No. _____

IN THE

Supreme Court of the United States

MARK ALLEN JENKINS,
Petitioner,

v.

JEFFERSON DUNN,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Wilson v. Sellers*, this Court affirmed, as it has "time and again," that when evaluating a reasoned state-court decision under 28 U.S.C. § 2254(d), the federal habeas court "simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." 138 S. Ct. 1188, 1192 (2018); *see also, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 313 (2015). Nearly every circuit court has followed this Court's instruction. The Eleventh Circuit, breaking from its sister circuits, has repeatedly strayed beyond the reasons given by the state court, invoking its own reasons to conclude that § 2254(d) bars relief. Here, the Eleventh Circuit's methodology resulted in the denial of a hearing on intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002), and risks the execution of a person with intellectual disability. This case thus presents the following question:

> Whether the Eleventh Circuit's failure to limit its review of a reasoned state-court decision under 28 U.S.C. § 2254(d) to the specific reasons given by the state court contravenes this Court's precedent in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), and *Brumfield v. Cain*, 576 U.S. 305 (2015).

LIST OF RELATED DECISIONS

Trial and Direct Appeal

State v. Jenkins, No. CC-89-68 (St. Clair Cnty. Cir. Ct. Apr. 10, 1991)

Jenkins v. State, No. CR-90-1044 (Ala. Crim. App. Feb. 28, 1992), *reh'g denied* (Apr. 17, 1992)

Ex parte Jenkins, No. 1911144 (Ala. May 28, 1993), *reh'g denied* (Oct. 8, 1993)

Jenkins v. Alabama, No. 93-7423 (S. Ct. Mar. 28, 1994)

State Post-Conviction Proceedings

Jenkins v. State, No. CC-89-68.60 (St. Clair Cnty. Cir. Ct. Dec. 31, 1997)

Jenkins v. State, No. CR-97-0864 (Ala. Crim. App. Feb. 27, 2004), *reh'g denied* (May 21, 2004)

Ex parte Jenkins, No. 1031313 (Ala. Apr. 8, 2005)

Jenkins v. State, No. CR-97-0864 (Ala. Crim. App. Nov. 23, 2005), *reh'g denied* (Apr. 14, 2006), *cert. denied*, No. 1050972 (Ala. May 18, 2007)

Jenkins v. Alabama, No. 07-7215 (S. Ct. Jan. 22, 2008)

Successor State Post-Conviction Proceedings

Jenkins v. State, No. CC-89-68.61 (St. Clair Cnty. Cir. Ct. Nov. 25, 2008)

Jenkins v. State, No. CR-08-0490 (Ala. Crim. App. Aug. 26, 2011)

Ex parte Jenkins, No. 1101410 (Ala. Sept. 21, 2012)

Jenkins v. Alabama, No. 12-7860 (S. Ct. Mar. 25, 2013)

Federal Habeas Proceedings

Jenkins v. Allen, No. 4:08-cv-00869-VEH-SGC (N.D. Ala. Aug. 31, 2016)

Jenkins v. Commissioner, Alabama Department of Corrections, No. 17-12524 (11th Cir. June 29, 2020), *reh'g denied* (Aug. 26, 2020)

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Petitioner Mark Jenkins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's amended opinion affirming the denial of federal habeas relief (Pet. App. 001a–041a) is reported at 963 F.3d 1248. The Eleventh Circuit's order denying rehearing en banc (Pet. App. 579a) is unpublished. Both the federal district court's decision denying habeas relief (Pet. App. 042a–388a) and its decision denying the motion for an evidentiary hearing on intellectual disability (Pet. App. 389a–442a) are unpublished. The Alabama Supreme Court's decision affirming in relevant part the denial of state post-conviction relief (Pet. App. 443a–449a) is reported at 972 So. 2d 159. The Alabama Court of Criminal Appeals' decision denying relief under *Atkins v. Virginia*, 536 U.S. 304 (2002), and affirming the denial of state post-conviction relief (Pet. App. 450a–498a) is reported at 972 So. 2d 111. The St. Clair County Circuit Court's decision denying state post-conviction relief (Pet. App. 499a–578a) is unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on June 29, 2020, and denied a timely petition for rehearing en banc on August 26, 2020. This petition for a writ of certiorari is timely pursuant to Supreme Court Rules 13(3) and 30(1) and this Court's order dated March 19, 2020, which extended to 150 days the time to file a petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), in pertinent part, states as follows:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

Mark Jenkins faces execution despite his intellectual disability because the Eleventh Circuit, clinging to a form of AEDPA review that this Court has rejected, improperly denied him the opportunity to prove he is ineligible for the death penalty under *Atkins v. Virginia*, 563 U.S. 304 (2002).[1]

The state-court record—a record developed before this Court decided *Atkins*, when evidence of intellectual disability was potentially harmful—contains compelling indications of Jenkins's persistent deficits in intellectual and adaptive functioning. Jenkins, born underweight after delivery complications, was impaired and listless from infancy. He fell behind in elementary school, despite his marked efforts and special-education services. In fifth grade, he could read and write at only the third-grade level—the same level at which he functioned when the State's expert evaluated him nearly two decades later. Jenkins was also plagued by bowel- and bladder-control problems, which started during his childhood and continued into adulthood, and he was ridiculed as "stinky" and "pissy pants" by peers. He struggled with relationships and was vulnerable to exploitation; his own mother extorted money from him. As an adult, Jenkins could manage only menial work and had housing only because others procured it for him.

Despite this evidence of intellectual disability in the limited pre-*Atkins* record, Jenkins has never been afforded an evidentiary hearing to establish that he is entitled to relief under *Atkins*. After this Court decided *Atkins*, the Alabama Court of

[1] Except in quotations and citations, Jenkins uses the preferred term "intellectual disability" instead of the previously common term "mental retardation." *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

Criminal Appeals (CCA) denied Jenkins a hearing. The CCA rested its denial on two grounds, neither of which could withstand scrutiny under this Court's precedent. Yet the Eleventh Circuit still found the CCA's decision reasonable. The Eleventh Circuit did so by surmising its own reasons to justify the ruling—reasons that the CCA had not mentioned. By conducting its review in this way, the Eleventh Circuit departed from its sister circuits and defied this Court's precedent, including its recent decision in *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

The Eleventh Circuit has previously charted its own course on AEDPA review, prompting this Court to intervene. In fact, this Court granted certiorari in *Wilson* to resolve a circuit split the Eleventh Circuit had created on AEDPA review of a state high court's summary ruling. *Id.* at 1192–93. This Court rejected the en banc Eleventh Circuit's position and held that a federal habeas court must "look through" the summary ruling to evaluate the lower state court's express reasoning. *Id.* Confirming longstanding precedent, this Court reiterated that when reviewing a reasoned decision under 28 U.S.C. § 2254(d), a federal court may review only the specific reasons provided by the state court. *Id.* at 1192 (deeming the inquiry a "straightforward" one that the Court had "affirmed . . . time and again"); *see also, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 313 (2015).

Despite this mandate, the Eleventh Circuit has again gone astray, this time by flouting *Wilson*'s directive to focus on the state court's specific reasons for denying Jenkins a hearing. This case is no outlier. It is one among several in which the Eleventh Circuit has supplemented the state court's reasoning and thereby ignored

this Court's rulings. *See, e.g.*, *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1177, 1182 (11th Cir. 2019), *petition for cert. filed* (U.S. Sept. 8, 2020) (No. 20-363).

The Eleventh Circuit's errant AEDPA methodology warrants this Court's attention. By relying on reasons beyond those given by the state court, the Eleventh Circuit has resisted this Court's precedent and has broken from its sister circuits. The Eleventh Circuit has, moreover, undermined the comity and federalism interests that AEDPA holds paramount. Indeed, the court below has effectively neutered *Wilson*: There is little point in looking through a summary denial to analyze a lower state court's reasoning when, regardless of what the lower court said, the federal habeas court can offer its own grounds to conclude that § 2254(d) precludes relief.

Jenkins's case is the ideal vehicle for this Court to address the Eleventh Circuit's disregard for *Wilson* and the resulting circuit split. The facts material to the *Wilson* question are undisputed, and the error was blatant. The CCA provided reasoning to support its hearing denial, and the Eleventh Circuit refused to limit its review to that reasoning before concluding that § 2254(d) barred relief. The *Wilson* error is also outcome-determinative: Had the Eleventh Circuit confined its review to the four corners of the CCA's decision, the court would have had to conclude that Jenkins had overcome § 2254(d) and was entitled to a hearing. *See Brumfield*, 576 U.S. at 307, 314–22 (holding that the state court unreasonably denied an intellectual-disability hearing when the denial rested on a record developed pre-*Atkins*). Indeed, it was precisely because the CCA's reasons could not support the hearing denial that

the Eleventh Circuit looked beyond those reasons. This case presents the troubling prospect that the Eleventh Circuit's unsanctioned § 2254(d) approach will lead to the execution of a person with intellectual disability before he has had his day in court.

To ensure uniform AEDPA review that conforms to precedent, and to ensure Jenkins gets the intellectual-disability hearing to which he has long been entitled, this Court should grant certiorari.

STATEMENT OF THE CASE

I. Jenkins's Childhood and Adolescence[2]

Mark Jenkins—premature, underweight, and developmentally impaired—entered a world of familial chaos and abuse. After his mother had delivery complications, he was born at just five pounds and spent the first weeks of his life in an incubator. Vol. 19 at 491, 515.[3] His mother was ashamed of her mixed-race son—she called him "Puerto Rican puke" and "little bastard"—and initially put him up for adoption. Vol. 19 at 483; Vol. 20 TR.184–85, 190, 245. Jenkins was "very slow" as an infant; according to his grandmother, "he would just lie there. He was not active. He was just . . . immobile." Vol. 20 TR.246.

Jenkins's limited schooling was characterized by genuine effort but continual failure. He consistently received Ds and Fs, operated several grade levels behind his peers, and was placed in special education by fourth grade. Vol. 27 at 886–87, 902,

[2] The evidence discussed here is contained in the pre-*Atkins* state post-conviction record.

[3] Federal district court filings and orders are cited as "D. Ct. ECF No.," followed by the docket and page numbers. Respondent manually filed the state-court record in the federal district court. The state-court record is cited using the volume and tab numbers provided in Respondent's Habeas Corpus Checklist, filed on October 29, 2008. *See* D. Ct. ECF No. 22.

937, 940–41. Jenkins's fourth-grade teacher noted that Jenkins "trie[d] hard" but was stymied by "his lack of fundamental skills in reading, math, and language." Vol. 27 at 944. His fifth-grade teacher commented, "Grading Mark isn't fair. He has worked hard this year and made some growth, but 5th grade is too far above the level he is working. He has about 2 or 3 grade levels to catch up." Vol. 27 at 940. Jenkins stalled at the third-grade level in reading and math: He functioned at that level in fifth grade and still in seventh grade, when he was held back. *See, e.g.*, Vol. 27 at 902, 905, 936. Jenkins was socially promoted to ninth grade due to his age but was held back again; he never completed tenth grade. Vol. 27 at 887–88, 902, 938.

Jenkins also lacked practical skills necessary for daily life. He wore soiled, smelly clothing. Vol. 20 TR.196; Vol. 21 TR.459–60. One school official observed that he was "frequently unkempt," and report cards noted that he struggled with basic tasks such as following directions and learning self-control. Vol. 27 at 935, 941. Jenkins also suffered severe bowel- and bladder-control problems after he was sexually abused at age four; the problems required medication and persisted into adulthood. Vol. 19 at 510; Vol. 19 TR.57–59; Vol. 20 TR.89–90, 115–16, 196, 255; Vol. 21 TR.452–54; Vol. 22 TR.485.

As a child, Jenkins had difficulty developing interpersonal skills. Vol. 20 TR.108–10; Vol. 22 TR.494. He had no friends. Vol. 20 TR.108. According to witnesses and records, his peers at best "tolerated" him and at worst humiliated him, calling him "stinky," "pissy pants," and "little human garbage pail." Vol. 20 TR.110, 194, 212; Vol. 27 at 891. When Jenkins was twelve, a school psychiatrist identified Jenkins as

having numerous "significant areas of concern" in his social-emotional development, including interpersonal relationships and immaturity. Vol. 27 at 961–62.

Jenkins went from a childhood of neglect and scapegoating to an adolescence in which others exploited his gullibility. *See, e.g.*, Vol. 20 TR.184, 192–93. After escaping his abusive home around age twelve, Jenkins spent his teenage years cycling between relatives' houses, juvenile facilities, and the streets. Vol. 20 TR.200–01; Vol. 22 TR.482; Vol. 26 at 755–62. When he fled a juvenile facility, his mother extorted money from him in exchange for not reporting him to authorities. Vol. 22 TR.483–84. Although Jenkins found unskilled jobs, including pumping gas and doing yardwork, his employers overworked and underpaid him. Vol. 19 TR.60–61; Vol. 25 at 574; Vol. 29 at 1255. At the time of the crime, when Jenkins was twenty-one, he was staying in a messy, sparsely furnished bungalow that others had secured for him. Vol. 6 TR.1048–49, 1058; Vol. 7 TR.1227–28. He paid no rent and had no proper electricity; the owner suspected Jenkins made do with a flashlight. Vol. 6 TR.1050, 1052.

II. Procedural History

In 1991, Jenkins was convicted of two counts of capital murder for the murder of Tammy Hogeland and sentenced to death in St. Clair County, Alabama. The CCA and Alabama Supreme Court affirmed Jenkins's convictions and death sentence. *Jenkins v. State*, 627 So. 2d 1034 (Ala. Crim. App. 1992), *aff'd sub nom. Ex parte Jenkins*, 627 So. 2d 1054 (Ala. 1993).

A. State Post-Conviction Proceedings Prior to *Atkins*

Jenkins sought state post-conviction relief. He asserted, among other claims, that his trial counsel had failed to investigate and present a trove of mitigating evidence about the chronic abuse and neglect he had suffered as a child. He did not, however, seek relief based on his intellectual disability. There was little reason to do so in this pre-*Atkins* litigation; intellectual disability did not yet preclude the death penalty and was, in fact, potentially harmful, as it suggested future dangerousness.

The circuit court heard evidence on ineffective assistance of counsel and other claims in late 1996 and early 1997. Jenkins presented medical, school, juvenile-court, and other records, and four family members testified about the horrific nature of Jenkins's upbringing. *See, e.g.*, Vol. 20 TR.81–264. In addition, two psychologists—one State's expert and one defense expert—testified about Jenkins's overall functioning and his history of psychological trauma stemming from childhood abuse. Vol. 21 TR.428–76; Vol. 22 TR.479–96, 562–604, 609–89.

The State's expert, Karl Kirkland, Ph.D., performed "a general post conviction appeal evaluation," during which he assessed Jenkins's intellectual deficits. Vol. 22 TR.618. Dr. Kirkland testified that Jenkins's full-scale IQ score of 76 was approximately "two standard deviations" below the mean and was "consistent with other reports of his difficulties with academic functioning." Vol. 22 TR.624, 670–71. Dr. Kirkland further determined that Jenkins fell in the first percentile on the Short Category Test, showing deficits in cognitive flexibility, perceptual shift ability, and problem solving. Vol. 22 TR.625–26, 669–70. Because, at nearly thirty years old,

Jenkins could read at only a third-grade level, Dr. Kirkland needed to read the test questions aloud to him to conduct the evaluation. Vol. 22 TR.641.

As the hearing occurred before *Atkins*, Dr. Kirkland made clear that he was not assessing intellectual disability: "The other standard [for diagnosing intellectual disability is] integrating[] social and adaptive behavior . . . , which I did not do in this case. That is really not what I was looking for." Vol. 22 TR.671.

Jenkins's expert, David Lisak, Ph.D., likewise was not asked to and did not attempt to diagnose intellectual disability. Vol. 22 TR.571. Even so, he testified that Jenkins was "very slow in school and a very slow learner." Vol. 21 TR.444. Dr. Lisak's conclusions were based on his evaluation of Jenkins, interviews with many people familiar with Jenkins's history, and a review of extensive records. Vol. 21 TR.432–38.

The circuit court denied relief. Pet. App. 578a. In its ruling, the court accepted and "relied on the testimony" of State's expert Dr. Kirkland. Pet. App. 492a–493a.

B. *Atkins* and the Subsequent CCA Decision

In 2002, while Jenkins's post-conviction appeal was pending before the CCA, this Court held that the Eighth Amendment bars the execution of people with intellectual disabilities. *See Atkins*, 536 U.S. at 321. The clinical definition of intellectual disability has three prongs: (1) significantly subaverage intellectual functioning; (2) significant limitations in adaptive functioning; and (3) juvenile onset of deficits. *Id.* at 308 n.3, 318; *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002); *see also* Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 13–14 (10th ed. 2002) (AAMR-10) (defining first criterion as

an IQ score "approximately two standard deviations below the mean").[4] This Court recognized that people with intellectual disabilities are less culpable for their crimes, less able to meaningfully assist counsel, and less able to persuasively show mitigation. *Atkins,* 536 U.S. at 318, 320–21.

Shortly after this Court decided *Atkins*, Jenkins sought relief from the CCA based on his intellectual disability. He detailed evidence of his intellectual disability in the state post-conviction record and requested that the CCA "vacate his death sentence and remand the case back to the lower court for further proceedings," including a "meaningful opportunity to be heard." Vol. 39, Tab #R-56 at 2–5, 25–26.

The CCA declined to remand the case and, relying solely on the limited pre-*Atkins* record, denied Jenkins's claim on the merits. Pet. App. 493a–494a. The CCA did so even though Alabama courts had adopted the "broadest" definition of intellectual disability and a permissive standard affording a hearing if there was "any inference" or "indication" of intellectual disability. *See Ex parte Perkins*, 851 So. 2d at 455–57. The CCA made two determinations—one on intellectual functioning and one on adaptive behavior—that it believed precluded the possibility of intellectual disability. *See* Pet. App. 493a–494a. The court made no finding about the juvenile onset of deficits. *See* Pet. App. 493a–494a. The CCA's analysis, in its entirety, follows:

[4] Previously the clinical criterion for adaptive functioning required impairments in two of ten areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and health and safety. *Atkins*, 536 U.S. at 308 n.3. Current clinical standards require deficits in one of three domains of adaptive functioning: (1) conceptual skills (including language, reading, writing, money concepts, and self-direction); (2) social skills (including interpersonal skills, self-esteem, gullibility, naiveté, and victimization); and (3) practical skills (including daily living, occupational skills, and maintaining safe environments). AAMR-10 at 73, 81–82; *see also id.* at 81–82 (recognizing the conceptual consistency between the previous and current clinical standards).

> [State's expert] Dr. Kirkland testified that he performed psychological tests on Jenkins and that Jenkins's IQ was 76. There was evidence presented at Jenkins's trial indicating that Jenkins maintained relationships with other individuals and that he had been employed by P.S. Edwards Landscaping Company, Cotton Lowe 76 Service Station, and Paramount Painting Company. The record fails to show that Jenkins meets the most liberal view of mental retardation adopted by the Alabama Supreme Court in *Perkins*. Jenkins's death sentence does not violate *Atkins v. Virginia.*

Pet. App. 494a.

Jenkins renewed his request for an evidentiary hearing, first in a petition for rehearing to the CCA and then in a petition for certiorari to the Alabama Supreme Court. *See* Vol. 39, Tab #R-59 at 58; Vol. 40, Tab #R-60 at 57–58. The CCA and Alabama Supreme Court each denied the request. *See* Pet. App. 449a–450a.[5] No state court afforded Jenkins a hearing on intellectual disability.

C. Proceedings Before the Federal District Court

Jenkins next sought a writ of habeas corpus in federal court. The federal district court first denied Jenkins's motion for an *Atkins* hearing and subsequently denied habeas relief. Pet. App. 389a; Pet. App. 125a, 388a.[6] In deeming the CCA's decision reasonable under § 2254(d), the district court first speculated that the State's expert "simply misspoke" when he testified that Jenkins's IQ score was two standard deviations below the mean—i.e., that the IQ score satisfied the intellectual-deficits criterion. *See* Pet. App. 424a; *see also* AAMR-10 14. The court then hypothesized that

[5] The Alabama Supreme Court reversed the judgment of the CCA on a claim unrelated to the issue in this petition and remanded for further proceedings. *See* Pet. App. 449a.

[6] During federal habeas proceedings, the district court granted Jenkins a stay to return to state court and litigate a claim unrelated to the issue in this petition. D. Ct. ECF No. 23 at 1–6.

even though the CCA "mentioned only two [adaptive] skill areas," it might have considered other aspects of adaptive functioning. Pet. App. 439a. The district court also found that Jenkins had an "indisputabl[y] . . . horrible childhood in which he was seriously abused, ignored, and mistreated by his parents" and asserted that any behavioral deficits "were in no way attributable to Jenkins or his adaptive ability." Pet. App. 437a. Lastly, the court held that the CCA's finding on juvenile onset satisfied § 2254(d). Pet. App. 441a. The CCA, though, had made no such finding.

D. The Eleventh Circuit's Decision

Jenkins appealed to the Eleventh Circuit, asserting that he has intellectual disability and requesting an evidentiary hearing.

On June 29, 2020, over a dissent by Judge Wilson, two judges affirmed the district court's denial of relief. Pet. App. 001a, 007a–008a (withdrawing earlier opinion and issuing amended opinion). The Eleventh Circuit majority, like the CCA before, relied on the record developed before *Atkins* and rejected Jenkins's *Atkins* claim without a hearing. In its § 2254(d) review, the majority looked beyond the CCA's specific reasoning and fashioned its own reasons to deny Jenkins a hearing.

Intellectual Functioning. Instead of reviewing only the CCA's finding that Jenkins's IQ score precluded any possibility of deficits, the Eleventh Circuit also focused on the absence of an expert diagnosis of intellectual disability. The majority deemed it "[m]ost fundamental[]" and "tremendously significant" that neither expert witness who testified at the hearing—one held five years before *Atkins*—opined that Jenkins has intellectual disability. Pet. App. 028a–029a.

Adaptive Deficits. The majority acknowledged the state court's "terse discussion of Jenkins's adaptive behavior," which had cited only Jenkins's purported ability to maintain relationships and past employment. *See* Pet. App. 030a (citing Pet. App. 494a). Rather than reviewing only those specific reasons, the Eleventh Circuit adopted new ones, including reasons related to the crime: "Jenkins was able to communicate well enough to solicit an alibi and to sell his car . . . . He then was able to . . . purchas[e] a bus ticket and hitchhik[e] across the country." Pet. App. 030a. According to the majority, these facts "fail[ed] to show significant deficits in the areas of communication, self-care, community use, and self-direction." Pet. App. 030a. The CCA had discussed none of those facts, and none of those areas of adaptive behavior, when denying a hearing.

Age of Onset. The Eleventh Circuit found no clear error in the district court's determination on juvenile onset. Pet. App. 031a. The majority did not acknowledge that the district court had applied AEDPA deference even though the CCA had made no relevant finding. *See* Pet. App. 031a. The majority concluded that the "records all show a child with serious academic deficits and some intellectual and adaptive deficits, but they do not clearly show an intellectually disabled child." Pet. App. 031a.

Judge Wilson dissented. "To deny Jenkins's claim," he explained, "the majority relies on evidence from unrelated parts of the record. . . . [C]ourts should not rely on pre-*Atkins* evidence—evidence that was presented in a wholly distinct context—to support a finding that a petitioner is not intellectually disabled." Pet. App. 039a–040a (citing *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1320 (11th Cir. 2013)

(recognizing that evidence of intellectual disability constituted a double-edged sword before *Atkins*)). He admonished the majority for "attempting to make a medical diagnosis based on an insufficient record" and would instead have remanded for an evidentiary hearing. Pet. App. 040a.

On August 26, 2020, the Eleventh Circuit denied Jenkins's timely petition for rehearing en banc. Pet. App. 579a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Refusal to Limit AEDPA Review to the State Court's Reasoning Conflicts with This Court's Precedent and Creates a Circuit Split.

This Court has, in no uncertain terms, required federal courts assessing claims for habeas relief under 28 U.S.C. § 2254(d) to limit review of state-court decisions to "the specific reasons given by the state court." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). While other federal courts of appeals have heeded this directive, *see, e.g.*, *Subdiaz-Osorio v. Humphreys*, 947 F.3d 434, 443–45 (7th Cir. 2020), the Eleventh Circuit has repeatedly ventured beyond the state court's reasoning and imagined new reasons for denying a claim under § 2254(d). In doing so, the court has splintered from other circuits and has defied this Court's commands. *See* Sup. Ct. R. 10(a), (c).

A. This Court's Longstanding Practice Has Been to Confine AEDPA Review to the State Court's Reasoning.

Where a state court has explained the reasons for its ruling, AEDPA "requires the federal habeas court to 'train its attention on the particular reasons—both legal and factual—why [the] state court[] rejected'" a petitioner's claim and, if appropriate, defer to those particular reasons. *Wilson*, 138 S. Ct. at 1192 (quoting *Hittson v.*

Chatman, 135 S. Ct. 2126, 2126 (2015) (Ginsburg, J., concurring in denial of certiorari)). A federal court can hypothesize about the state court's reasoning when faced with an unexplained denial, *see Harrington v. Richter*, 562 U.S. 86, 98 (2011), but that framework does not apply "where there is a reasoned decision by a . . . state court," *Wilson*, 138 S. Ct. at 1195; *see also, e.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam) (noting that *Richter*'s approach applies where there is "no reasoned state-court decision on the merits"). Instead, when, as here, a state court has explained its ruling, this Court requires federal courts to "focus[] exclusively on the actual reasons" the state court set forth. *Wilson*, 138 S. Ct. at 1195–96. If the state court's justifications are unreasonable under § 2254(d), then the federal court does not defer to those justifications but considers the claim *de novo*. *See Johnson v. Williams*, 568 U.S. 289, 303 (2013).

This approach is not new. For two decades, whenever a state court has given reasons for its decision, this Court has confined its § 2254(d) review to those reasons. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (citing the state court's incorrect legal standard in holding that the decision was contrary to clearly established federal law and warranted no deference); *Wetzel v. Lambert*, 565 U.S. 520, 524–26 (2012) (per curiam) (vacating the circuit court's order for failing to examine under AEDPA the state court's specific grounds for denying a claim); *Porter v. McCollum*, 558 U.S. 30, 42–44 (2009) (per curiam) (dissecting the state court's application of a legal standard and focusing on that application in deeming the state-court decision unreasonable under § 2254(d)); *Yarborough v. Gentry*, 540 U.S. 1, 6–7 (2003) (per curiam)

(considering only the reasoning specifically set forth by the state court when reviewing under § 2254(d)); *Wiggins v. Smith*, 539 U.S. 510, 527–29 (2003) (same); *Early v. Packer*, 537 U.S. 3, 8–11 (2002) (per curiam) (same).

In *Brumfield v. Cain*, for example, this Court expressly "train[ed] [its] attention on the two underlying factual determinations on which the trial court's decision [to deny an *Atkins* hearing] was premised." 576 U.S. 305, 313 (2015). This Court then held that each of the state court's two determinations was unreasonable in light of the record. *Id.* at 314–22. This Court ended its § 2254(d) analysis there. It did not inject into the inquiry other reasons that could have supported the state court's denial of relief. In so doing, this Court repudiated the Fifth Circuit's decision below, which had relied on reasons—such as the absence of a clinical diagnosis of intellectual disability—beyond what the state court had cited. *See Brumfield v. Cain*, 744 F.3d 918, 926 (5th Cir. 2014), *rev'd*, 576 U.S. 305 (2015).

In *Wilson*, this Court reinforced its directive that lower courts must focus on the state court's reasoning. 138 S. Ct. at 1192. If there had been any doubt, *Wilson* extinguished it: During AEDPA review, federal courts cannot invent rationales that "could have supported" a state-court decision that gave reasons. *Id.* at 1194–96.

B. Courts of Appeals Other Than the Eleventh Circuit Follow This Court's Guidance.

Except the Eleventh Circuit, every circuit that has reviewed reasoned state-court decisions under § 2254(d) post-*Wilson* has examined only those reasons.[7]

[7] It does not appear that the Eighth Circuit or the District of Columbia Circuit has directly confronted this issue since *Wilson*.

In line with this Court's precedent, four circuits have for years limited their AEDPA review to the state court's reasoning. The Third Circuit will "not gap-fill when the state court has articulated its own clear reasoning." *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 283–84, 286 (3d Cir. 2016) (en banc) (holding that in such cases, "federal habeas courts may not speculate as to theories that 'could have supported' the state court's decision"). In *Grueninger v. Director, Virginia Department of Corrections*, the Fourth Circuit rejected the State's argument that even when there was a reasoned state-court decision, the petitioner could "prevail only by showing that *any* hypothetical ground for denying his claim, whether or not addressed by the [state court], would be objectively unreasonable." 813 F.3d 517, 525 (4th Cir. 2016). The Ninth Circuit has held the same. *Cannedy v. Adams*, 706 F.3d 1148, 1157–66 (9th Cir. 2013) (conducting *de novo* review after rejecting as unreasonable each of the state court's reasons for denying a claim), *amended on denial of reh'g*, 733 F.3d 794 (9th Cir. 2013) (mem.). Finally, while the First Circuit has been less explicit about its AEDPA methodology, it has long adopted the approach endorsed in *Wilson*. *See Clements v. Clarke*, 592 F.3d 45, 52, 57 (1st Cir. 2010) ("deduc[ing] the basis for the state court's holding" and evaluating the reasonableness of that basis).[8]

[8] These circuits have continued to follow this AEDPA methodology post-*Wilson*. *See, e.g.*, *Gomes v. Silva*, 958 F.3d 12, 20–26 (1st Cir. 2020) (reviewing specifics of the state court's reasoning for reasonableness under § 2254(d)); *Pierce v. Adm'r N.J. State Prison*, 808 F. App'x 108, 112–13, 112 n.19 (3d Cir. 2020) (concluding that AEDPA deference did not apply because the justifications that the state court had articulated were unreasonable); *Dodson v. Ballard*, 800 F. App'x 171, 178–79 (4th Cir. 2020) (same); *White v. Ryan*, 895 F.3d 641, 665–73 (9th Cir. 2018) (citing *Wilson* and, after deeming the state-court explanation unreasonable, engaging in *de novo* review).

Five circuit courts may have used contrary AEDPA analyses before *Wilson*, but they now follow *Wilson*'s command. The Second Circuit recently cited *Wilson* and clarified that it "consider[s]" only the "rulings and explanations" from the last reasoned state-court decision. *Scrimo v. Lee*, 935 F.3d 103, 111–12, 115–16 (2d Cir. 2019) (limiting AEDPA review to the state court's explanation and deeming that explanation unreasonable). The Sixth, Seventh, and Tenth Circuits have ruled similarly in the wake of *Wilson*. *See, e.g.*, *Coleman v. Bradshaw*, 974 F.3d 710, 718–19 (6th Cir. 2020) (citing *Wilson* and confining AEDPA review to "the actual grounds on which the state court relied," instead of the grounds argued by the State); *Gish v. Hepp*, 955 F.3d 597, 603–04 (7th Cir. 2020) (quoting *Wilson*'s instruction to focus on the state court's particular reasons and, after rejecting those reasons under § 2254(d)(1), engaging in *de novo* review), *cert. denied*, 208 L. Ed. 2d 286 (2020); *Subdiaz-Osorio v. Humphreys*, 947 F.3d 434, 443–45 (7th Cir. 2020) (similarly quoting and following *Wilson*'s directive); *Dyer v. Farris*, 787 F. App'x 485, 492–95 (10th Cir. 2019) (citing *Wilson* and scrutinizing the state court's reasoning), *cert. denied*, 140 S. Ct. 1157 (2020). Finally, while the Fifth Circuit has expressed some confusion about *Wilson*'s effect on AEDPA review, *see Sheppard v. Davis*, 967 F.3d 458, 466–69, 467 nn.4–5 (5th Cir. 2020), *petition for cert. filed* (U.S. Dec. 21, 2020) (No. 20-6786), that court too has cited—and followed—*Wilson*'s directive, *see Atkins v. Hooper*, 979 F.3d 1035, 1042–49 (5th Cir. 2020) (concluding from the state court's reasoning that the state court had failed to apply this Court's relevant precedent).

In sum, other circuits follow this Court's instruction.

C. The Eleventh Circuit's Methodology Defies This Court's Precedent and Cements a Circuit Split.

As it has in other cases, the Eleventh Circuit here looked beyond the state court's rationales and supplied its own reasons to conclude that Jenkins could not overcome § 2254(d) on his *Atkins* claim. The state court gave two justifications for denying Jenkins an *Atkins* hearing: (1) Jenkins's IQ score of 76 precluded the possibility of intellectual deficits; and (2) Jenkins's purported ability to maintain relationships and employment precluded the possibility of adaptive deficits. Pet. App. 494a. Even though the Eleventh Circuit quoted *Wilson,* the majority refused to limit its AEDPA analysis to the reasonableness of the state court's two justifications. *See* Pet. App. 016a, 026a–031a. Instead, the Eleventh Circuit manufactured different reasons to reject the *Atkins* claim.

With respect to intellectual deficits, the Eleventh Circuit's § 2254(d) review hinged in significant part on the fact that no expert testified at Jenkins's post-conviction hearing that Jenkins had intellectual disability. *See* Pet. App. 028a–029a. Indeed, the Eleventh Circuit declared the absence of a clinical diagnosis at the hearing "[m]ost fundamental[]" and "tremendously significant." Pet. App. 028a–029a. The court did so even though the hearing predated *Atkins*, meaning that intellectual disability was not yet a bar to the death penalty but was instead a "two-edged sword" that could make the defendant appear more dangerous. *See Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Bobby v. Bies*, 556 U.S. 825, 836–37 (2009) (recognizing that intellectual-disability evidence was potentially harmful before *Atkins* and that *Atkins* changed

parties' calculus on how to approach such evidence). And the Eleventh Circuit did so even though the CCA had not mentioned the absence of a clinical diagnosis.

The Eleventh Circuit's AEDPA review of adaptive deficits likewise went beyond the CCA's analysis. The Eleventh Circuit recognized the CCA had "mentioned only Jenkins's successes in employment and social skills," but the majority did not consider whether the absence of deficits in two areas could, in fact, preclude the possibility of intellectual disability. *See* Pet. App. 030a. Rather, the Eleventh Circuit rested its decision on its own conclusion that "the facts of the crime also fail[ed] to show significant deficits in the areas of communication, self-care, community use, and self-direction" and that the testimony "described a man who did not have serious difficulties in communicating . . . and caring for himself." Pet. App. 030a–031a. Because the majority agreed with the state court's outcome, the federal court deemed the CCA's decision reasonable under § 2254(d) without grappling with the CCA's actual reasoning. The Eleventh Circuit's decision to fashion new reasons, ranging far beyond those offered in the state-court decision, flouts this Court's mandate to "simply review[]" the state court's "specific reasons." *See Wilson*, 138 S. Ct. at 1192.

This decision is emblematic of the Eleventh Circuit's repeated refusal to follow *Wilson* and its predecessors. The court has declined to constrain its AEDPA review to the state court's proffered reasons since at least 2002, when the court announced that § 2254(d)'s "statutory language focuses on the result, not on the reasoning that led to the result." *Wright v. Sec'y for Dep't of Corr.*, 278 F.3d 1245, 1255 (11th Cir. 2002). Since then, the Eleventh Circuit has regularly premised denials under § 2254(d) on

reasons other than those provided by the state court. For example, in *Gill v. Mecusker*, the Eleventh Circuit confronted a summary appellate affirmance of a trial-court decision "based on potentially flawed reasoning." 633 F.3d 1272, 1289–91 (11th Cir. 2011). Even so, the court held that under AEDPA, its review "must focus on [the] state court's ultimate conclusion" and declared that "[n]othing in the language of AEDPA required the district court to evaluate or rely upon the correctness [of] the state court's process of reasoning." *Id.* at 1290–92; *see also, e.g.*, *Gissendaner v. Seaboldt*, 735 F.3d 1311, 1329 (11th Cir. 2013) ("In any event, AEDPA 'focuses on the result' of a state court's decision, 'not on the reasoning that led to that result.'" (quoting *Wright*, 278 F.3d at 1255)).

Even after *Wilson*, the Eleventh Circuit has refused to comply. Instead, the Eleventh Circuit has repudiated *Wilson*'s rule and has reasserted its contrary view that the federal habeas court's review is "not limited to the reasons the [state] [c]ourt gave in its analysis." *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1177–78 (11th Cir. 2019) (*Whatley I*) (proclaiming that federal habeas courts are "most concerned with the [state] court's ultimate conclusion, not the quality of its written opinion" (internal quotation marks omitted)), *petition for cert. filed* (U.S. Sept. 8, 2020) (No. 20-363). The court contended that even when reviewing a decision with reasoning, the habeas court must assess what arguments "*could* have supported" the state court's ultimate conclusion. *Id.* at 1182 (quoting *Richter*, 562 U.S. at 102). The Eleventh Circuit en banc declined to address the panel's statement on AEDPA review. *See Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 955

F.3d 924, 926 (11th Cir. 2020) (*Whatley II*) (Martin, J., dissenting from denial of rehearing en banc) (declaring that *Whatley I* could "[]not be squared" with *Wilson*).

Whatley I's incorrect approach, implicitly sanctioned by the full court, has become further entrenched in circuit law. *See, e.g.*, *Presnell v. Warden*, 975 F.3d 1199, 1228–32 (11th Cir. 2020) (making a negative credibility finding to deny relief under AEDPA even though the state court had relied on different reasoning and had made no such credibility finding); *Wood v. Sec'y, Dep't of Corr.*, 793 F. App'x 813, 820 (11th Cir. 2019) (per curiam) ("[W]e are not limited to the reasons the [state court] gave and instead focus on its 'ultimate conclusion.'" (alterations in original) (quoting *Whatley I*, 927 F.3d at 1182)); *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349–50 (11th Cir. 2019) (acknowledging *Wilson*, but relying on "law of the circuit" predating *Wilson* to refuse to consider the specifics of the state-court reasoning), *cert. denied*, 140 S. Ct. 394 (2019).

Because the Eleventh Circuit has committed to a form of AEDPA review that runs afoul of this Court's precedent, this Court should grant certiorari to secure the lower court's conformity.

II. This Issue Is Exceptionally Important Because the Eleventh Circuit's Methodology Undermines Uniformity, Comity, and Federalism.

This Court should review this circuit split because the Eleventh Circuit's methodology undermines uniformity on an important issue of federal law. *See* Sup. Ct. R. 10(a), (c). Previously, this Court has granted certiorari in a number of cases to resolve disagreements over the proper interpretation of AEDPA. *See, e.g.*, *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020); *Wilson*, 138 S. Ct. at 1193.

The Eleventh Circuit's approach also undermines key principles that undergird AEDPA: comity and federalism. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). This Court has consistently "emphasize[d]" that AEDPA review "focuses on what a state court knew and did." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). In *Wilson*, this Court specified that federal courts "respect what the state court actually did" by focusing on the state court's reasoning rather than "substitut[ing] . . . the federal court's thought as to more supportive reasoning." 138 S. Ct. at 1196–97. Indeed, the Eleventh Circuit's approach vitiates *Wilson*'s requirement that federal courts "look through" state-court summary denials to the reasoning given below—a requirement designed to respect state-court decision-making. *See id*. *Wilson*'s holding cannot survive when the reviewing court can always provide new reasons to deny relief, regardless of what the state court did. By supplanting the state court's reasoning, the Eleventh Circuit has frustrated AEDPA's goal of promoting comity and federalism.

Lastly, only this Court can address the Eleventh Circuit's contumacy on this important issue. The Eleventh Circuit has declined multiple opportunities to change its course. *See, e.g.*, *Whatley II*, 955 F.3d at 927 (Martin, J., dissenting from denial of rehearing en banc); *Meders v. Warden*, *Ga. Diagnostic Prison*, Nos. 14-14178-P, 15-14734-P, 2019 U.S. App. LEXIS 6556, at *1 (11th Cir. Mar. 4, 2019) (per curiam) (denying petition for rehearing en banc that raised the panel's failure to focus on the state court's reasoning). Unless this Court intervenes, the Eleventh Circuit will continue to misapply AEDPA unchecked.

III. This Case Is an Ideal Vehicle for Resolving the Circuit Split.

This case presents an excellent opportunity to secure uniform AEDPA review for three reasons. First, the material facts are undisputed, and the Eleventh Circuit's defiance of this Court's precedent is clear from the record. Second, the question presented is outcome-determinative: Whether Jenkins is afforded an evidentiary hearing on his *Atkins* claim turns squarely on whether the federal courts follow *Wilson*. Finally, the Eleventh Circuit's improper methodology in this case risks the execution of a person with intellectual disability.

First, this case is an ideal vehicle because the material facts are undisputed and the Eleventh Circuit's improper review was glaring. There is no dispute that Jenkins was denied a hearing based on the pre-*Atkins* record. Moreover, the CCA plainly offered two reasons when denying Jenkins a hearing, *see* Pet. App. 494a, and the Eleventh Circuit just as plainly relied on additional reasons to conclude that § 2254(d) barred relief, *see* Pet. App. 028a–029a (emphasizing the absence of a clinical diagnosis, which was not part of the CCA's decision); Pet. App. 030a–031a (examining areas of adaptive behavior that the CCA did not discuss). This case thus presents a clean opportunity for this Court to resolve an important and recurring issue.

Second, this case is an ideal vehicle because the resolution of the question presented is outcome-determinative: Because the Eleventh Circuit in its AEDPA review improperly strayed beyond the state-court reasoning, the court wrongly denied Jenkins an *Atkins* hearing. As elaborated below, under this Court's precedent neither of the CCA's two stated grounds for denying relief survives review under

§ 2254(d)(2). *See Brumfield*, 576 U.S. at 314–22. Further, Jenkins put forth sufficient evidence to meet Alabama's low threshold for a hearing and was diligent in state court. *See Ex parte Perkins*, 851 So. 2d 453, 455–57 (Ala. 2002) (requiring only "any inference" or "indication" of intellectual disability for a hearing); 28 U.S.C. § 2254(e)(2). Therefore, should this Court grant certiorari and address the Eleventh Circuit's misguided approach to AEDPA, Jenkins would be afforded a hearing.

In *Brumfield*, this Court held that the petitioner had overcome § 2254(d)(2) when challenging the state-court denial of an *Atkins* hearing. 576 U.S. at 307, 313–14. Critically, the Louisiana court made the overarching error of failing to "take[] into account that the evidence before it was sought and introduced at a time [before *Atkins*] when Brumfield's intellectual disability was not at issue." *Id.* at 321–22. As evidence of intellectual disability was double-edged prior to *Atkins*, that failure "resulted in an unreasonable determination of the facts." *Id.* Moreover, the two specific findings upon which the state-court hearing denial rested were unreasonable under § 2254(d)(2). The state court had first cited Brumfield's IQ scores: 75 on one test and possibly higher on another test. *Id.* at 314. But this Court deemed it unreasonable to deny a hearing on that ground. *Id.* Taking into account the margin of error, those IQ scores were "entirely consistent" with intellectual disability. *Id.* at 314–16 (noting that IQ scores "cannot be assessed in a vacuum"). Second, the Louisiana court had ignored swaths of evidence to find that Brumfield had presented no evidence of adaptive impairment. *Id.* at 317. This Court pointed to evidence of Brumfield's premature birth and low birth weight, special-education enrollment,

learning disabilities, and fourth-grade reading level—all of which gave "substantial reason to believe" that Brumfield had adaptive impairments. *Id.* at 318–19, 321. While some evidence "cut against" a finding of intellectual disability, "in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much." *Id.* at 320. The state court's determination on adaptive impairment, like its determination on intellectual deficits, was unreasonable, and Brumfield had satisfied § 2254(d)(2). *Id.* at 317.

Here, the CCA's denial of an *Atkins* hearing was unreasonable for the same reasons that the state-court decision in *Brumfield* was unreasonable. Chiefly, just as in *Brumfield*, the CCA unreasonably rested its ruling on a record developed long before *Atkins*, when intellectual-disability evidence was potentially harmful because it could suggest that the defendant would pose a danger in the future. *See id.* at 321–22 (holding unreasonable under § 2254(d)(2) the state court's failure to take into account that the record was developed when evidence of intellectual disability was double-edged); *Atkins*, 536 U.S. at 321 (recognizing the pre-*Atkins* incentive not to present intellectual disability); *see also* Pet. App. 039a–040a (Wilson, J., dissenting) (criticizing the majority for denying a hearing under § 2254(d) based on "pre-*Atkins* evidence[] . . . presented in a wholly distinct context").

Beyond that foundational error, the CCA's first finding—that Jenkins's IQ score precluded intellectual disability—was independently unreasonable under *Brumfield*. An IQ score of 76 is not inconsistent with, and so cannot preclude, the possibility of significant intellectual deficits. *See* Vol. 22 TR.670–71 (State's expert

testifying that IQ score of 76 was approximately two standard deviations below the mean); AAMR-10 13–14 (defining an IQ score approximately two standard deviations below the mean as indicative of significant intellectual deficits); *see also Brumfield*, 576 U.S. at 314–16 (deeming it unreasonable to discount intellectual disability even with a possible IQ score of 76 or higher); *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1321 (11th Cir. 2013) (ordering an *Atkins* hearing for an Alabama prisoner with an IQ score of 76). Accounting for the standard error of measurement, as this Court did in *Brumfield*, Jenkins's IQ score lies "squarely" in the range of potential intellectual disability. *See Brumfield*, 576 U.S. at 314–16; *Tarver v. State*, 940 So. 2d 312, 317–21 (Ala. Crim. App. 2004) (explaining that IQ scores must be considered in context and remanding for an *Atkins* hearing when defendant's most recent IQ score was 76). Moreover, the CCA unreasonably ignored other evidence of intellectual deficits, including the State's expert's undisputed testimony that he had to read the test questions aloud because Jenkins read at a third-grade level and that Jenkins's IQ score fell two standard deviations below the mean. *See* Vol. 22 TR.641, 670–71; AAMR-10 13–14; *see also Brumfield*, 576 U.S. at 317–20 (deeming it unreasonable under § 2254(d)(2) to ignore portions of the record). The CCA's finding on intellectual deficits was therefore unreasonable.

The CCA's second finding—that Jenkins's purported ability to maintain relationships and his scattered history of menial employment precluded intellectual disability—was likewise unreasonable under *Brumfield*. In mentioning no other aspect of adaptive behavior, the CCA unreasonably excluded from consideration

record evidence of Jenkins's deficits in most of the ten areas of adaptive behavior. *See Brumfield*, 576 U.S. at 317–20; *Atkins*, 536 U.S. at 308 n.3 (noting that intellectual disability requires significant deficits in only two of the ten areas of adaptive functioning). Further, it is well established that strengths in certain areas do not preclude intellectual disability. *Brumfield*, 576 U.S. at 320 (citing AAMR-10 8 (recognizing that "intellectually disabled persons may have . . . 'strengths in some adaptive skill areas'")); *see also id.* (holding that clinical testimony that the petitioner was "normal from a neurocognitive perspective" did not preclude intellectual disability). Even if the CCA had correctly determined that Jenkins had relative strengths in two areas, it was unreasonable to conclude that this finding precluded the possibility of other significant adaptive deficits. *See id.* at 314–16 (deeming unreasonable the denial of an *Atkins* hearing when findings were consistent with possible intellectual disability).

As in *Brumfield*, the CCA also unreasonably overlooked "substantial grounds" to question Jenkins's functioning in several adaptive areas. *See id.* at 319; *cf. Atkins*, 536 U.S. at 308 n.3 (requiring deficits in only two areas of adaptive behavior). Those grounds included his premature birth at low weight, special-education placement, and ongoing struggles with daily living and interpersonal skills. *See supra* pp. 6–8; *see also Brumfield*, 576 U.S. at 317–21 (citing comparable evidence as signifying potential adaptive impairment). Jenkins stalled at a third-grade level in reading, writing, and arithmetic, and he consistently placed in the bottom percentile of achievement tests. Vol. 22 TR.624–25. Indeed, the Eleventh Circuit accepted "that

Jenkins may be substantially limited in functional academics . . . ." Pet. App. 030a. Further, he had ongoing, substantial deficits in such areas as self-care, self-direction, interpersonal skills, and home living. For example, he was unable to maintain hygiene and complete basic functions such as following directions. *See, e.g.*, Vol. 19 TR.57–59; Vol. 27 at 941. He was also gullible, vulnerable to exploitation, and unable to form friendships. *See, e.g.*, Vol. 22 TR.483–84. The state court's second finding, like its first, was unreasonable within the meaning of § 2254(d)(2).

Accordingly, had the Eleventh Circuit focused on the CCA's stated reasons, the court would have held that § 2254 did not bar relief. The Eleventh Circuit's error was not merely incidental; the court did not simply tack on extra reasons to bolster state-court reasoning that was on its own defensible. It was because the CCA's stated reasons failed under § 2254(d) that the Eleventh Circuit invoked different grounds upon which to deny relief, engineering a different outcome.

Because Jenkins has overcome § 2254(d), he is entitled to an evidentiary hearing. His evidence of intellectual disability easily raises the "inference" or "indication" of intellectual disability needed under Alabama's permissive law.[9] *See Ex*

[9] In addition to evidence of significant intellectual and adaptive deficits, Jenkins put forth adequate evidence regarding juvenile onset to warrant a hearing. There is no lower-court decision requiring deference on this issue. The district court wrongly conducted § 2254(d) review, even though the CCA had not reached this issue. *See* Pet. App. 493a–494a; Pet. App. 440a–441a; *see also Brumfield*, 576 U.S. at 323 (holding that where the state court has failed to address the age-of-onset requirement, there is "no determination on that point to which a federal court must defer" under § 2254(d)). Moreover, the district court did not consider in the first instance whether there was enough age-of-onset evidence to satisfy the threshold for a hearing. *See* Pet. App. 440a–441a. Given Jenkins's relative youth at the time of arrest, the record evidence of deficits comes almost exclusively from his childhood and adolescent years. *Cf.* Vol. 6, TR.1148. As Jenkins presented "sufficient evidence" predating adulthood to suggest that he had significant intellectual and adaptive deficits, "he also established good reason to think that he ha[s] [had these deficits] since he was a child." *See Brumfield*, 576 U.S. at 323. Jenkins has accordingly raised "an inference" that he meets all three diagnostic criteria for intellectual disability, and he is entitled to a hearing. *See Ex parte Perkins*, 851 So. 2d at 455–57.

parte Perkins, 851 So. 2d at 455–57; *Ex parte Smith*, 213 So. 3d 214, 224 (Ala. 2003) (noting that Alabama courts have adopted "the most liberal definition[]" of intellectual disability); *Tarver*, 940 So. 2d at 320 (recognizing that, given the context, an IQ score of 76 was consistent with intellectual deficits and granting a hearing); *see also* Pet. App. 031a (Eleventh Circuit acknowledging that "the record . . . contains evidence of Jenkins's childhood academic and social deficits"). Further, Jenkins satisfied 28 U.S.C. § 2254(e)'s diligence requirement by asking the CCA to vacate his death sentence and remand for further proceedings, which under state law necessarily included a hearing. *See* Ala. R. Crim. P. 32.9 ("Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing . . . ."); *see also* Pet. App. 040a–041a (Wilson, J., dissenting) (describing Jenkins's reasonable efforts to pursue his claim).[10] At a hearing, Jenkins would be able to adduce further evidence of intellectual disability, offer appropriate context for evidence in the record, and contest the State's evidence. For example, Jenkins would offer evidence that his IQ score, taking into account the standard error of measurement and the Flynn Effect, falls between 65 and 76.[11] *See* D. Ct. ECF No. 48-1 at 5; D. Ct. ECF No. 48-2 at 5.

[10] In a footnote, the majority seemed to question whether Jenkins had properly challenged the district court's denial of an evidentiary hearing. Pet. App. 031a–032a n.16. The majority then proceeded to acknowledge that Jenkins had requested a hearing in the only way permitted by this Court's precedent: He argued that he had overcome the limitations of § 2254(d) and was therefore entitled to a hearing. Pet. App. 031a–032a n.16; *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (holding that when § 2254(d) precludes relief, no hearing is required). Further, as the majority "accept[ed]" and the dissent made clear, the certificate of appealability encompassed the hearing denial. Pet. App. 031a–032a n.16; Pet. App. 038a–039a (Wilson, J., dissenting). Jenkins has overcome the strictures of § 2254, and there is no further obstacle to a hearing.

[11] The "Flynn Effect" is a quantifiable, empirically proven phenomenon whereby the general population's IQ scores gradually increase over time. *See* D. Ct. ECF No. 48-1 at 3–5; D. Ct. ECF No. 48-2 at 3–5. When an individual is assessed with an outdated testing instrument, the individual's IQ score should be adjusted to correct for the obsolete norms. *See, e.g.*, D. Ct. ECF No. 48-2 at 4.

Whether the AEDPA review in this case conforms to *Wilson* is thus dispositive of whether Jenkins has the opportunity to prove his intellectual disability.

Finally, the Eleventh Circuit's improper AEDPA analysis risks particularly grave consequences in this case. Here, the Eleventh Circuit's denial of an *Atkins* evidentiary hearing will potentially lead to the cruel and unusual execution of a person with intellectual disability. This case is an ideal vehicle for this Court to resolve the circuit split resulting from the Eleventh Circuit's disregard for *Wilson*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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