. A verified statement of substantial hardship, signed by the

plaintiff and approved by the court, shall be filed with the clerk of court.” Ala. Code § 12–19–70(b).

In fact, if they had conducted a more expansive investigation into the requirements for properly filing a Rule 32 petition, Clemons’s counsel would have learned that they had to pay the filing fee or submit a motion to proceed in forma pauperis accompanied by a certified copy of his prison account to invoke the jurisdiction of the circuit court. *De-Gas, Inc. v. Midland Resources*, 470 So. 2d 1218, 1222 (Ala. 1985) (“[T]he payment of the fees required by § 12–19–70 or the filing of a court-approved verified statement of substantial hardship is a jurisdictional prerequisite to the commencement of an action for statute of limitations purposes.”); *Beavers*, 779 So. 2d at 1225 (“Because the circuit court denied his request to proceed in forma pauperis, it lacked jurisdiction to rule on the merits of his [Rule 32] petition.”); *Carpenter v. State*, 782 So. 2d 848, 849 (Ala. Crim. App. 2000) (“[A]bsent the payment of a filing fee or the granting of a request to proceed in forma pauperis the trial court fails to obtain subject matter jurisdiction to consider a postconviction petition.”) (citing *Goldsmith v. State*, 709 So. 2d 1352, 1353 (Ala. Crim. App. 1997)).

Based on the foregoing, the Eleventh Circuit correctly found that Clemons’s counsel were “clearly negligent” for failing to investigate and comply with the unambiguous requirements for properly filing his Rule 32 petition and, further, that their negligence caused his petition not to be timely filed until after AEDPA’s statute of limitations expired. Pet. App. 18a-21a. Even if his counsel were confused about whether they needed to pay the filing fee, they easily could have filed a

motion to proceed in forma pauperis accompanied by a certified copy of his prison account when they submitted the petition on December 27, 1999. *Id.* at 21a. After all, they filed those very same documents on January 28, 2000. *Id.*

Having found that Clemons's counsel acted negligently in failing to make sure that his petition was properly filed before AEDPA's limitations period expired, the Eleventh Circuit properly followed *Holland* and *Maples* in concluding that he was bound by their negligence pursuant to agency principles.⁴ Pet. App. 18a. And because attorney negligence does not constitute an extraordinary circumstance that warrants equitable tolling, the court correctly held that Clemons is not entitled to that rare and extraordinary remedy to obtain review of the time-barred claims in his habeas petition. *Id.* (“[A]lthough 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.”).

Nevertheless, Clemons argues that the Eleventh Circuit’s decision conflicts with *Holland* because the court did not consider all of the relevant facts and circumstances in denying his equitable-tolling claim. He asserts that the court failed to consider that someone in the clerk’s office stamped “filed” on the petition that was submitted on December 27, 1999, that the clerk’s office misplaced that petition, and that the clerk’s office did not notify his counsel that they failed to pay

⁴ In section I(B) of his petition, Clemons suggests in passing that he is entitled to equitable tolling because he reasonably relied on his counsel to properly file his petition. Pet. 22. That most decidedly is not the law.

the filing fee or submit a properly supported motion for leave to proceed in forma pauperis. Pet. 12–14. He is mistaken.

The Eleventh Circuit considered and rejected his argument that the purported errors of the circuit clerk’s office constitute an extraordinary circumstance that warrants equitable tolling. In reaching that result, the court correctly found 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.” Pet. App. 21a.

Indeed, as relevant here, it is settled law in Alabama that “[i]t is not the responsibility of the clerk of th[e] court to review the attachments or records submitted in each case to ensure that attorneys have submitted each and every document necessary to support their petitions or appeals.” *Ex parte Strickland*, 172 So. 3d 857, 859 (Ala. Civ. App. 2014); *see also Smith v. Cowart*, 68 So. 3d 802, 812 (Ala. 2011) (“It is the prevailing rule in Alabama ‘that a litigant . . . has responsibility for keeping track of his case and knowing its status.’”) (quoting *D. & J. Mineral and Min., Inc. v. Wilson*, 456 So. 2d 1099, 1100 (Ala. Civ. App. 1984)). Additionally, “[t]he decision regarding what to include with each submission to th[e] court lies with the attorney submitting a petition or appeal, not with the clerk’s office.” *Id.* at 859–60.

Thus, the Eleventh Circuit correctly rejected Clemons’s attempt to shift the blame for his counsel’s mistake to the circuit clerk’s office. The circuit clerk and her

employees were not responsible for making sure that his Rule 32 petition was properly filed.⁵ That was his counsel’s responsibility, and it was only because of their negligence that his petition was not properly filed until after AEDPA’s statute of limitations expired. Because the court of appeals correctly followed *Holland* and this Court’s other precedents in holding that his counsel’s negligence does not constitute an extraordinary circumstance that warrants equitable tolling, this Court should deny certiorari.

B. The Eleventh Circuit’s decision neither contributed to nor created a circuit split.

Clemons argues that the Eleventh Circuit’s decision “created a conflict of authority” regarding the analysis that should be applied in determining whether a petitioner is entitled to equitable tolling of AEDPA’s limitations period. Pet. 2, 14–18. In his telling, the First, Third, Sixth, and Ninth Circuits require courts to consider all of the relevant facts and circumstances in addressing the question of equitable tolling while the Eleventh Circuit does not.⁶

⁵ In section I(B) of his petition, Clemons presents an argument so novel and untethered from the facts of his case that it merits only brief mention. He contends that the circuit clerk’s office is to blame for his counsel’s failure to properly file his Rule 32 petition before AEDPA’s limitations period expired because the clerk’s office purportedly “invited” attorneys to inquire about filing fees and “advertised” that it would provide attorneys with such information; because Mr. Christie accepted that “invitation” by calling the clerk’s office and relied on the misinformation he received, Clemons asserts that the clerk’s office is at fault. Pet. 18–19. To support this curious proposition, he cites circuit court websites from four Alabama counties. *Id.* But not only do his exemplars not include the clerk’s office at issue, the websites are referenced as they currently exist in 2021. *Id.* There is no evidence in the record showing that the Shelby County Circuit Clerk’s Office invited attorneys to contact its office or that it advertised anything in December 1999. But even assuming that it did, it was the responsibility of his counsel, not the clerk or her employees, to ensure that his petition was properly filed. *Smith*, 68 So. 3d at 812; *Strickland*, 172 So. 3d at 859–60.

⁶ Clemons also cites a divided decision of the Second Circuit and a divided decision of the Fourth Circuit and asserts that there is an intra-circuit split regarding the proper standard for resolving equitable-tolling claims in those circuits. Pet. 16–17.

But there is no meaningful divergence in how these courts approach equitable tolling. Each of those courts has required a case-by-case, fact-specific inquiry into a petitioner's request for equitable tolling. And more importantly, each of those courts has recognized that attorney negligence, unlike attorney abandonment or other egregious professional misconduct, does not constitute an extraordinary circumstance that would warrant equitable tolling. Because the split that Clemons identifies is illusory, this Court should deny certiorari.

1. *First Circuit.* The First Circuit has held that attorney negligence does not constitute an extraordinary circumstance that warrants equitable tolling. *Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005) (“[C]ounsel’s errors in calculating the time limits or advising a petitioner of the appropriate filing deadlines do not constitute extraordinary circumstances warranting equitable tolling.”). The decision cited in Clemons’s petition is not to the contrary. In *Ramos-Martínez v. United States*, 638 F.3d 315, 318 (1st Cir. 2011), the court determined as a matter of first impression that 28 U.S.C. § 2255(f) is subject to equitable tolling but went “no further,” remanding the petitioner’s case for an evidentiary hearing. In so ruling, the court observed that factors that, alone, are not sufficient to warrant equitable tolling might warrant tolling when considered together. *Id.* at 324.

2. *Third Circuit.* The Third Circuit has held that attorney abandonment, unlike attorney negligence, may constitute an extraordinary circumstance that warrants equitable tolling. *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 89 & n. 6 (3d Cir. 2013). The decision cited in Clemons’s petition is not to

the contrary. In *Pabon v. Mahoney*, 654 F.3d 385, 398–99 (3d Cir. 2011), the petitioner, who was proceeding pro se, alleged that he was entitled to equitable tolling because he cannot read, write, or understand English and was denied access to Spanish-language legal materials and legal or translation assistance. In remanding his case for a hearing, the court held that those facts, if true, would constitute an extraordinary circumstance warranting equitable tolling. *Id.* at 387.

3. *Sixth Circuit.* The Sixth Circuit has recognized the distinction between attorney negligence, which does not constitute an extraordinary circumstance warranting equitable tolling, and attorney abandonment or other egregious attorney behavior, which might. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). The decision cited by Clemons is not to the contrary. There, the court held that a petitioner who was proceeding pro se was entitled to equitable tolling because his partial illiteracy, medical conditions, and prison transfers prevented him from learning about a decision issued by this Court that entitled him to relief. *Jones v. United States*, 689 F.3d 621, 627 (6th Cir. 2012).

4. *Ninth Circuit.* The Ninth Circuit likewise has recognized the distinction between attorney negligence and attorney abandonment or other egregious attorney misconduct for the purposes of equitable tolling. *Rudin v. Myles*, 781 F.3d 1043, 1055 n. 15 (9th Cir. 2014). The decision cited by Clemons is not to the contrary. There, the petitioner hired an attorney to prepare a federal habeas petition, paid him \$20,000 in advance, provided him with his files, and made regular inquiries about the status of his case. *Doe v. Busby*, 661 F.3d 1001, 1012

(9th Cir. 2011). Despite all that, the attorney never filed a habeas petition and then waited six months before returning the petitioner's files. *Id.* The court held that the attorney's particularly egregious professional misconduct constituted an extraordinary circumstance that warranted equitable tolling. *Id.*

5. *Second Circuit.* The Second Circuit has held that attorney misconduct will not constitute an extraordinary circumstance for the purposes of equitable tolling unless it is "so egregious as to amount to an effective abandonment of the attorney-client relationship." *Rivas v. Fischer*, 687 F.3d 514, 538 (2d Cir. 2012). The decision cited by Clemons is not to the contrary. In *Jenkins v. Greene*, 630 F.3d 298, 305 (2d Cir. 2010), the majority held that the petitioner's "mistaken belief" about how to raise an ineffective-assistance-of-counsel claim in state court did not amount to an extraordinary circumstance that would warrant equitable tolling, especially where the requirements for raising the claim were clear. The dissent disagreed with the majority's analysis of the state law requirements, found that they were confusing, and stated that the petitioner, who was proceeding pro se, should be entitled to equitable tolling. *Id.* at 308 (Parker, J., dissenting).

6. *Fourth Circuit.* The Fourth Circuit long has recognized that attorney negligence, ignorance, and inadvertence do not constitute extraordinary circumstances that warrant equitable tolling because such attorney errors are attributable to the petitioner "under standard principles of agency." *Rouse v. Lee*, 339 F.3d 238, 248–49 (4th Cir. 2003) (en banc). The decision cited by Clemons is not to the contrary. There, the majority rejected the petitioner's claim that he was

entitled to equitable tolling because he was prevented from timely filing by unfavorable precedent, reasoning that the standard set forth in *Holland* focuses “on whether a factor beyond the defendant’s control prevented him from filing within the limitations period at all.” *Whiteside v. United States*, 775 F.3d 180, 185 (4th Cir. 2014) (en banc). The dissent argued that the petitioner would be entitled to relief under newly established precedent from this Court if his claim is addressed on the merits and concluded that he should, therefore, be entitled to equitable tolling. *Id.* at 188–89 (Gregory, J., Davis, J., dissenting).

7. *Eleventh Circuit.* The Eleventh Circuit has recognized that “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 v. Fla. Dep’t of Corr.*, 853 F.3d 1216, 1227 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1042 (2018) (mem.). The Eleventh Circuit also has recognized that courts should engage in “‘equitable, case-by case’ inquiries into whether abandonment or any other extraordinary circumstance occurred, provided, of course, that negligence or gross negligence is not treated as a sufficient extraordinary circumstance all by itself.” *Id.* at 1228; *see also Hutchinson v. Florida*, 677 F.3d 1097, 1098 (11th Cir. 2012) (“Equitable tolling is, well, equitable in nature, and decisions regarding it must be made ‘on a case-by-case basis’ in light of ‘special circumstances, often hard to predict in advance,’ although we ‘can and do

draw upon decisions made in other similar cases for guidance.”) (quoting *Holland*, 560 U.S. at 650–51).

Thus, rather than establishing a circuit split, Clemons has done the opposite. In light of the foregoing decisions, the consensus among the circuit courts is that the question of equitable tolling requires a case-by-case and fact-specific inquiry but that attorney negligence does not constitute an extraordinary circumstance that warrants equitable tolling. Because Clemons has failed to establish a split with regard to this issue, the writ should be denied.

II. The Eleventh Circuit correctly followed this Court’s precedents in denying Clemons’s *Atkins* claim.

Clemons seeks certiorari review of the Eleventh Circuit’s denial of his claim that he is intellectually disabled and, thus, ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). He argues that the Eleventh Circuit “disregarded this Court’s standards and precedents” in reaching that result. Pet. 22–23. Not so. The court properly applied AEDPA deference in reviewing the CCA’s determination that he is not intellectually disabled and correctly found, under 28 U.S.C. § 2254(d), that the CCA’s decision was not contrary to or an unreasonable application of then-existing clearly established federal law or based on an unreasonable determination of the facts in light of the state-court record. Certiorari should be denied.

A. The Eleventh Circuit correctly held that the CCA’s decision was not contrary to or an unreasonable application of *Atkins* or based on an unreasonable determination of the facts.

Clemons argues that certiorari is warranted because the Eleventh Circuit failed to recognize that “the state court” identified the correct clinical standards for diagnosing intellectual disability but failed to apply them in denying his *Atkins* claim, resulting in a decision that was contrary to or an unreasonable application of *Atkins* and was based on an unreasonable determination of the facts. Pet. 25–30. Clemons further suggests that he is entitled to habeas relief on his *Atkins* claim in light of *Hall* and *Moore*. *Id.* He is mistaken on both counts.

In *Atkins*, this Court held that the execution of capital offenders who are intellectually disabled violates the Eighth Amendment’s prohibition against cruel and unusual punishment. 536 U.S. at 321. The Court declined to create a national standard that lower courts should use in determining whether a capital offender is intellectually disabled and, thus, not eligible for the death penalty. *Id.* at 317. The Court left to the individual states “the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences.” *Id.*

In *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), the Alabama Supreme Court set forth the definition of intellectual disability that Alabama courts are to apply in adjudicating *Atkins* claims. To be considered intellectually disabled under Alabama law, a petitioner “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; *see also Ex parte Smith*, 213 So. 3d 214, 224–25 (Ala. 2003) (holding that a defendant who has a full-scale IQ score of 72 does not suffer from significantly subaverage intellectual functioning); *Albarran v. State*, 96 So. 3d 131, 200 (Ala. Crim. App. 2011) (“Because the circuit court could have reasonably determined that Albarran’s IQ was 71, a score that places him outside the Alabama Supreme Court’s definition of mental retardation, this Court cannot say that the circuit court abused its discretion in denying [his] *Atkins* motion.”).

As a critical threshold matter, Clemons focuses his attention on the wrong state court decision. Where a lower state court gave reasons for its decision but a higher state court did not, “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). So, as the Eleventh Circuit correctly found, the relevant state court decision for federal habeas purposes is the CCA’s decision, not that of the state circuit court. Pet. App. 8a.

In adjudicating Clemons’s *Atkins* claim, the CCA did not set forth clinical definitions of intellectual disability and then fail to consider them. *Clemons*, 55 So. 3d at 323–32. Indeed, the CCA did not set forth any clinical standards in its decision. *Id.* Instead, the CCA applied the Alabama Supreme Court’s definition of intellectual disability in *Perkins* and *Smith* to the circuit court’s findings of fact and held that the circuit court correctly denied his *Atkins* claim. *Id.* at 332 (“We have

reviewed the record in light of *Perkins* and *Smith*, and we conclude that it supports the circuit court’s findings.”).

True, the CCA did not refer to the standard error of measurement in holding that Clemons failed to demonstrate that he has significantly subaverage intellectual functioning. But, as the Eleventh Circuit correctly found, at the time of the CCA’s decision in 2005, “no clearly established federal law prohibited state courts from using a bright-line cutoff for IQ scores above 70.” Pet. App. 31a. For that reason, the CCA’s holding that Clemons does not have significantly subaverage intellectual functioning because he “consistently scores in the 70-80 range on intelligence tests” when he puts forth effort is neither contrary to nor an unreasonable application of *Atkins*. *Id.* at 33a. Moreover, that “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, [Clemons’s expert] Dr. Golden, ever opined that Clemons was intellectually disabled.” *Id.* In fact, five of those seven experts “opined that Clemons was malingering psychological symptoms.” *Id.* In light of this evidence, the CCA properly rejected Clemons’s *Atkins* claim and, at a minimum, the court’s conclusion was not an unreasonable application of *Atkins*.

It also is true that the CCA focused more on Clemons’s adaptive strengths than his weaknesses in holding that he does not have significant or substantial deficits in adaptive behavior. But the Eleventh Circuit correctly found that clearly established federal law in 2005 did not require state courts to focus on a defendant’s

weaknesses in assessing adaptive functioning. Pet. App. 34a–35a. As such, the CCA’s decision on that front was not contrary to or an unreasonable application of *Atkins*. *Id.*

To the extent that he suggests that he is entitled to relief in light of *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), Clemons is mistaken. Pet. 23–30. As the Eleventh Circuit correctly found, those cases were decided years after the CCA denied his *Atkins* claim and, thus, could not have been clearly established federal law at that time. Pet. App. 34a. The court also correctly held that *Hall* and *Moore* do not apply retroactively to cases on collateral review. *Id.* at 32a–33a. Notably, Clemons does not challenge either of those holdings in his petition.

Moreover, this Court has determined that reliance on *Moore* in analyzing an *Atkins* claim in a federal habeas petition under Section 2254(d)(1) is improper if the last relevant state court adjudication occurred before *Moore*. *Shoop v. Hill*, 139 S. Ct. 504, 509 (2019). The Court explained that AEDPA “imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases” and that “[t]he statute respects the authority and ability of state courts and their dedication to the protection of constitutional rights.” *Id.* at 506. Therefore, under “28 U.S.C. § 2254(d)(1), habeas relief may be granted only if the state court’s adjudication ‘resulted in a decision that was contrary to, or involved an unreasonable application of,’ Supreme Court precedent that was ‘clearly established’ at the time of the adjudication.” *Id.* (citations omitted).

The Court held that *Moore*'s rule was not dictated by *Atkins*, summarily reversed the judgment of the Sixth Circuit “[b]ecause the reasoning of the Court of Appeals lean[ed] so heavily on *Moore*,” and remanded for the Sixth Circuit to “determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time.” *Id.* at 508–09. The Court rejected the Sixth Circuit’s “assert[ion] that the holding in *Moore* was ‘merely an application of what was clearly established by *Atkins*.’” *Id.* at 508 (quoting *Hill v. Anderson*, 881 F.3d 483, 487 (6th Cir. 2018)). In so ruling, the Court noted that the Sixth Circuit “did not explain how the rule it applied can be teased out of the *Atkins* Court’s brief comments about the meaning of what it termed ‘mental retardation.’” *Id.*; see also *id.* (“[W]hile *Atkins* noted that standard definitions of mental retardation included as a necessary element ‘significant limitations in adaptive skills . . . that became manifest before age 18,’ *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States.”) (quoting *Atkins*, 536 U.S. at 318). That same reasoning applies to *Hall* as well.

Simply put, Clemons has failed to show that the Eleventh Circuit erroneously held that the CCA’s decision was neither contrary to nor an unreasonable application of *Atkins* and was not based on an unreasonable determination of the facts. He likewise has failed to show that the Eleventh Circuit’s decision conflicts with any decision of this Court or creates a circuit split. His claim, therefore, is meritless and unworthy of certiorari review.

B. The Eleventh Circuit’s decision does not conflict with *Brumfield*.

Clemons argues that certiorari is warranted because the Eleventh Circuit’s denial of his *Atkins* claim conflicts with *Brumfield v. Cain*, 576 U.S. 305 (2015). Pet. 30–32. Because there is no conflict between those decisions, this Court should deny certiorari.

In *Brumfield*, the Court held that the Louisiana state trial court’s denial of Brumfield’s request for an evidentiary hearing on his *Atkins* claim was based on an unreasonable determination of the facts in light of the evidence that was presented in the state court proceedings, under 28 U.S.C. § 2254(d)(2). 576 U.S. at 312–15. In reaching that result, the Court emphasized that “Brumfield had little reason to investigate or present evidence relating to intellectual disability” at his trial because it was held pre-*Atkins*, at a time when defense counsel often chose not to present such evidence to prevent the sentencer from using it to find future dangerousness. *Id.* at 321. The Court concluded that the state court’s failure to “take[] into account” that the evidence on which it relied in denying his *Atkins* claim “was sought and introduced at a time when [his] intellectual disability was not at issue” resulted in a decision that was based on an unreasonable determination of the facts. *Id.* at 322.

Here, the CCA remanded Clemons’s case to the circuit court with instructions to hold an evidentiary hearing on his *Atkins* claim. *Clemons*, 55 So. 3d at 321–22. The circuit court did as ordered. *Id.* at 322. On return to remand, the CCA reviewed the record, applied the standards set forth by the Alabama Supreme Court

for adjudicating *Atkins* claims, and properly affirmed the circuit court's holding that he is not intellectually disabled. *Id.* at 323–32.

Thus, unlike *Brumfield*, who was never given an opportunity to present evidence in support of his *Atkins* claim in state court, Clemons had a full and fair evidentiary hearing on his claim in the state circuit court. As such, *Brumfield* is easily distinguishable from Clemons's case. Certiorari should, therefore, be denied.

CONCLUSION

This Court should deny Clemons's petition for writ of certiorari.

Respectfully submitted,

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