No. 20-6972

In the Supreme Court of the United States

MARK ALLEN JENKINS,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of *Amici Curiae* Disability Organizations in Support of Petitioner

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEDERAL STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are nonprofit organizations that represent, provide direct services to, and advocate for the rights of people with intellectual and developmental disabilities.[1] They share a vital interest in ensuring that all individuals with intellectual disability receive the protections and supports to which they are entitled by law—including, where appropriate, a hearing and the opportunity to present evidence—and that courts employ scientific principles for the diagnosis of intellectual disability. *Amici* take no position as organizations regarding capital punishment broadly, but respectfully submit that respecting those legal protections and adhering to those principles is no less important in the context of capital punishment than in any other context.

The **Alabama Disabilities Advocacy Program ("ADAP")** is part of the National Disability Rights Network, the nonprofit membership organization for the federally mandated Protection and Advocacy ("P&A") system. The P&A system constitutes the nation's largest provider of legally based advocacy services for persons with disabilities. As Alabama's only statewide, cross-disability, comprehensive legal advocacy organization, ADAP protects and promotes the civil rights of Alabamians with physical, cognitive, and mental health disabilities.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice of *amici*'s intent to file this brief, and counsel for all parties consented in writing to its filing.

Access Living was founded in 1980 and is one of the nation's largest, most experienced, and most prominent disability rights organizations governed and staffed by people with disabilities. As a Center for Independent Living ("CIL") established under the federal Rehabilitation Act, Access Living's statutorily-mandated mission includes advocacy to ensure the independence, integration, and full citizenship of people with disabilities. Access Living envisions a world free from barriers and discrimination where disability is respected as a natural part of the human experience, and people with disabilities are included and valued. The arguments in this brief support that mission, and protect the rights of people with disabilities.

The **Autistic Self Advocacy Network ("ASAN")** is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities, including within the criminal legal system.

The **Civil Rights Education and Enforcement Center ("CREEC")** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability.

CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, as well as provision of necessary procedural and substantive safeguards in civil and criminal proceedings.

The **Coelho Center for Disability Law, Policy and Innovation (the "Coelho Center")** was founded in 2018 by the Honorable Tony Coelho, primary author of the Americans with Disabilities Act. Housed at Loyola Law School in Los Angeles, the Coelho Center collaborates with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. The Coelho Center brings together thought leaders, advocates, and policy makers to craft agendas that center disabled voices.

Disability Rights Advocates ("DRA") is a nonprofit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with all types of disabilities throughout the United States. DRA works to end discrimination in all public services, including in the courts.

The **Disability Rights Education & Defense Fund ("DREDF")** is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the

interpretation of federal civil rights laws protecting persons with disabilities.

The **Disability Rights Legal Center ("DRLC")** is a nonprofit legal organization founded in 1975 to represent and serve people with disabilities. DRLC assists people with disabilities in attaining the benefits, protections, and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and other state and federal laws. Its mission is to champion the rights of people with disabilities through education, advocacy, and litigation. DRLC supports fairness in the criminal justice system to ensure people with disabilities are not discriminated against nor improperly punished or incarcerated for having a disability.

Disability Rights Maryland ("DRM") is a nonprofit legal services organization mandated to advance the civil rights of people with disabilities. Since 1975, DRM has served as the federally mandated P&A for the state of Maryland. One of DRM's service priorities is to monitor and advocate for the provision of appropriate care of individuals in prison facilities. DRM has issued public reports criticizing the under-identification of persons with disabilities in our carceral system. DRM frequently advocates for proper evaluation of youth and adults who may have intellectual or developmental disabilities, through provision of technical assistance or representation that urges the need to obtain neuropsychological or specialty evaluations to establish eligibility for services based on their intellectual or developmental disabilities. DRM has an interest in this case and in ensuring

comprehensive assessments and identification of persons with disabilities so as to fully identify those with disabilities and to protect their interests.

Disability Rights North Carolina ("DRNC") is North Carolina's designated P&A. As such, DRNC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. DRNC's interest in the present case is to advocate for the legal rights and interests of North Carolinians with intellectual disabilities to receive fair and humane treatment in the criminal justice system.

The **National Disability Rights Network ("NDRN")** is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

SUMMARY OF ARGUMENT

As this Court has recognized, a death row inmate with a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), should have the opportunity to develop an appropriate record in support of that claim when there is evidence of impairment that could be attributable to intellectual disability. That common-sense rule is grounded in principles of due process and fundamental fairness, taking into account the way *Atkins* fundamentally changed the legal context of intellectual-disability evidence in capital cases. It also is grounded in clinical standards regarding the diagnosis of intellectual disability, which emphasize the importance of thorough evidence-gathering and clinical judgment.

The Eleventh Circuit's application of its outlier approach to habeas in this case deprived Mark Allen Jenkins of his opportunity to develop such a record. The available record in this case—although incomplete and deficient, as it was developed in a pre-*Atkins* context—already includes significant evidence that Jenkins may be a person with intellectual disability. Yet in the last reasoned state-court decision on Jenkins's *Atkins* claim, the Alabama Court of Criminal Appeals ("CCA") unreasonably disregarded that evidence in a cursory analysis that relied on stereotypes to preclude the possibility of *Atkins* relief. The CCA's reasoning cannot be reconciled with the core holding of *Atkins*. Consequently, Jenkins's habeas petition satisfied the requirements of 28 U.S.C. § 2254(d), and he is entitled at least to an evidentiary hearing.

Rather than limiting its review to the specific reasons given by the CCA for denying *Jenkins*'s

claim, however, the Eleventh Circuit created its own rationale for that result. In so doing, the Eleventh Circuit impermissibly bypassed the need to confront the CCA's indefensible reasoning, in contravention of *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), which other circuits have followed faithfully. Furthermore, the Eleventh Circuit's own reasoning contradicted this Court's precedents incorporating relevant clinical guidance. The Eleventh Circuit's reasoning also disregarded the central importance of an appropriate evidentiary record in *Atkins* cases, even as the court denied Jenkins the opportunity he has long sought to build such a record.

Absent this Court's review, Mark Allen Jenkins may be executed without ever having the opportunity to develop an appropriate evidentiary record in support of his intellectual-disability claim. This Court's review of the Eleventh Circuit's outlier approach to habeas review is necessary, among other reasons, to avert the serious risk that a person with intellectual disability may be executed.

ARGUMENT

I. Applicable Legal and Scientific Principles Support the Importance of Evaluating *Atkins* Claims on a Record Developed for That Purpose.

The Eighth Amendment prohibits the execution of any person with intellectual disability. *See Atkins*, 536 U.S. at 321. The basic definition of intellectual disability requires (1) intellectual-functioning deficits, generally indicated by an IQ score approximately two standard deviations below the mean, (2) adaptive deficits, and (3) onset of those deficits during the developmental period. *See*

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33, 37 (5th ed. 2013) ("DSM-5"); AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1, 31 (11th ed. 2010) ("AAIDD Manual"). Clinical definitions of intellectual disability "were a fundamental premise of *Atkins*," which was informed by "the diagnostic criteria employed by psychiatric professionals." *Hall v. Florida*, 572 U.S. 701, 720-21 (2014) (citing *Atkins*, 536 U.S. at 308-09 nn.3, 5).

This Court has emphasized repeatedly the importance of adjudicating death row inmates' intellectual-disability claims based on a record developed after *Atkins* for that purpose. *See, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 321-22 (2015) (petitioner's argument for an evidentiary hearing was supported by the fact that he "had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim"); *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (recognizing that prior to *Atkins*, it often was in the interest of prosecutors rather than the defense to use evidence of intellectual disability). Proper examination of any intellectual-disability claim requires informed expert analysis because, as this Court recognized in *Atkins*, intellectual disability is ultimately a "clinical" diagnosis. 536 U.S. at 308 n.3, 317 n.22; *see also Morris v. Dretke*, 413 F.3d 484, 500 (5th Cir. 2005) (Higginbotham, J., concurring) (explaining that inmate had diligently developed the factual basis for his *Atkins* claim where he "diligently sought to gather evidence of mental retardation during the time period

after Atkins was decided" (emphasis added)).[2] As a matter of due process and fundamental fairness, *Atkins* claimants should have an opportunity to develop an appropriate record.

The importance of that opportunity is also grounded in, and confirmed by, the clinical literature that was fundamental to *Atkins*. The relevant clinical standards emphasize the importance of gathering information from a variety of sources, including a thorough history, and evaluating that information using clinical judgment. *See* DSM-5 at 37; AAIDD Manual at 94-96, 99-102. A court purporting to evaluate an intellectual-disability claim based on a pre-*Atkins* record not developed for that purpose likely will lack important information. *See, e.g.*, AAIDD Manual at 100 ("A valid diagnosis of ID is based on multiple sources of information that include a thorough history (social, medical, educational), standardized assessments of intellectual functioning and adaptive behavior, and possibly additional assessments or data relevant to the diagnosis."). Among other things, the court will lack reliable expert testimony, since an expert testifying regarding an intellectual-disability claim must gather and analyze the relevant information with the applicable standard in mind. *See* DSM-5 at 37 (for a valid diagnostic inquiry, the relevant information "must be interpreted using clinical judgment"); AAIDD Manual at 90-91 (a clinician's effectiveness depends on "his or her systematic and reasoned approach to understanding *the question at hand*" and "using a sequential and logical approach to

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[2] This brief uses the term "intellectual disability" in place of "mental retardation" except when quoting sources. *See Hall*, 572 U.S. at 704-05.

data collection" and synthesis (emphasis added)). Adjudications made on the basis of a deficient record are unreliable. That is why, post-*Atkins*, individuals must be given the opportunity to develop a record appropriate to adjudicating an *Atkins* claim, at least where the existing pre-*Atkins* record reveals evidence of impairment that could be attributable to intellectual disability.

II. The Eleventh Circuit's Application of its Outlier Approach to Habeas Review Deprived Jenkins of the Opportunity to Develop an Appropriate Record in Support of His *Atkins* Claim.

Even though Mark Allen Jenkins has never had an opportunity to develop an appropriate evidentiary record in support of his intellectual-disability claim, the available record—developed before *Atkins*—nevertheless contains significant evidence supporting the possibility that he has intellectual disability. The CCA's decision denying Jenkins's *Atkins* claim despite that evidence (which the CCA largely ignored) was unreasonable, and for that reason the Eleventh Circuit should have concluded that Jenkins was entitled at least to an evidentiary hearing. The Eleventh Circuit's decision instead to bypass the state court's reasoning and deny Jenkins's claim based on its own justification—which likewise runs afoul of this Court's precedents and disregards the importance of an appropriate evidentiary record—amply warrants this Court's review.

A. The State Court Record, Despite its Limitations, Contains Substantial Evidence that Jenkins May Be a Person with Intellectual Disability.

The state court record in Jenkins's case—such as it is—provides a substantial basis to conclude that he may be a person with intellectual disability, and offers no justification for precluding such a diagnosis. Given that the evidence was developed before *Atkins*, it provides "even greater cause to believe he might prove such a claim in a full evidentiary hearing." *Brumfield*, 576 U.S. at 321. Under this Court's jurisprudence, the CCA was required to consider the existing evidence in that context, and was ultimately required to provide Jenkins the opportunity to develop it at an appropriate post-*Atkins* evidentiary hearing.

The evidence already in the record supporting Jenkins's intellectual-disability claim is compelling. As to Jenkins's intellectual functioning, the *State's* expert, Dr. Kirkland, testified that Jenkins's IQ score was "two standard deviations" below the mean, Vol.22 TR.670-71,[3] which would satisfy the intellectual-functioning criterion of the diagnostic framework, *see* DSM-5 at 37. Jenkins also scored in the bottom one percent of all test-takers on a neuropsychological test measuring cognitive flexibility and problem solving. *See* Vol.22 TR.669-70.

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[3] This brief cites the state court record using the volume and tab numbers in Respondent's Habeas Corpus Checklist, filed before the district court, consistent with the citation form used in Petitioner's submission to this Court. *See* Pet. 6 n.3.

The record also reveals significant evidence of adaptive deficits. At nearly 30 years old, Jenkins still operated at a third-grade level in reading, spelling, and arithmetic, results that were consistent with Jenkins's performance in school. *See* Vol.22 TR.641, 669. Both in childhood and as an adult, Jenkins demonstrated gullibility that led to his being manipulated and taken advantage of by others. *See* Vol.19, Tab #R-48 at TR.60-61; Vol.20 TR.124; Vol.22 TR.483; *see also Ybarra v. Filson*, 869 F.3d 1016, 1026-27 (9th Cir. 2017) (concluding that district court erred by overlooking state court's statements discounting defendant's "gullibility" and inability to avoid victimization, which authoritative clinical guidelines list specifically as "examples of limited social adaptive skills"); DSM-5 at 34, 38 (noting that "[g]ullibility is often a feature" of intellectual disability, and places the person "at risk of being manipulated by others"); *accord* AAIDD Manual at 44. As a child, Jenkins had significantly limited interpersonal skills and no friends. *See* Vol. 20 TR.108-10. As an adult, he has struggled to maintain employment even in unskilled jobs, to maintain adequate housing, and to manage basic self-care tasks like hygiene. *See, e.g.*, Vol.20, Tab #R-48 at TR.151, 200-01; Vol.22 TR.485-86; Vol.29 TR.1255.[4]

The available evidence in this case also indicates the presence of many risk factors for intellectual disability. Those risk factors include, for example, child abuse, neglect, domestic violence, and social deprivation, all of which Jenkins experienced to a horrifying degree. *See* AAIDD Manual at 60; Pet.

[4] This evidence also indicates that the intellectual and adaptive deficits present in Jenkins's life first manifested during the developmental period, a question that the CCA did not reach.

App. 12a-14a. Other risk factors present here include maternal drug and alcohol abuse in the prenatal period, premature birth, parental rejection of caretaking, and malnutrition. *See* AAIDD Manual at 60; Pet. App. 12a-14a. Jenkins also was at risk of a traumatic brain injury or other brain damage during the developmental period due to frequent beatings with various implements by his stepfather. *See* AAIDD Manual at 60; Pet. App. 12a-13a. These risk factors provide additional support for Jenkins's *Atkins* claim.

The existing record contains all this evidence of intellectual disability *despite* Jenkins never having been provided the opportunity of a hearing to develop an intellectual-disability claim. There is no reason to believe that, by sheer chance, all evidence that could support such a claim is in the record. Indeed, at the time this evidence came in, there was no *Atkins* claim to be made, and such evidence could instead be used against Jenkins as evidence of future dangerousness. *See Atkins*, 536 U.S. at 321; *Bies*, 556 U.S. at 836. That, under such circumstances, the record nevertheless contains compelling evidence supporting an intellectual-disability claim gives "even greater cause to believe [Jenkins] might prove such a claim in a full evidentiary hearing." *Brumfield*, 576 U.S. at 321. At the very least, Jenkins should be given such a hearing and an opportunity to develop evidence on his *Atkins* claim.

B. The Last Reasoned State-Court Decision Denying Jenkins's Claim is Indefensible.

The CCA's decision in this case unreasonably ignored evidence supportive of intellectual disability and, in a cursory discussion, relied on harmful and

inaccurate stereotypes to reject Jenkins's *Atkins* claim. That reasoning is indefensible.

The CCA's decision ignored virtually all of the evidence supporting Jenkins's intellectual-disability claim, and failed to even acknowledge that the available record was developed before this Court's decision in *Atkins*, and thus before Jenkins had reason to develop evidence to support an *Atkins* claim. The CCA's disregard of the evidence and its context was unreasonable, as precedent from this Court and many circuits confirms. *See, e.g.*, *Brumfield*, 576 U.S. at 317-22; *Kipp v. Davis*, 971 F.3d 939, 954 (9th Cir. 2020) (recognizing that "[i]n *Brumfield*, the Supreme Court also attributed the state court's erroneous failure to hold an evidentiary hearing on petitioner's intellectual disability, in part, to the fact that the court overlooked evidence in the record about issues with the petitioner's adaptive functioning"); *Williams v. Mitchell*, 792 F.3d 606, 624 (6th Cir. 2015) ("[C]learly established Federal law . . . requires courts to consider all relevant evidence bearing on an individual's intellectual functioning and to apply clinical principles of intellectual disability adopted by federal precedent.").

Moreover, the CCA's analysis of Jenkins's adaptive functioning consisted of a single sentence indicating that he must not have significant deficits in adaptive behavior because he was able to "maintain[] relationships with other individuals" and sometimes had a job. Pet. App. 494a. But the idea that a person who can do those things must not be a person with intellectual disability is a harmful, offensive, and inaccurate stereotype with no basis in law or science. Many people with intellectual disability are capable of maintaining relationships with other individuals

and being employed. *See, e.g.*, DSM-5 at 34 ("In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills."); AAIDD Manual at 151 (rejecting the "incorrect stereotypes" that people with intellectual disability "never have friends, jobs, spouses, or children"). The fact that Jenkins had a string of low-skill, menial-labor jobs—jobs he held for only a few months each, during which time employers took advantage of him—in no way precludes a diagnosis of intellectual disability. The state court's analysis contravened the core holding of *Atkins* that the Eighth Amendment bars execution for the entire category of persons with intellectual disability. *See Atkins*, 536 U.S. at 321; *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005).

The CCA's reasons for denying Jenkins an evidentiary hearing or other relief on his *Atkins* claim were plainly unreasonable and cannot withstand even deferential scrutiny. In seeking an evidentiary hearing, Jenkins "was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much." *Brumfield*, 576 U.S. at 320. To deny an *Atkins* claim without an evidentiary hearing under these circumstances "creates an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704.

C. The Eleventh Circuit's Improperly Substituted Rationale for Denying Jenkins's Claim Also Fails, Including Because the Court Disregarded the Importance of an Appropriate Evidentiary Record.

Rather than recognize that the state court's decision was unreasonable and that Jenkins consequently was entitled to at least an evidentiary hearing, the Eleventh Circuit crafted a new rationale to try to justify the result the state court reached. *Amici* agree with Petitioner's submission to this Court regarding the conflict between the Eleventh Circuit's outlier approach to habeas review and this Court's decision in *Wilson v. Sellers*, and respectfully submit that the Court should grant certiorari to review this important issue. *Amici* also emphasize that the Eleventh Circuit's new rationale itself contravened relevant legal and clinical guidance regarding intellectual-disability claims—including by disregarding the context in which the evidentiary record in this case was developed.

In denying Jenkins what would have been his first opportunity to develop an appropriate record in support of his *Atkins* claim, the Eleventh Circuit improperly relied on a purported absence of *Atkins*-claim-specific evidence in the pre-*Atkins* record. In particular, the court deemed it "[m]ost fundamental[]" that neither of the experts who testified at Jenkins's Rule 32 hearing—half a decade before *Atkins*—gave a clinical opinion that Jenkins is a person with intellectual disability; the court also treated as "tremendously significant" the absence of other such clinical assessments in the record. Pet.

App. 28a-29a. But again, prior to *Atkins*, evidence of intellectual disability was (at best) "a two-edged sword" that could be treated as evidence of the aggravating factor of future dangerousness, thereby making a death sentence more likely. *Atkins*, 536 U.S. at 321. Indeed, the categorical rule this Court adopted in *Atkins* was intended, in part, to *avoid* forcing defendants in capital cases to gamble with their lives when presenting evidence of intellectual disability. As the dissent below recognized, it was unreasonable to penalize Jenkins for deficits in a record developed during the hazardous pre-*Atkins* period, especially because Jenkins sought to develop his intellectual-disability claim promptly after *Atkins* was decided. *See* Pet. App. 40a-41a (Wilson, J., dissenting).

Contrary to the approach taken by the Eleventh Circuit, this Court has made clear that courts adjudicating *Atkins* claims must take into account the context of how the available record was developed. *See Brumfield*, 576 U.S. at 321-22. Petitioners may be able to investigate, support, and prove claims of intellectual disability that they would not have had reason to develop or introduce before *Atkins* put their intellectual disability at issue. *See id.*

Indeed, even beyond allowing for the opportunity to introduce such evidence, a post-*Atkins* hearing is important for the additional reason that it allows judicial evaluation of an *Atkins* claim to be properly informed by clinical judgment. By contrast, at Jenkins's post-conviction hearing, Dr. Kirkland testified, for example, that he did not look to "integrat[e] social and adaptive behavior" with Jenkins's IQ score and other evidence of his cognitive

functioning." Vol. 22 TR.671. In other words, he specifically did *not* perform the "conjunctive and interrelated assessment" of intellectual functioning and adaptive deficits that this Court has recognized is essential to assessing an intellectual-disability claim. *Hall*, 572 U.S. at 723.

The Eleventh Circuit's denial of an evidentiary hearing or other relief ran afoul of longstanding principles for assessing *Atkins* claims in other ways as well. For example, the court's analysis of Jenkins's adaptive functioning assumed he has a substantial deficit in functional academics, but otherwise focused on various perceived strengths as excluding a potential diagnosis of intellectual disability. *See* Pet. App. 30a-31a. For example, the court rejected Jenkins's claimed deficits "in the areas of communication, self-care, community use, and self-direction" based on "the facts of the crime," *id.* at 30a, even though legal precedent and clinical literature repudiate that analysis. *See Brumfield*, 576 U.S. at 320 (rejecting argument that purported adaptive strengths demonstrated in the facts of the crime negated the need for an evidentiary hearing); *Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) ("Individuals with mental retardation have strengths and weaknesses, like all individuals. . . . Dr. Ackerson's predominant focus on Holladay's actions surrounding the crime suggests that she did not recognize this."); AAIDD, *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 20 (2012) ("The diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'").

Remarkably, the Eleventh Circuit's decision acknowledged that the record "contains evidence of Jenkins's childhood academic and social deficits"—including "serious academic deficits and some intellectual and adaptive deficits"—but disregarded this evidence based on an unsupported legal determination that "Jenkins's childhood is not directly relevant to our consideration of his present limitations." Pet. App. 31a. That reasoning directly contravenes legal authority and clinical standards, which do not distinguish in any such way between childhood and adulthood when assessing adaptive deficits. In fact, evidence from the developmental period is highly relevant to whether a person has adaptive deficits evidencing intellectual disability, which is a developmental disability. *See, e.g.*, *Brumfield*, 576 U.S. at 317-19 (relying heavily on evidence from birth and childhood to conclude that the record "contained sufficient evidence to raise a question as to whether Brumfield met" the adaptive-deficits criteria, such that an evidentiary hearing should have been conducted); *Van Tran v. Colson,* 764 F.3d 594, 613-14 (6th Cir. 2014) (remanding for a new evidentiary hearing because the state court erroneously discounted evidence of adaptive impairments during the developmental period and erroneously relied on the absence of any test of intellectual functioning before the age of 18); DSM-5 at 37; AAIDD Manual at 94-96. The Eleventh Circuit's disregard of childhood adaptive-deficit evidence is especially significant here, both because Jenkins was only 21 years old at the time of his crime and because of the court's acknowledgment that the disregarded evidence reveals deficits in at least two areas of adaptive functioning. *See* Pet. App. 31a.

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Longstanding legal and scientific principles support the common-sense proposition that a death row inmate with an *Atkins* claim should have an opportunity to develop that claim on an evidentiary record suited to that purpose. Mark Allen Jenkins has never had that opportunity. And even though he has been denied that basic procedural right, substantial evidence supports the possibility that he has intellectual disability and compels the conclusion that he should have an evidentiary hearing. Unless this Court intervenes, there is the very real risk that a person with intellectual disability will be put to death without ever having had a proper chance to prove that his execution constitutes cruel and unusual punishment under the Eighth Amendment.

This Court's review of the decision below is necessary and warranted, including because the Eleventh Circuit's application of its outlier habeas approach was indispensable to a decision that risks the execution of a person who, if finally given the opportunity, may be able to show that his execution would be unconstitutional.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should grant the petition for a writ of certiorari.

March 1, 2021

Respectfully submitted,

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