

CAPITAL CASE
No. 20-1197

In the Supreme Court of the United States

EUGENE MILTON CLEMONS II, PETITIONER-APPELLANT,
v.
JEFFERSON S. DUNN, COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS, ET AL., RESPONDENTS.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

Allison M. Booth
Sharon Lin
Siarra Rae Rogers
Joelle L. Ross
WINSTON & STRAWN LLP
WASHINGTON, DC 20036

Ryan S. Spiegel
PALEY, ROTHMAN
Bethesda, MD 20814

Wesley A. Van Winkle
Berkeley, CA 94705

LINDA T. COBERLY
COUNSEL OF RECORD
Sarah J. Bily
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

ERIC W. BLOOM
WASHINGTON, DC 20036

Counsel for Petitioner

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The State of Alabama’s opposition brief makes the same mistake the Eleventh Circuit did. It addresses only the first of the clerk’s four errors (the erroneous information about the filing fee), concluding that counsel’s reliance on information provided by the clerk constitutes attorney negligence *per se*. That is where its analysis ends. It entirely ignores the additional errors by the clerk that indicated that the petition had been accepted for filing and made it impossible for counsel to discover and cure any filing error. This truncated analysis contravenes *Holland’s* teaching to consider all relevant facts in evaluating equitable tolling. It also gives rise to the circuit split described below.

The split of authority should not remain unresolved, particularly when it has the effect of sending an intellectually disabled man to his execution without any meaningful federal review of his constitutional claims. This Court should grant review.

I. The opposition’s focus on the facts of the cases implicated in the circuit split only highlights the circuit disagreement about the standard.

The State asserts that the decision below is “not contrary to” the various court of appeals decisions cited in the Petition (at 15–17) and thus does not create a conflict meriting this Court’s attention. This argument misses the forest for the trees.

As the petition explained, the various circuits have articulated a clear and unambiguous standard to govern equitable tolling, requiring district courts to consider all relevant facts. *Ibid.* The State claims “no conflict” only by skipping over the standard and focusing instead on the particular facts of each case. It is true that each case presents unique facts, but that does not justify the differences in the standard itself.

For example, in *Ramos-Martinez v. United States*, 638 F.3d 315, 323 (1st Cir. 2011), the First Circuit observed that the equitable tolling claim there rested, in part, on the “professional failings” of a legal assistant. Still, though, the First Circuit required consideration of all facts and circumstances, including the petitioner’s “limited education” and “lack of familiarity with the English language.” It concluded that “[a]lthough any one of these factors, standing alone, may be insufficient to excuse a failure to file a timely habeas petition,” “the whole may be greater than the sum of the parts.” *Id.* at 324–26. And the court went on to remand the case for further development of the factual record. *Id.*¹ This stands in sharp contrast with the approach taken by the Eleventh Circuit, which held that counsel’s professional failings “ended” the analysis. Pet. App. 18a.

Like *Ramos-Martinez*, the Sixth Circuit, in *Jones v. United States*, 689 F.3d 621 (6th Cir. 2012), acknowledged the need for “flexibility” in applying the doctrine of equitable tolling, just as this Court instructed in *Holland v. Florida*, 560 U.S. 631, 649–50 (2010) (citations omitted). Accordingly, the Sixth Circuit found that “[a]lthough any one of the above factors may not constitute ‘extraordinary circumstances’ alone, the combination of all of these factors justifies applying equitable tolling to Jones’s claims.” *Jones*, 689 F.3d at 627. The opposition’s description of

¹ The State’s description of the First Circuit’s decision in *Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005), holding that “attorney negligence does not constitute an extraordinary circumstance” (Opp. 20), studiously avoids that court’s later determination in *Ramos-Martinez* that negligence does *not* “end the analysis,” in contrast to the Eleventh Circuit’s reasoning here.

Jones conspicuously fails to mention, much less address, this standard. *See also Pabon v. Mahanoy*, 654 F.3d 385, 399 & n.21 (3d Cir. 2011) (like *Jones* and *Ramos-Martinez*, rejecting bright-line tests and requiring comprehensive analysis instead); *Doe v. Busby*, 661 F.3d 1001, 1015 (9th Cir. 2011) (same).

The question here is simply whether the Eleventh Circuit applied the same standard as its sister circuits to govern equitable tolling. It plainly did not; it stopped the analysis with its finding of professional negligence, considering no other facts.

This error in the standard led to a highly problematic result. Even if the Eleventh Circuit were correct that the fee nonpayment reflected attorney negligence, it ignored that an arm of the State actively (even if inadvertently) prevented counsel from discovering or curing any alleged error. In this regard, Mr. Clemons asked the Eleventh Circuit to consider that the clerk's office (1) represented that the Rule 32 petition was "received and filed" on December 27, 1999; (2) then lost the Rule 32 petition behind a filing cabinet; and (3) failed to follow internal procedures by notifying counsel of any deficiency. While submitting the December 27, 1999 petition one month prior to the deadline should have afforded counsel more than ample time to cure any filing deficiency, counsel was never afforded that opportunity.²

² Contrary to the record, the opposition asserts that Mr. Clemons's counsel refiled his Rule 32 petition, along with an *in forma pauperis* petition, only after "discovering" the purported error. In fact, counsel took these steps "[a]bsent knowledge that the Rule 32 petition had not

The Eleventh Circuit’s choice of standard permitted it to put on blinders, notwithstanding that its sister circuits require consideration of *all* relevant facts. That represents a fundamental conflict among the circuits and warrants this Court’s attention.

Moreover, if it had considered all relevant facts—as its sister circuits do—the Eleventh Circuit would have had to address the other relevant facts bearing on whether the nonpayment reflected negligence in the first place. For example:

- It is the clerk’s duty to address filing fee questions and calculate filing fee amounts, *see* Pet. 13, 19;
- Reflecting the administrative (and nonlegal) nature of filing fee requirements, Alabama circuit court clerk’s offices affirmatively invite counsel to consult with them, *see* Pet. 18–19;
- Determination of the fee amount for each circuit court requires consultation with the clerk because of

actually been filed,” Pet. 7, with the expectation that (i) the IFP would permit waiver of certain motion fees going forward, and (ii) the pre-printed Rule 32 petition, which would relate back in time to the original Rule 32 petition, would serve to correct any claims of improper language. Had counsel known that the December 27, 1999 petition had not been “filed,” as the court clerk contemporaneously represented, counsel would have messengered—not mailed—the documents. *Id.*

the imposition of varying, unpublished fees, *see* Pet. 19–20;³ and

- Having elected to answer counsel’s filing fee inquiry (as was its custom), the clerk’s office knew or reasonably should have known that counsel would rely on that information. *See* Pet. 13, 19; *see also* Brief for the R Street Institute as Amicus Curiae at 6 (March 31, 2021); Brief for Conservatives Concerned About the Death Penalty as Amicus Curiae at 15 (March 31, 2021).

This case is not about the correctness or constitutionality of the death penalty. It instead raises the broader question of whether the federal courts have the power to ensure that extraordinary circumstances—often difficult to predict in advance—do not interfere with the proper administration of justice. The courts cannot discharge that responsibility when they leave material facts unconsidered. This is precisely why *Holland* eschewed bright lines and opted instead for flexibility to allow courts “to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct * * * particular injustices.” 560 U.S. at 649–50 (citations omitted).

Our system of justice loses credibility when courts ignore errors attributable to the State of the kind and magnitude of those raised here. The Eleventh Circuit’s myopic approach to equitable tolling undermines the

³ The single case cited by Alabama for the proposition that the filing fee was \$140 was issued in 2000 and, thus, was not available when Mr. Clemons filed his December 27, 1999 Petition. *See* Opp. 15 (citing *Ex parte Beavers*, 779 So. 2d 1223, 1224 (Ala. 2000)).

principles set forth in *Holland* and creates a conflict with its sister circuits that this Court should resolve.

II. The opposition effectively concedes that the state trial court failed to comply with its own stated standards or adhere to this Court’s teachings in *Atkins* and *Brumfield*; its tactical focus on the state appellate decision instead is misplaced because this Court must “look through” it to the lower court decision.

Both the state trial court and the state court of criminal appeals recognized that Mr. Clemons’s IQ is as low as 70, thereby demonstrating significant subaverage intellectual functioning (Pet. 25–26); Mr. Clemons suffers statistically significant deficits in six of 10 adaptive functioning skill sets (*id.* at 27–28); and he was diagnosed as mildly mentally retarded at age 6 (*id.* at 23–24). Given this, the Eleventh Circuit’s decision affirming the state courts’ finding of no disability contravenes this Court’s teachings in *Atkins* and *Brumfield*.⁴

Significant Subaverage Functioning: The opposition accepts that both the State and Mr. Clemons, through their experts, agreed at the 2004 *Atkins* hearing that the test for significant subaverage intellectual functioning requires consideration of the standard error of measurement rather than application of a strict 70 IQ cutoff. Despite this, the opposition contends that this

⁴ Mr. Clemons does not “suggest[] that he is entitled to relief on his *Atkins* claim in light of *Hall* and *Moore*.” Opp. 25. As the Petition observed, “Mr. Clemons’s entitlement to relief exists independently of this Court’s decisions in *Hall* and *Moore*.” Pet. 25.

agreement does not matter because the operative state court decision for this Court's review is not the circuit court decision but rather the decision of the court of criminal appeals. According to the opposition, that court "did not set forth clinical definitions of intellectual disability" and therefore could not have failed to consider them. Opp. 26.

First, precedent requires this Court to "look through" the appellate court's decision to the decision of the court below. The relevant section of the 2005 decision on appeal was overwhelmingly, more than 95%, a "cut-and-paste" job from the lower court, excerpted directly from the lower court's opinion. *Clemons v. State*, 55 So. 3d 314, 322–32 (Ala. Crim. App. 2005) (on return from remand). At the end of this ten-page block quote, the appellate court offered a cursory concluding paragraph, stating only this:

We have reviewed the record in light of *Perkins* and *Smith*, and we conclude that it supports the circuit court's findings. Therefore, *we adopt those findings as part of this opinion*.

Id. at 332 (emphasis added). It then found that "based on the record before us," "the appellant before us is not mentally retarded." *Ibid.* It is in the context of this strikingly thin review that the State argues that the appellate court somehow applied an entirely different standard for analyzing the *Atkins* factors than the lower court. But the decision of the appellate court offers no original thinking; it instead makes clear that it is adopting the lower court's findings in whole cloth and, thus, presents the precise circumstances where "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." Opp. 26 (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018)); also *Hittson v. Chatman*, 576 U.S. 1028 (2015)

(Ginsburg, J., joined by Kagan, J., concurring in denial of certiorari) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (“[U]nexplained orders” are those that reflect “agree[ment] . . . with the reasons given below.”)); *Atkins v. Hooper*, 979 F.3d 1035, 1042–45 (5th Cir. 2020) (concluding that thin analysis of issue, even if accompanied by brief references to burdens of proof and relevant cases, is not enough, without independent analysis, to constitute a reasoned opinion). The appellate court’s passing invocation of *Perkins* and *Smith* does not suggest that it was adopting a different standard than the lower court did; after all, the lower court’s decision references these same decisions. Pet. App. 158a–59a.

Second, the State’s new-found adoption of a 70 IQ cutoff contradicts the position it repeatedly offered below and in state court. As noted, the State’s expert testified in the state trial court that an IQ over 70 does not exclude an intellectual disability diagnosis. C.A. App. 765–66. In its proposed order to that court, in fact, the State conceded there was no bright-line cutoff. Accepting the clinical evidence offered by both parties, the trial court adopted the experts’ clinical standard, finding that the IQ score must take into consideration the accepted standard error of measurement of ± 5 . Pet. App. 157a.

Even in its briefs before the court of criminal appeals—and eventually in the federal courts—the State acknowledged the standard error of measurement. *See* State’s Brief Before the Eleventh Circuit at 45 (cherry-picking data to argue that, even accounting for the standard error of measurement, Mr. Clemons IQ is too high to qualify as intellectually disabled). The State has waived its opportunity to reverse course and now argue that the

state courts appropriately applied a strict IQ cutoff at 70.⁵ *New Hampshire v. Maine*, 532 U.S. 742 (2001) (judicial estoppel prevents a party from prevailing in one phase of a case then relying on an inconsistent argument to prevail in another); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 562–63 (2011).

Third, if the appellate court had disregarded the parties’ agreement on the proper test for significant subaverage intellectual functioning, then that would serve as an additional, independent ground on which the federal courts should have granted habeas relief.

Significant Subaverage Adaptive Functioning: The State concedes that the appellate court (like the trial court) improperly focused on Mr. Clemons’s adaptive *strengths* rather than, as the clinical standards require, his adaptive *deficits*. Opp. 27. The state courts thus applied a standard that is not a valid test of adaptive functioning.

Curiously, the State’s position here seems to be only that the appellate court did not announce a standard to govern an analysis of Mr. Clemons’s adaptive functioning, and thus it cannot be faulted for failing to apply that standard. The State is in the ironic position of conceding serious, successive judicial errors in the state courts. It

⁵ The district court expressly found that the state courts evaluated Mr. Clemons while taking into account the standard error of measurement. Pet. App. 116a–117a, 157a. The State relied on the district court’s finding in its Eleventh Circuit Brief (at 45). The doctrine of judicial estoppel prevents the State from “playing fast and loose” and adopting a position different than that on which it relied to its benefit in the lower courts. *New Hampshire*, 532 U.S. at 750 (internal citations omitted).

hangs its hat on the notion that the appellate court's bare-bones decision both washed away the trial court's error and masked its own. For the reasons already provided above, this Court should "look through" the bare-bones, nonsubstantive appellate decision to the lower court decision. Or, if the appellate decision is operative, then its failure to consider Mr. Clemons's adaptive deficits was contrary to the evidentiary record developed before the lower court.⁶

Condition Manifested Itself Before the Age of 18:

Perhaps in recognition of Mr. Clemons's diagnosis as "mentally retarded" at the age of 6, the State does not dispute here that Mr. Clemons has satisfied the third prong of the *Atkins* intellectual disability test, i.e., the condition must manifest itself before age 18.

⁶ While Mr. Clemons's so-called adaptive strengths are irrelevant under the clinical standards adopted by the trial court, the state courts' discussion of these "strengths" underscore the absurdity of the decision-making. The appellate court—relying on the lower court's findings—attributed Mr. Clemons's inability to hold a job as a Domino's delivery driver to a "lack of desire" (*Clemons*, 55 So. 3d at 329), even though his supervisor thought he "wanted to succeed, tried to work very hard, but ... was just unable to do the job despite all his efforts" (C.A. App. 555). Likewise, the appellate court concluded that "Clemons had the ability to form interpersonal relationships with women" on the basis of a self-report given during a competency exam (*Clemons*, 55 So.3d at 330), but omitted from its summary of this self-report that his only serious girlfriend "broke off the relationship because...[he] wasn't normal" (C.A. App. 919).

The State seeks to explain away this Court's decision in *Brumfield v. Cain*, 576 U.S. 305 (2015), because of the differing procedural postures of the two cases. Opp. 30–31. But it fails to address this Court's central holding that the state court there rendered an unreasonable determination of fact when it found that an IQ of 75 and the existence of adaptive strengths are inconsistent with an intellectual disability diagnosis. *Brumfield*, 576 U.S. at 313–14. The state court decision under review here thus cannot be reconciled with *Brumfield*.

CONCLUSION

The various wrongs identified above converge in a shocking way. Even the State concedes that Mr. Clemons, at a minimum, “functions in the borderline range of intellectual ability.” *Ex parte Clemons*, 55 So. 3d 348, 351 n.1 (Ala. 2007). The State also does not dispute that Mr. Clemons would be found intellectually disabled (and ineligible for the death penalty) upon application of current federal law. Nor does the State dispute that the state trial court failed to apply the clinical standards it found governed, or that the appellate court affirmed only by applying an exceedingly deferential standard of review of the lower court's decision, which in turn had merely rubber-stamped the State's own proposed order.

Even though there is little doubt that Mr. Clemons is, in fact, intellectually disabled, trial counsel never introduced any evidence of Mr. Clemons's cognitive impairment to the jury, even (and especially) in the penalty phase of the trial. But Mr. Clemons has been denied the opportunity to have his ineffective assistance of counsel claim heard in federal court, all because the court clerk committed a variety of errors that effectively shut the door on Mr. Clemons's ability to discover and cure any

deficiency. Habeas review and equitable tolling are designed to address difficult-to-predict, egregious wrongs of precisely this type.

This Court should grant the petition for certiorari.

Respectfully submitted.

Allison M. Booth
Sharon Lin
Siarra Rae Rogers
Joelle L. Ross
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000

/s/ Linda T. Coberly
Linda T. Coberly
Counsel of Record
Sarah J. Bily
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

Ryan S. Spiegel
PALEY, ROTHMAN,
GOLDSTEIN, ROSENBERG,
EIG & COOPER CHTD
4800 Hampden Lane,
6th Floor
Bethesda, MD 20814
(301) 968-3412

Eric W. Bloom
1901 L Street, NW
Washington, DC 20036
(240) 994-0022

Wesley A. Van Winkle
P.O. Box 5216
Berkeley, CA 94705
(541) 735-3170

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