

No. 20-6972
CAPITAL CASE

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 IN OPPOSITION

STEVE MARSHALL
Attorney General

Edmund G. LaCour Jr.
Solicitor General

Henry M. Johnson*
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300

Henry.Johnson@AlabamaAG.gov
*Counsel of Record

Counsel for Respondent

**CAPITAL CASE
QUESTION PRESENTED
(Rephrased)**

The Alabama Court of Criminal Appeals denied Mark Allen Jenkins’s *Atkins* claim on the merits. Applying AEDPA’s deferential standard of review, the Eleventh Circuit Court of Appeals rejected Jenkins’s argument that the state court’s decision 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)(2). Should this Court deny certiorari where the Eleventh Circuit’s method of resolving Jenkins’s claim was fully in accord with *Wilson v. Sellers*, 138 S. Ct. 1188 (Apr. 17, 2018), and *Brumfield v. Cain*, 576 U.S. 305 (2015), and where the evidence in the state-court record establishes that Jenkins is not intellectually disabled in any event?

RELATED CASES

Underlying Trial and Direct Appeal:

State of Alabama v. Mark Allen Jenkins, CC–89–68, Circuit Court of St. Clair County, Alabama.

Judgment Entered: April 10, 1991.

Jenkins v. State, CR–90–1044, 627 So. 2d 1034 (Ala. Crim. App. 1992), Alabama Court of Criminal Appeals.

Judgment Entered: February 28, 1992.

Rehearing Denied: April 17, 1992.

Ex parte Jenkins, No. 1911144, 627 So. 2d 1054 (Ala. 1993), Alabama Supreme Court.

Judgment Entered: May 28, 1993.

Rehearing Denied: October 8, 1993.

Jenkins v. Alabama, No. 93–7423, 511 U.S. 1012 (1994) (mem.), United States Supreme Court.

Judgment Entered: March 28, 1994.

State Postconviction Proceeding (Rule 32) and Appeal:

Jenkins v. State, CC–89–68.60, Circuit Court of St. Clair County, Alabama.

Judgment Entered: December 31, 1997.

Jenkins v. State, CR–97–0864, 972 So. 2d 111 (Ala. Crim. App. 2004), Alabama Court of Criminal Appeals.

Judgment Entered: February 27, 2004.

Rehearing Denied: May 21, 2004.

Ex parte Jenkins, No. 1031313, 972 So. 2d 159 (Ala. 2005), Alabama Supreme Court.

Affirmed in Part, Reversed in Part, and Remanded: April 8, 2005.

Jenkins v. State, CR–97–0864, 972 So. 2d 165 (Ala. Crim. App. 2005), Alabama Court of Criminal Appeals.

Judgment Entered: November 23, 2005.

Rehearing Denied: April 14, 2006.

Ex parte Jenkins, No. 1050972, Alabama Supreme Court.

Judgment Entered: May 18, 2007.

Jenkins v. Alabama, No. 07–7215, 552 U.S. 1167 (2008) (mem.), United States Supreme Court.

Judgment Entered: January 22, 2008.

Second State Postconviction Proceeding (Rule 32) and Appeal:

Jenkins v. State, CC–89–68.61, Circuit Court of St. Clair County, Alabama.

Judgment Entered: November 25, 2008.

Jenkins v. State, CR–08–0490, 105 So. 3d 1234 (Ala. Crim. App. 2011), Alabama Court of Criminal Appeals.

Judgment Entered: August 26, 2011.

Ex parte Jenkins, No. 1101410, 105 So. 3d 1250 (Ala. 2012), Alabama Supreme Court.

Judgment Entered: September 21, 2012.

Jenkins v. Alabama, No. 12–7860, 568 U.S. 1252 (2013) (mem.), United States Supreme Court.

Judgment Entered: March 25, 2013.

Federal Habeas (2254) and Appeal:

Jenkins v. Allen, No. 4:08–cv–00869, United States District Court for the Northern District of Alabama, Middle Division.

Judgment Entered: August 31, 2016.

Jenkins v. Comm’r, Ala. Dep’t of Corr., No 17–12524, 936 F.3d 1252 (11th Cir. 2019), Eleventh Circuit Court of Appeals.

Judgment Entered: August 30, 2019.

Opinion Vacated and Substituted: June 29, 2020.

Jenkins v. Comm’r, Ala. Dep’t of Corr., No 17–12524, 963 F.3d 1248 (11th Cir. 2020), Eleventh Circuit Court of Appeals.

Judgment Entered: June 29, 2020.

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STATEMENT OF THE CASE

A. Statement of the Facts

During the early morning hours of April 18, 1989, Tammy Hogeland was working as a cook at the Airport Omelet Shoppe in Birmingham, Alabama. *Jenkins v. State*, 627 So. 2d 1034, 1037–38 (Ala. Crim. App. 1992). At approximately 2:00 a.m., Hogeland's coworker, Sarah Harris, noticed a red sports car pull into the parking lot of the restaurant. *Id.* at 1038. She identified Jenkins as the driver of the vehicle and observed that he was intoxicated. *Id.* She later watched as Jenkins and Hogeland drove away in the red sports car. *Id.* Hogeland, who was a heavy smoker, left behind her cigarettes, lighter, purse, and a paycheck, and she did not even remove her apron. *Id.* at 1038, 1040. Harris had worked with Hogeland on other occasions and had never known her to leave without telling another employee. *Id.* at 1038.

At approximately 5:00 a.m. that morning, Geraldine and Bobby Coe were at a gas station off of interstate highway 59 when a man driving a red sports car parked beside them. *Id.* They identified Jenkins as the driver of the vehicle and noticed a female in the passenger seat who appeared to be "passed out." *Id.* He asked them for cigarettes and directions to interstate highway 459. *Id.* The Coes, who were driving separate vehicles, then left the gas station, with Jenkins following them. *Id.* Soon thereafter, Bobby Coe observed Jenkins "flash his lights, slow down, and then pull to the side of the road between mile markers 151 and 152." *Id.*

On April 21, 1989, Hoagland's body was found on an embankment on the side of I-59 in the same area where Bobby Coe observed Jenkins pull to the side of the

highway. *Id.* at 1037–38. Her body was so badly decomposed that she had to be identified by her dental records. *Id.* at 1037. A forensic pathologist testified that her hyoid bone was fractured and that her cause of death was manual strangulation. *Id.*

Law enforcement officers found the red sports car abandoned on the side of I–459. *Id.* at 1040. Hair fibers collected from Hogeland and her clothing established her presence in the vehicle, and hair fibers taken from Jenkins’s clothes connected him to the vehicle too. *Id.* Hoagland’s hair fibers were found on the car seat and the storage area behind the seats, and one of her pubic hairs was found on the passenger-side floorboard mat. *Id.* Forty-six car seat fibers were found on Jenkins’s blue jeans, and fibers from his jeans were found on Hogeland’s apron. *Id.*

A cellmate of Jenkins in the St. Clair County jail testified that Jenkins approached him several times and talked about Hogeland’s murder. *Id.* Jenkins confessed what he had done to Hogeland to that witness. *Id.*

B. The Proceedings Below

On March 19, 1991, a St. Clair County, Alabama jury found Jenkins guilty of the capital offenses of murdering Tammy Hogeland during the course of a kidnapping and during the course of a robbery, in violation of sections 13A–5–40(a)(1) and (a)(2) of the Code of Alabama. Doc. 22–10 at C. 10, 113–14.¹ The jury recommended by a vote of ten to two that he should be sentenced to death. *Id.* at 10, 115. The trial court followed the jury’s recommendation. *Id.* at 19.

¹ Document numbers refer to the district court proceedings below.

Jenkins’s convictions and death sentence were affirmed on direct appeal. *Jenkins v. State*, 627 So. 2d 1034 (Ala. Crim. App. 1992), *aff’d*, 627 So. 2d 1054 (Ala. 1993), *cert. denied*, 511 U.S. 1012 (1994) (mem.).

Jenkins filed a Rule 32 petition for postconviction relief and an amended petition in the St. Clair County Circuit Court. Doc. 22–17 at C. 6–29; Doc. 22–18 at C. 347–96. Following an evidentiary hearing, the circuit court denied his amended petition. Pet. App. 499a–578a.

Jenkins appealed the circuit court’s denial of his amended petition to the Court of Criminal Appeals (“CCA”), and while his case was pending, that court ordered the parties to file supplemental briefs regarding this Court’s decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The CCA affirmed the circuit court’s judgment and also denied his *Atkins* claim.² Pet. App. 450a–98a (*Jenkins v. State*, 972 So. 2d 111 (Ala. Crim. App. 2004)).

The Alabama Supreme Court granted certiorari, held that the CCA erred in concluding that one of his claims was procedurally barred, and remanded his case for further proceedings. Pet. App. 443a–49a (*Ex parte Jenkins*, 972 So. 2d 159, 165 (Ala. 2005)). The CCA again affirmed the circuit court’s judgment, and the Alabama Supreme Court denied certiorari. *Jenkins v. State*, 972 So. 2d 165 (Ala. Crim. App. 2005). This Court also denied certiorari. *Jenkins v. Alabama*, 552 U.S. 1167 (2008) (mem.).

² Courts previously employed the term “mental retardation” in addressing *Atkins* claims, but we will follow this Court’s decision in *Hall v. Florida*, 572 U.S. 701, 704 (2014), by using the term “intellectual disability” except when quoting or discussing earlier court decisions and documents in the record.

Jenkins next filed a petition for writ of habeas corpus and an amended habeas petition in the Northern District of Alabama. Docs. 1, 12. Respondent filed his answer to Jenkins's amended petition, the state-court record, and the habeas checklist. Docs. 20, 21, 22. Jenkins then filed a second Rule 32 petition in state court and successfully moved the district court to stay and hold his proceeding in abeyance. Docs. 14, 25.

The state circuit court summarily dismissed Jenkins's second Rule 32 petition, and the CCA affirmed that court's judgment. *Jenkins v. State*, 105 So. 3d 1234, 1239 (Ala. Crim. App. 2011). The Alabama Supreme Court affirmed the CCA's decision as to the one issue on which it granted certiorari and otherwise denied certiorari. *Ex parte Jenkins*, 105 So. 3d 1250 (Ala. 2012). This Court denied certiorari. *Jenkins v. Alabama*, 568 U.S. 1252 (2013) (mem.).

Jenkins returned to federal court and filed an amendment to his amended habeas petition. Doc. 36. Respondent filed his answer to Jenkins's amendment, the state-court record from Jenkins's litigation of his second Rule 32 petition, and an updated habeas checklist. Docs. 40, 42, 43.

On March 31, 2015, the district court entered a Memorandum Opinion denying Jenkins's *Atkins* claim and his request for an evidentiary hearing on the same. Pet. App. 389a–442a. On August 31, 2016, the district court entered a Memorandum Opinion denying and dismissing Jenkins's amended habeas petition. Pet. App. 042a–388a. In a separate Order of Dismissal, the court declined to grant Jenkins a certificate of appealability. Doc. 58.

Jenkins moved the Eleventh Circuit to grant him a certificate of appealability. The court granted a certificate of appealability as to two of his claims but otherwise denied his motion. After briefing and oral argument, the court of appeals affirmed the district court's judgment. *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 936 F.3d 1252 (11th Cir. 2019). The court vacated its opinion and substituted it with a new opinion affirming the district court's judgment. Pet. App. 001a–041a (*Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248 (11th Cir. 2020)). The court denied his petition for panel rehearing and rehearing en banc. Pet. App. 579a.

REASONS FOR DENYING THE PETITION

This Court should not grant certiorari on the question presented by Jenkins. His claim that the Eleventh Circuit's method of adjudicating his *Atkins* claim conflicts with *Wilson* and *Brumfield* and creates a circuit split is meritless. In resolving his claim, the court followed *Wilson* and this Court's other precedents by looking to the last state court—the CCA—that set forth reasons for denying his claim and determining whether that court's decision 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)(2). Far from inventing or manufacturing reasons to deny his claim, the court followed *Brumfield* by identifying the CCA's reasons for denying his claim and then thoroughly reviewing the entire state-court record to determine whether those reasons were, in fact, reasonable. And, the court correctly found that they were. The court's decision, therefore, neither conflicts with this

Court's precedents nor creates a circuit split. At bottom, Jenkins simply disagrees with the court's resolution of his claim, and as such, his petition should be denied.

In addition, this case is a poor vehicle for deciding whether the Eleventh Circuit's method of applying 28 U.S.C. § 2254(d) to state-court decisions conflicts with *Wilson* and *Brumfield* because Jenkins is not intellectually disabled. His petition should be denied for that reason as well.

I. The Eleventh Circuit's decision does not conflict with *Wilson* or *Brumfield*.

Jenkins seeks certiorari review of the Eleventh Circuit's denial of his claim that he is intellectually disabled and, thus, ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). He contends that the Eleventh Circuit's method of adjudicating his *Atkins* claim conflicts with *Wilson v. Sellers*, 138 S. Ct. 1188 (Apr. 17, 2018), and *Brumfield v. Cain*, 576 U.S. 305 (2015), and resulted in the court erroneously denying him an evidentiary hearing. Because his argument is without merit, this Court should deny certiorari.

A. The Eleventh Circuit's methodology in resolving Jenkins's *Atkins* claim is in keeping with *Wilson*.

According to Jenkins, federal courts, in light of *Wilson*, must confine their review of a state court's denial of a claim to the exact reasoning set forth in the state court's decision. He contends that the Eleventh Circuit violated *Wilson* by looking beyond the "four corners" of the CCA's decision denying relief on his *Atkins* claim. Pet. 5. Jenkins's argument is based on a misreading of the Court's limited holding in

Wilson, and he fails to show any conflict between *Wilson* and the Eleventh Circuit’s methodology in adjudicating his claim.

The Eleventh Circuit’s decision faithfully applied *Wilson* in conjunction with this Court’s other longstanding precedents. The court identified the CCA’s reasons for denying Jenkins’s *Atkins* claim, properly reviewed the state-court record in its entirety to determine whether those reasons were reasonable, and correctly held that they were. Pet. App. 026a–032a.

In conducting that analysis, the Eleventh Circuit properly accorded the deference that is due to the CCA’s decision under the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”). AEDPA “instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court’s decision only if it was ‘based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(d)(2)); see also *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (“[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d).”).

A state court’s factual determinations are not objectively unreasonable “merely because the federal habeas court would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301 (2010). Nor will habeas relief be

granted where “reasonable minds reviewing the record might disagree” about the state court’s factual determinations. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006).

Habeas relief likewise will not be granted “unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA.” *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (emphasis in original). Thus, if a “fairminded jurist could agree” that even one of the factual determinations supporting the state court’s decision is reasonable, then the state court’s remaining factual determinations are “beside the point.” *Shinn v. Kayer*, 141 S. Ct. 517, 524 (Dec. 14, 2020); *see also Parker v. Matthews*, 567 U.S. 37, 42 (2012) (“That ground was sufficient to reject Matthews’ claim, so it is irrelevant that the [state] court also invoked a ground of questionable validity.”).

So, to determine whether a state court’s decision is “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)(2), a federal court must, of course, thoroughly review the evidence in the state-court record. *See, e.g., Brumfield*, 576 U.S. at 314 (“[O]ur examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.”); *McDaniels v. Kirkland*, 813 F.3d 770, 780 (9th Cir. 2015) (en banc) (“Federal courts sitting in habeas may consider the entire state-court record, not merely those materials that were presented to the state appellate courts.”). That is precisely the method of review that the Eleventh Circuit applied in adjudicating Jenkins’s *Atkins* claim. Pet. App. 026a–032a.

Wilson did not create a different methodology that federal courts must employ in reviewing state court factual determinations under 28 U.S.C. § 2254(d)(2). There, the Court was presented with the narrow question of how a federal court should address a case where a lower state court gave reasons for its decision but a higher state court did not. 138 S. Ct. at 1192. The Court held that “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.” *Id.*

Jenkins reads *Wilson* to stand for far more than the case’s limited holding. He specifically contends that the Eleventh Circuit’s methodology runs afoul of *Wilson* because the court failed to “confine[] its review to the four corners of the” state court’s decision. Pet. 5. But, *Wilson* did not hold that federal courts, in determining whether a state court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court, may consider only a state court’s factual determinations as they are worded in its decision and not the evidence in the state-court record supporting the state court’s reasoning. *See, e.g., Thompson v. Skipper*, 981 F.3d 476, 483–84 (6th Cir. 2020) (Nalbandian, J., concurring) (“Federal courts have never been required to confine their habeas analysis to the exact reasoning that the state court wrote, and ... *Wilson* ... [does not] compel[] us to change our analysis.”). Nor did *Wilson* address “the specificity or thoroughness with which state courts must spell out their reasoning to be entitled to AEDPA deference or the level of scrutiny that [federal courts] are to apply to the reasons that they give.” *Meders v.*

Warden, Ga. Diagnostic Prison, 911 F.3d 1335, 1350 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 394 (Oct. 15, 2019) (mem.).

Indeed, under Jenkins’s proposed reading, *Wilson* would be inconsistent with longstanding precedent of this Court in at least three respects. First, federal courts reviewing a state court decision under 28 U.S.C. § 2254(d) must not be “read[y] to attribute error” to a state court. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Instead, federal courts are to “presum[e] that state courts know and follow the law.” *Id.* Also, such skeptical review is “incompatible with § 2254(d)’s highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Id.* (cleaned up).

Second, this Court repeatedly has held that federal courts “have no power to tell state courts how they must write their opinions” or “impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim.” *Coleman v. Thompson*, 501 U.S. 722, 739 (1991); *see also Johnson v. Williams*, 568 U.S. 289, 300 (2013) (“[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts.”). The courts of appeals follow this Court’s teaching. *See, e.g., Sheppard v. Davis*, 967 F.3d 458, 469 (5th Cir. 2020) (“[W]e do not sit to grade the thoroughness of a state court’s opinion.”); *Meders*, 911 F.3d at 1350 (“This Court has stressed that in applying AEDPA deference federal courts are not to take a magnifying glass to the state court opinion or grade the quality of it.”); *Grant v. Royal*, 886 F.3d 874, 905–06 (10th Cir. 2018) (“On habeas review, we properly eschew the role of strict English teacher, finely dissecting every

sentence of a state court’s ruling to ensure all is in good order.”); *Zuluaga v. Spencer*, 585 F.3d 27, 31 (1st Cir. 2009) (“[I]t would elevate form over substance to impose some sort of requirement that busy state judges provide case citations to federal law (or corresponding state law) before federal courts will give deference to state court reasoning. Such formalism would be contrary to the congressional intent expressed in AEDPA.”); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (rejecting “grading papers” approach in habeas review).

Third, AEDPA deference must be accorded to state court decisions that contain no rationale or reasoning whatsoever. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). For that reason, “[i]t would be irrational to afford deference to a decision with no stated explanation but not afford deference to one that states reasons, albeit not as thoroughly as it could have.” *Meders*, 911 F.3d at 1351; *see also Santellan v. Cockrell*, 271 F.3d 190, 194 (5th Cir. 2001) (“It would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not.”).

Simply put, Jenkins’s reading of *Wilson* does not square with this Court’s precedents. *See, e.g., Sheppard*, 967 F.3d at 467 n.5 (“[I]t is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court’s ultimate *ruling* rather than to its specific *reasoning*.”) (emphasis in original); *Meders*, 911 F.3d at 1351 (“Only the clearest indication that *Wilson* overruled the Supreme Court’s previous decisions, such as *Johnson*, would warrant ignoring those decisions, and there is no indication

at all that *Wilson* did so.”). Moreover, the Eleventh Circuit properly followed this Court’s precedents in adjudicating Jenkins’s *Atkins* claim while also applying *Wilson*’s “look-through” presumption by focusing on the last reasoned state court decision. His claim that the court’s decision is contrary to *Wilson* and created a circuit split, therefore, is meritless and unworthy of review.

B. The Eleventh Circuit’s methodology in resolving Jenkins’s *Atkins* claim was identical to that employed in *Brumfield*.

Jenkins contends that the methodology that the Eleventh Circuit employed in adjudicating his *Atkins* claim conflicts with the methodology used by the Court in resolving the *Atkins* claim that was at issue in *Brumfield*. Pet. i. 4–6, 17. He is mistaken. Because the Eleventh Circuit followed *Brumfield* and this Court’s other precedents in resolving Jenkins’s claim, certiorari should be denied.

As the Eleventh Circuit correctly explained:

Alabama courts have followed [*Atkins*’s] tripartite definition, adopting what they consider the “broadest” definition of mental retardation for *Atkins* purposes:

[A] defendant, to be considered mentally retarded, must have significantly sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).

Pet. App. 027a (quoting *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)).

As a critical threshold matter, Jenkins misrepresents this Court’s holding in *Brumfield*. Pet. 5. He argues that this Court held “that the state court unreasonably denied an intellectual-disability hearing when the denial rested on a record developed

pre-*Atkins*.” *Id.* True, the record before the state court was developed before *Atkins* was decided, but that fact was not central to the Court’s holding. And, to be clear, this Court did not hold in *Brumfield* and, indeed, has never held that a court cannot resolve a petitioner’s *Atkins* claim based on a pre-*Atkins* record.

Instead, the Court held that the state court’s denial of Brumfield’s request for an evidentiary hearing on his *Atkins* claim was based on an unreasonable determination of the facts in light of the evidence that was presented in the state court proceedings, under 28 U.S.C. § 2254(d)(2). 576 U.S. at 312–15. The Court reached that result by concluding that both of the factual determinations that the state court made in support of its denial of an evidentiary hearing were objectively unreasonable. *Id.* at 314; *see also Wetzel*, 565 U.S. at 525 (holding that habeas relief will not be granted “unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA”) (emphasis in original).

With regard to the first of the three *Atkins* prongs, the state court, in denying an evidentiary hearing, determined that “Dr. Bolter in particular found [Brumfield] had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ.” 576 U.S. at 310. Having thoroughly reviewed the state-court record, this Court found that the state court’s factual determination was unreasonable. *Id.* at 314–16. Specifically, the Court held that the state court’s determination was unreasonable because there was no evidence in the record that Dr. Jordan or any other mental-health professional “came up” with a higher IQ score for Brumfield. *Id.* at 316. The Court further concluded that the state court’s reliance on the sole recorded IQ score

of 75 in the record to deny Brumfield an evidentiary hearing was an unreasonable determination of the facts. *Id.*

Regarding the second *Atkins* prong, the state court, in denying a hearing, stated only, “I do not think that the defendant has demonstrated impairment based on the record in adaptive skills.” *Id.* at 310. In holding that the state court’s factual determination on that count likewise was unreasonable, the Court concluded that “the evidence in the state-court record provided substantial grounds to question Brumfield’s adaptive functioning.” *Id.* at 317, 319.

Regarding the third *Atkins* prong, the Court observed that the state court “never made any finding that Brumfield had failed to produce evidence suggesting he could meet this age-of-onset requirement. There is thus no determination on that point to which a federal court must defer in assessing whether Brumfield satisfied § 2254(d).” *Id.* at 323. Upon de novo review, the Court found that “the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield’s disability manifested before adulthood.” *Id.*

The Court concluded that Brumfield satisfied his burden of showing that the state court’s decision was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Id.* at 307, 324 (quoting 28 U.S.C. § 2254(d)(2)). But again, the Court reached that result only after identifying the state court’s reasons for its denial of Brumfield’s request for a hearing and then reviewing the evidence in the state-court record to determine whether those reasons were reasonable.

Here, the CCA reasoned as follows in denying Jenkins's *Atkins* claim:

Neither is there any indication that Jenkins's death sentence violates the United States Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). The United States Supreme Court held in *Atkins v. Virginia*, that it was cruel and unusual punishment in violation of the Eighth Amendment to execute a mentally retarded individual. Though Alabama has not enacted legislation addressing the holding in *Atkins*, our Supreme Court in *Ex parte Perkins*, 808 So. 2d 1143 (Ala. 2001), has applied the most liberal view of mental retardation. To be considered mentally retarded a defendant must have a significantly subaverage intellectual functioning (an IQ score of 70 or below), significant deficits in adaptive behavior, and the problems must have manifested themselves before the defendant reached the age of 18. *Perkins*.

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. 493a–94a (*Jenkins*, 972 So. 2d at 154–55). The Eleventh Circuit applied precisely the same methodology in adjudicating Jenkins's *Atkins* claim that this Court employed in *Brumfield*. Pet. App. 026a–032a.

Regarding the first prong of *Atkins*, the CCA made the factual determination that Jenkins does not have significantly subaverage intellectual functioning and cited his IQ score of 76 on an intelligence test that was administered to him as an adult in support thereof. Pet. App. 494a (*Jenkins*, 972 So. 2d at 155). To determine whether the CCA's factual determination regarding his intellectual functioning was reasonable, the Eleventh Circuit carefully reviewed the evidence in the state-court

record. *Id.* at 027a–029a. In conducting that review, the court found that the record not only reveals that Jenkins obtained an IQ score of 76 on a test that was administered to him by Dr. Kirkland but also that the record reveals that “neither of the clinicians who testified about Jenkins’s intellectual ability in the Rule 32 hearing opined that he was mentally retarded.”³ *Id.* at 028a. In addition, the court found that “no clinical assessments in the entire record of these proceedings has found that Jenkins has mental retardation or intellectual disability.” *Id.* at 029a. And, as the court recounted, the evidence in the record reveals that Jenkins obtained IQ scores of 83, 81, and 86 before the age of eighteen. *Id.* at 031a.

Far from inventing reasons to deny Jenkins’s *Atkins* claim, the Eleventh Circuit properly reviewed the entire state-court record to determine whether the CCA’s factual determination regarding his intellectual functioning was reasonable, just as this Court did in assessing the reasonableness of the state court’s factual determinations in *Brumfield*. The court correctly found that the CCA’s factual determination on that front was reasonable.

Because the Eleventh Circuit’s method of reviewing the reasonableness of the CCA’s factual determination regarding Jenkins’s intellectual functioning was entirely in keeping with *Brumfield* and this Court’s other precedents and because the

³ Dr. Karl Kirkland, a psychologist, evaluated Jenkins at the request of the State during Jenkins’s Rule 32 postconviction proceeding. Doc. 22–22 at R. 610, 617. Dr. Kirkland administered the Wechsler Adult Intelligence Scales, Revised, (“WAIS–R”) to Jenkins, and he generated an IQ score of 76. *Id.* at 624. Dr. Kirkland testified that Jenkins’s performance on that test reveals that his intelligence falls “in the range of borderline intellectual functioning which is between mild mental retardation and low average intellectual functioning.” *Id.* Dr. David Lisak, a psychologist and Jenkins’s expert witness at that hearing, agreed with Dr. Kirkland’s conclusion that his intelligence falls within the borderline range of intellectual functioning. Doc. 22–21 at R. 467–68.

court correctly held that the CCA's determination was reasonable, Jenkins cannot show that the court erred in denying habeas relief as to his claim, much less an evidentiary hearing. *See, e.g., Shinn*, 141 S. Ct. at 524 (holding that if a "fairminded jurist could agree" that even one of the factual determinations supporting the state court's decision is reasonable, then the state court's remaining factual determinations are "beside the point"); *Wetzel*, 565 U.S. at 525; *Parker*, 567 U.S. at 42. This Court, thus, need not review the Eleventh Circuit's holding regarding the reasonableness of the CCA's factual determinations as to the second and third prongs of *Atkins*. But, we will address that court's decision on those fronts out of an abundance of caution.

Regarding the second prong of *Atkins*, the CCA made the factual determination that Jenkins does not have significant or substantial deficits in adaptive functioning, specifically highlighting his employment record and social skills. Pet. App. 494a (*Jenkins*, 927 So. 2d at 155). Having thoroughly reviewed the state-court record, the Eleventh Circuit correctly concluded that the "record evidence is inconsistent with a substantial deficit in the area of work." *Id.* at 030a. The court further concluded that the record reveals that Jenkins does not have any "serious difficulties" in the area of social skills, as exemplified by, among other things, his ability to "communicate well enough to solicit an alibi and to sell his car, including writing out a bill of sale." *Id.* The court correctly concluded, based on its review of the evidence in the state-court record, that the CCA's factual determination that Jenkins does not have significant or substantial deficits in adaptive functioning was reasonable. *Id.* at 030a–031a.

With regard to the third prong of *Atkins*, the Eleventh Circuit held that the CCA did not pass on the issue of whether Jenkins’s alleged intellectual and adaptive deficits manifested before the age of eighteen. *Id.* at 031a. Just as this Court did in *Brumfield*, 576 U.S. at 323, the court properly conducted de novo review. *Id.* The court thoroughly reviewed the evidence in the state-court record and correctly concluded that Jenkins cannot satisfy *Atkins*’s third component, relying heavily on his IQ scores of 83, 81, and 86 that he achieved during his adolescence. *Id.*

The Eleventh Circuit correctly followed the method that this Court employed in *Brumfield* and its other precedents in determining whether, under 28 U.S.C. § 2254(d)(2), the CCA’s decision denying Jenkins’s *Atkins* claim was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Certiorari accordingly should be denied.

II. This case is a poor vehicle for deciding whether the Eleventh Circuit’s method of applying 28 U.S.C. § 2254(d) to state-court decisions conflicts with *Wilson* and *Brumfield* because Jenkins is not intellectually disabled.

This case is a poor vehicle for deciding whether the Eleventh Circuit’s application of AEDPA to state-court decisions conflicts with *Wilson* and *Brumfield* because the evidence in the state-court record demonstrates that Jenkins is not intellectually disabled. For that additional reason, certiorari should be denied.

A. Jenkins did not exhibit significantly subaverage intellectual functioning before or after the age of eighteen.

Relying on *Brumfield*, Jenkins and his *amici* argue that his IQ score of 76 cannot preclude a finding of intellectual disability. But there was only one IQ score

at issue in Brumfield's case—his IQ score of 75. 576 U.S. at 316 (“Nor was there evidence of any higher IQ test score that could render the state court’s determination reasonable.”). Here, there are at least four additional IQ scores in the state-court record, all of which are above 80. The evidence in the record, therefore, establishes that Jenkins did not suffer from significantly subaverage intellectual functioning before eighteen or as an adult.

Jenkins first was evaluated on February 25, 1980, when he was twelve. Doc. 22–27 at C. 955. During that evaluation, Jenkins was administered the Wechsler Intelligence Scale for Children–Revised, and he generated an IQ score of 83 on that test. *Id.* He also was administered the Peabody Picture Vocabulary Test and the Raven Progressive Matrices Test, and he generated an IQ score of 90 on each of those tests. *Id.* Significantly, the clinician who administered the tests to Jenkins was instructed to mark whether his “intellectual capacity” was “below average,” “borderline,” or “average,” and the record reveals that he or she marked that Jenkins’s intellectual capacity was “average.” *Id.*

Jenkins next was evaluated by Dr. Martha L. Barkey, a clinical psychologist, in September of 1981, when he was fourteen. *Id.* at 845–48. Dr. Barkey administered the Shipley Institute of Living Scale and the Peabody Picture Vocabulary Test to Jenkins, and he generated an IQ score of 81 on the former and an IQ score of 86 on the latter. *Id.* at 845. In her report, Dr. Barkey stated the following regarding her assessment of Jenkins’s intellectual functioning:

Mark is functioning in the Dull-Normal range of intelligence according to the [Shipley] Institute of Living Scale and the Peabody Picture

Vocabulary Test. Mark appears to be suffering from a definite learning disability.... Mark is in need of special education designed for the emotionally disturbed adolescent with definite learning disabilities.

Id. at 846. In summarizing her findings and conclusions from her psychological evaluation of Jenkins, Dr. Barkey stated:

Testing suggests an innate dull normal or lower level of average normal intelligence. However, his difficulty with verbal comprehension and ability to concentrate suggest a learning disability, possibly a factor of emotional interference in his cognitive processes. *Therefore, in his present emotional state he may appear to be less intelligent than is actually the case.*

Id. at 847 (emphasis added). Thus, just like the clinician who evaluated Jenkins in 1980, Dr. Barkey did not find that Jenkins has significant limitations in intellectual functioning, nor did she suggest that he might be mentally retarded. *Id.* Instead, she concluded that he is functioning within the “dull normal or lower level of average normal intelligence” and that his emotional problems may make him “appear to be less intelligent than is actually the case.” *Id.* at 846–47.

Jenkins next was evaluated after he was arrested for the capital murder of Tammy Hogeland, this time by a Lunacy Commission at the Taylor-Hardin Secure Medical Facility. Doc. 22–25 at C. 586. Dr. Wolfram Glaser, one of the three psychiatrists who was assigned to evaluate Jenkins, concluded that he falls within the borderline range of intellectual functioning and noted that his performance on a “thirty-item structured interview” test suggests that he was not suffering from any “substantial cognitive impairment.” *Id.* at 558, 586. Dr. James F. Hooper, the then-Chief of Medical Services at Taylor-Hardin, concluded that Jenkins was “limited in

education and intelligence” but was not suffering from “any significant cognitive impairments.” *Id.* at 588. After Dr. Kamal Nagi, the third member of the Lunacy Commission, introduced himself to Jenkins and explained the purpose of their meeting, Jenkins stated, “I’m getting tired of talking every time about the same damn thing, and I’m not going to talk anymore.” *Id.* at 589. Dr. Nagi terminated his contact with Jenkins and, thus, was unable to render an opinion regarding his intellectual functioning. *Id.* But Drs. Glaser and Hooper were able to evaluate Jenkins, and neither of them suggested, much less found, that he is mentally retarded.

Finally, Dr. Kirkland, a psychologist and the State’s Rule 32 expert, administered the WAIS–R to Jenkins, and he generated an IQ score of 76. Doc. 22–22 at R. 610, 617, 624. Dr. Kirkland testified that Jenkins’s performance on that test reveals that his intellectual functioning falls “in the range of borderline intellectual functioning which is between mild mental retardation and low average intellectual functioning.” *Id.* at 624. Dr. David Lisak, a psychologist and Jenkins’s expert witness, agreed that his intelligence falls within the borderline range of intellectual functioning. Doc. 22–21 at R. 467–68.

Jenkins has been the subject of multiple evaluations over the course of his life, and none of the mental-health professionals who have evaluated him have suggested, much less concluded, that he has significantly subaverage intellectual functioning. And, of particular note, Jenkins’s IQ score of 76 as an adult is his *lowest* IQ score in the record. Indeed, his IQ scores of 90, 86, 83, and 81 strongly refute any suggestion by Jenkins and his *amici* that he might be intellectually disabled.

B. Jenkins did not exhibit significant or substantial deficits in adaptive functioning before or after the age of eighteen.

The evidence in the state-court record likewise establishes that Jenkins, contrary to his assertions and those of his *amici*, did not exhibit significant or substantial deficits in adaptive functioning before or after the age of eighteen.

To begin, Jenkins called his close friend, Lonnie Seal, at the penalty phase of his trial, and Seal's compelling testimony reveals that Jenkins does not have significant or substantial limitations in adaptive functioning. Seal testified that he met Jenkins when he started working at the garage where Jenkins was employed in California. Doc. 22–9 at R. 1719. He described their job duties as consisting of “mostly heavy engine work,” and he stated that Jenkins did whatever their boss needed him to do, from driving a wrecker to installing engines. *Id.* at 1720. He testified that they became “well acquainted” and added that Jenkins regularly stopped by his home to visit with him, his wife, and their child. *Id.*

Seal testified that he and his wife decided to move to Alabama to be closer to relatives after they learned that she was pregnant with their second child. *Id.* at 1721. Jenkins volunteered to assist them with their move. *Id.* Jenkins drove their truck and attached trailer from California to Alabama while Seal drove himself, his wife, and their child to Alabama in his wife's car. *Id.* Once they arrived in Alabama, the Seals invited Jenkins to stay with them, and he accepted their offer. *Id.* at 1722. It took Seal “several weeks” to find a job, but Jenkins obtained a job just two days after they arrived in Alabama. *Id.*

Asked whether Jenkins paid rent and otherwise contributed to their household, Seal responded, “Yes, sir. He paid us about thirty dollars a week rent, and then he was constantly contributing, buying groceries, [doing] whatever he could do. He was always offering more.” *Id.* at 1722–23. Jenkins lived with them for approximately three weeks and then moved out of their residence because “he got his own mobile home in Vandiver.” *Id.* at 1723. Asked whether they had close contact with Jenkins after he left their home, Seal replied, “Yes, sir. I saw Mark about every day.” *Id.* He explained that Jenkins stopped by their house almost every day in the evening after his work shift to visit with him and his family. *Id.*

Sherry Seal’s testimony at Jenkins’s Rule 32 hearing was similar to her husband’s penalty-phase testimony. Asked to describe Jenkins’s role in her family’s move to Alabama, she stated that her “husband was driving a truck, pulling a trailer. I had my personal vehicle with myself and my child. At any given time, he was asked either to drive the truck or the car.” Doc. 22–19 at R. 51. She testified that he was of great assistance to them and added that “[h]e contributed to the financial aspects of the trip as far as gas or soft drinks. He paid his own way.” *Id.* at 52.

After they arrived in Alabama, the Seals and Jenkins lived in a three-bedroom mobile home. *Id.* at 53–54. She testified that Jenkins was the sole provider for their family for “at least two weeks.” *Id.* at 55. Asked whether she has any idea what would have happened to her family if they had not had Jenkins’s support, she replied, “No, and I didn’t want to think about it at the time.” *Id.*

The testimony of Mr. and Mrs. Seal reveals that Jenkins has good adaptive functioning in the areas of communication, self-care, home living, social and personal skills, use of community resources, and self-direction. Jenkins volunteered to drive their truck and attached trailer from California to Alabama and successfully completed that task. He then wisely accepted their offer to live with them until he found a home of his own, which he did just three weeks later. Unlike Mr. Seal, who had to spend weeks searching for a job, Jenkins found a job just two days after they arrived in Alabama, and he used the money that he earned from that job to pay rent, buy groceries, and otherwise support the household that he shared with the Seals. Jenkins stayed in contact with the Seals after he moved into his own home, visiting them in the evenings after completing his work duties. Thus, their testimony reveals that Jenkins could and did live independently, that he provided for his own needs and the needs of others, and that he had no difficulties in the above-named skill areas.

Moreover, Jenkins's behavior after he committed the crime reveals that he does not have significant or substantial deficits in adaptive functioning. In the early-morning hours of April 18, 1989, Jenkins kidnapped, robbed, and murdered Tammy Hogeland. Doc. 22–3 at R. 522–26; Doc. 22–4 at R. 672–73. Later that morning, Jenkins approached Michael Brooks, who was working as a mechanic at the Alford Avenue Shell in Birmingham, and asked Brooks if he was willing to buy his car for \$100 because, as he explained, he needed to travel to California to visit his ailing mother. Doc. 22–6 at R. 1026, 1032. After Brooks agreed to purchase the car for \$80, Jenkins produced a bill of sale and signed the car over to him. *Id.* at 1026–32.

Jenkins's exchange with Brooks reveals that he was able to fabricate a plausible reason for needing money and demonstrates that he understands proper sales transactions in light of the fact that he had the bill of sale with him and signed it over to Brooks. Jenkins's encounter with Brooks also demonstrates his ability and willingness to bargain over a price to achieve what he wanted—in this case, cash that he could use to flee Alabama.

Jenkins next persuaded Reba Wood, who also worked at the Alford Avenue Shell, to take him to the Greyhound Bus Station. *Id.* at 1035–39. Jenkins boarded a bus leaving Birmingham at approximately 12:00 p.m. *Id.* On the following day, Jenkins arrived in Houston, Texas, where his bus ticket was at the end of its use. *Id.* at 1157–58. So, he hitchhiked to Los Angeles, California. *Id.* at 1106. He ultimately was arrested there some 22 days after the offense. *Id.*

Jenkins's flight from Alabama to California and his ability to avoid arrest for three weeks after he committed the crime further demonstrate that he has good adaptive functioning. By way of example, Jenkins's encounters with Brooks and Wood and his ability to successfully hitchhike from Texas to California demonstrate good adaptive functioning in the areas of communication, social and personal skills, and self-direction. And, his use of a bus to flee Alabama demonstrates his ability to use community resources.

In sum, the evidence in the state-court record reveals that Jenkins is not intellectually disabled. Certiorari should, therefore, be denied because his case is a

poor vehicle for deciding whether the Eleventh Circuit's method of applying 28 U.S.C. § 2254(d) to state-court decisions conflicts with *Wilson* and *Brumfield*.

CONCLUSION

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

Respectfully submitted,

STEVE MARSHALL
Attorney General

Edmund G. LaCour Jr.
Solicitor General

s/ Henry M. Johnson
Henry M. Johnson*
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Henry.Johnson@AlabamaAG.gov
*Counsel of Record

Counsel for Respondent