No. 20-6972

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

REPLY BRIEF FOR PETITIONER

Joseph T. Flood
SHELDON & FLOOD, P.L.C.
10621 Jones Street
Suite 301A
Fairfax, VA 22030

Mridula S. Raman
Counsel of Record
Ty Alper
Elisabeth A. Semel
DEATH PENALTY CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, CA 94720
(510) 642-5748
mraman@berkeley.edu

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONER

The Eleventh Circuit has once again deployed a form of AEDPA review that this Court and other circuits have rejected: The court refused to train its attention on the state court's specific reasoning and combed the record for different grounds upon which to deny relief. *See, e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018); *Brumfield v. Cain*, 576 U.S. 305, 313 (2015). Because of that flawed methodology, and despite a record replete with evidence suggesting intellectual disability, the Eleventh Circuit denied Petitioner Mark Jenkins an evidentiary hearing on his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Respondent erroneously asserts that the Eleventh Circuit's decision does not conflict with this Court's decisions. He does not even attempt to reconcile the Eleventh Circuit's aberrational approach with that of the many circuits that properly focus on the state court's reasoning rather than undertaking their own free-floating inquiry. Instead, Respondent misstates the relevant AEDPA analysis and cites pieces of the record with no context that only emphasize the need for a hearing in this case.

The Eleventh Circuit's AEDPA review defies this Court's precedent, cements a circuit split, and is outcome-determinative of whether Jenkins is afforded an *Atkins* hearing. This Court should therefore grant certiorari.

I. The Eleventh Circuit Has Refused to Confine Its AEDPA Review to the State Court's Reasoning, Disregarding This Court's Precedent and Diverging from Other Circuits.

The Eleventh Circuit has embraced a rogue form of AEDPA review that defies this Court's clear command in *Wilson* and earlier precedent. Respondent neither

contests that the Eleventh Circuit routinely looks beyond the state court's reasoning, nor meaningfully engages with the circuit split that has resulted.

Respondent reads *Wilson* in a way that eviscerates this Court's holding. He suggests that a federal court need not limit its review of a decision that offers reasons to those specific reasons, but should instead focus on the state court's ultimate conclusion. Br. Opp'n 9–12 (citing, e.g., *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1351 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 394 (2019)).[1] But that position nullifies *Wilson*. There is no value in *Wilson*'s "look-through" approach if, regardless of the state court's reasoning, the federal court is free to invent new grounds upon which to deny relief under AEDPA. *See* Pet. 5, 24.

Respondent similarly submits that it is inconsistent to defer to summary state-court rulings but not to state-court rulings that include reasoning. *See* Br. Opp'n 11. However, a state-court decision, summary or not, warrants deference when reasonable, and no state-court decision warrants deference when unreasonable. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 98–99 (2011). *Wilson* demands precisely this approach: A state-court decision with reasoning receives deference only if that reasoning passes muster under 28 U.S.C. § 2254(d). *See Wilson*, 138 S. Ct. at 1192. Again, Respondent simply disagrees with this Court's decision.

Despite Respondent's protestations, *see* Br. Opp'n 10–11, when properly construed *Wilson* furthers AEDPA's goals of comity and federalism. *Wilson*'s

[1] Elsewhere Respondent takes the inconsistent position that this Court should deny certiorari because the Eleventh Circuit "faithfully applied" *Wilson* and *Brumfield* by "identif[ying] the CCA's reasons for denying Jenkins's *Atkins* claim [and] properly review[ing] the state-court record in its entirety to determine whether those reasons were reasonable . . . ." *See* Br. Opp'n 7; *see also, e.g.*, Br. Opp'n 5.

approach does not instruct state courts how to write opinions. *See Richter*, 562 U.S. at 99 ("Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court."). In fact, *Wilson* respects state courts by accepting that they mean what they say when they explain their opinions. *See Wilson*, 138 S. Ct. at 1196–97 (clarifying 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"). Nothing Jenkins argues requires state courts to provide more detail than they otherwise would; federal courts must simply take state-court opinions as they are and review them in accord with this Court's precedent. *See* Pet. 15–17.

Because his quarrel is with *Wilson*, Respondent does not dispute that the Eleventh Circuit's general practice is to venture beyond the state court's opinion and supply its own reasons to deny relief under § 2254(d). *See* Br. Opp'n 6–18. Indeed, Respondent cites recent circuit case law to contest Jenkins's reading of *Wilson*, not only acknowledging but defending the Eleventh Circuit's approach to AEDPA review. *See, e.g.*, Br. Opp'n 11–12 (repeatedly citing *Meders*, 911 F.3d at 1351).[2]

Finally, beyond a cursory denial, *see* Br. Opp'n 12, Respondent fails to address the circuit split the Eleventh Circuit has created. Other circuits have followed this Court's clear command. *See* Pet. 17–19; *see also, e.g.*, *Thompson v. Skipper*, 981 F.3d 476, 480 (6th Cir. 2020) (quoting *Wilson* and post-*Wilson* circuit precedent directing

[2] At least two other pending petitions for writs of certiorari present questions concerning the Eleventh Circuit's defiance of *Wilson*, attesting to the court's errant practice. *See* Pet., *Esposito v. Ford* (2021) (No. 20-7185); Pet., *Tollette v. Ford* (2021) (No. 20-6876). The need for review is especially compelling in this case, given that Jenkins has not even had a hearing on his *Atkins* claim.

federal courts to "review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable" (internal quotation marks omitted)). Apart from citing a concurrence rejected by a Sixth Circuit majority and dictum from the Fifth Circuit, *see, e.g.*, *Sheppard v. Davis*, 967 F.3d 458, 467 n.5 (5th Cir. 2020), *petition for cert. filed* (U.S. Dec. 21, 2021) (No. 20-6786), Respondent does not contest the fact that circuits other than the Eleventh Circuit have, since *Wilson*, conducted AEDPA review as this Court has directed, *see* Br. Opp'n 9–11.

II. The Eleventh Circuit Concluded Incorrectly That § 2254(d)(2) Precludes Relief by Inventing New Reasons to Support the State Court's Conclusion and by Ignoring *Brumfield*.

The Eleventh Circuit was able to affirm on AEDPA review only because the court defied *Wilson*'s directive to simply review the state court's reasons and failed to apply the holding in *Brumfield*. Respondent nevertheless asserts that the Eleventh Circuit here "faithfully applied *Wilson*" by "properly review[ing] the state-court record in its entirety to determine whether those reasons were reasonable, and correctly held that they were." Br. Opp'n 7. However, to reach that conclusion, Respondent misidentifies the relevant analysis under § 2254(d)(2), misunderstands how *Wilson* constrains that AEDPA analysis, and misstates the relevant holding from *Brumfield*. Had the Eleventh Circuit complied with *Wilson* and *Brumfield*, it would have concluded that § 2254(d)(2) poses no bar to relief.

To defend the Eleventh Circuit's review in this case, Respondent first asserts that *Wilson* and related precedent do not limit the federal habeas court's review of the record under § 2254(d)(2). Br. Opp'n 9–12. Specifically, Respondent fixates on an

issue that is not in dispute: that a reviewing court must "thoroughly review the evidence in the state-court record" to assess whether a state-court finding has enough evidentiary support to survive scrutiny under § 2254(d)(2). *See, e.g.*, Br. Opp'n 8, 13. Jenkins agrees that, when assessing whether a finding has support in the record, the federal court must review that record. *See Brumfield*, 576 U.S. at 317–19.

At this juncture, however, the relevant question under § 2254(d)(2) is not whether the findings have record support, but whether the findings are adequate to justify the state court's ultimate ruling—the denial of an *Atkins* hearing. As this Court concluded in *Brumfield*, a determination of fact is unreasonable under § 2254(d)(2) when it cannot justify the state court's ruling. *Id.* at 312–16. This Court did not question whether the state court's finding that Brumfield scored 75 on an IQ test had record support. *Id.* at 314–16. Instead, this Court deemed that finding unreasonable because, taking into account the proper context, the IQ score was "entirely consistent with intellectual disability" and could not sustain the denial of a hearing. *Id.* at 314. The determination was therefore an unreasonable basis under § 2254(d)(2) for the state court's ruling. *Id.*

Because Respondent focuses on the wrong analysis under § 2254(d)(2), he also misunderstands how *Wilson* constrains the relevant analysis. *See* Br. Opp'n 9–10. The application of *Wilson* and *Brumfield* in such circumstances is straightforward: When a state-court ruling rests exclusively on findings that are inadequate to sustain that ruling, a federal habeas court must conclude that § 2254(d)(2) has been overcome. *See Brumfield*, 576 U.S. at 314–16. Just as with any § 2254(d) analysis of

a state-court decision that includes reasoning, the reviewing court must consider only the reasons set forth by the state court. *See Wilson*, 138 S. Ct. at 1192; Pet. 15–17. The reviewing court cannot scour the record for new reasons, never cited by the state court, as a basis for denying relief under § 2254(d). *See, e.g.*, *Brumfield*, 576 U.S. at 314–22 (terminating AEDPA review after deeming the state court's proffered grounds unreasonable, instead of offering additional reasons to deny relief). Contrary to Respondent's argument, *see* Br. Opp'n 9, this is not a novel § 2254(d)(2)-specific methodology under *Wilson*, but a clear-cut application of this Court's longstanding AEDPA review, *see, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (conducting the same analysis during review under § 2254(d)(1)).

Lastly, Respondent misstates *Brumfield*'s relevant holding with respect to *Atkins* hearings. Respondent asserts that "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." Br. Opp'n 12. That, however, is beside the point. What *Brumfield* made explicit—and what is relevant here—is that "the state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. The court's failure to do so resulted in an unreasonable determination of the facts." 576 U.S. at 322. Although it may be permissible for a state court to resolve an intellectual-disability claim relying on a pre-*Atkins* record, the court may not ignore the reality that the record predated *Atkins*. *Id.*; *see also, e.g.*, *Bobby v. Bies*, 556 U.S. 825, 836–37 (2009) (recognizing that *Atkins* "substantially altered" the parties' incentives with respect to

presenting and contesting evidence of intellectual disability). If the state court fails to consider that pre-*Atkins* context, then that failure renders the state court's findings unreasonable for the purposes of § 2254(d)(2). *Brumfield*, 576 U.S. at 322.

Here, had the Eleventh Circuit adhered to *Wilson* and *Brumfield*, the court could only have concluded that Jenkins had satisfied § 2254(d). Following *Wilson*, the court was required to focus on the two findings of the Alabama Court of Criminal Appeals (CCA): (1) Jenkins's IQ score of 76; and (2) Jenkins's ability to maintain relationships and employment. *See* Pet. App. 494a. These findings, however, were inadequate to justify the denial of a hearing. *See Brumfield*, 576 U.S. at 314–16; *see also* Pet. 27–30.[3] Because the CCA's findings were fully consistent with the possibility of intellectual disability, it was unreasonable under § 2254(d) for the CCA to rely on those findings to deny Jenkins a hearing. *See Brumfield*, 576 U.S. at 314–16.

To conclude otherwise, the Eleventh Circuit hewed to its practice of dredging the record for reasons that could have supported the state court's conclusion. Here, the new reasons the Eleventh Circuit cited to dismiss the possibility of intellectual disability ranged from the absence of a clinical diagnosis at the pre-*Atkins* hearing to circumstances concerning the crime to testimony purportedly about Jenkins's ability to communicate and care for himself. *See* Pet. App. 028a–031a; Pet. 20–21. Respondent recognizes as much. When describing the Eleventh Circuit's reasoning, Respondent lays out the state court's findings and then explains that the Eleventh

[3] Relative adaptive strengths concerning work and relationships and an IQ score of 76 are both consistent with intellectual disability. *See Atkins*, 536 U.S. at 308 n.3 (requiring deficits in only two of the ten areas of adaptive behavior); *Tarver v. State*, 940 So. 2d 312, 317–21 (Ala. Crim. App. 2004) (remanding for an *Atkins* hearing when defendant's most recent IQ score was 76); *see also* Pet. 27–29.

Circuit "[i]n addition . . . found" no clinical diagnoses of intellectual disability and "further concluded" that Jenkins did not have deficits in such areas as social skills. Br. Opp'n 16–17. Under *Wilson* and *Brumfield*, the Eleventh Circuit should have made no such "addition[al]" findings or "further" conclusions.

Finally, the Eleventh Circuit disregarded that the CCA "should have taken into account that the evidence [was developed] at a time when [Jenkins's] intellectual disability was not at issue." *See Brumfield*, 576 U.S. at 322. Instead of adhering to *Brumfield* and deeming the CCA's ruling unreasonable, *see id.*, the Eleventh Circuit ignored the pre-*Atkins* context of the record and punished Jenkins for its inadequacy, *see, e.g.*, Pet. App. 029a (deeming "tremendously significant" that neither expert at Jenkins's pre-*Atkins* hearing had testified that Jenkins has intellectual disability).[4]

Despite Respondent's contentions, the Eleventh Circuit's § 2254(d) analysis in this case is not just incorrect but irreconcilable with this Court's precedent and with the decisions of other circuit courts. *See* Pet. 15–23.

III. Respondent's Brief in Opposition Confirms That Jenkins Is Entitled to an Evidentiary Hearing on His *Atkins* Claim.

Respondent attempts to deflect from the Eleventh Circuit's clear conflict with this Court's decisions and the resulting circuit split by asserting that Jenkins does not have intellectual disability. But that attempt fails, because whether Jenkins has such a disability is exactly the inquiry that must be addressed at the post-*Atkins*

[4] The Eleventh Circuit's error is so clear under *Wilson* and *Brumfield* that this Court may find it appropriate to grant the petition, summarily reverse, and remand for further proceedings. *See, e.g.*, *Mays v. Hines*, 141 S. Ct. 1145 (2021) (per curiam); *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam).

hearing Jenkins has yet to receive. And, in any event, Respondent's attempted deflection rests on severe mischaracterizations of the record.

Respondent wrongly claims that the state-court record "establishes" that Jenkins does not have intellectual disability. *See* Br. Opp'n 19, 22. But Respondent does not dispute any of the ample record evidence of Jenkins's persistent deficits in intellectual and adaptive functioning. *See* Br. Opp'n 18–26; *see* Pet. 6–8 (describing Jenkins's premature birth, special-education enrollment, third-grade reading level, gullibility, and ongoing struggles with daily living and interpersonal skills); *see also, e.g.*, *Brumfield*, 576 U.S. at 317–21 (citing comparable evidence as "substantial grounds" to question petitioner's adaptive functioning). Moreover, when discussing the record, Respondent ignores swaths of evidence. *See, e.g.*, Br. Opp'n 16 (relying on State expert testimony that Jenkins's IQ score was 76 but omitting the same expert's testimony that the score was two standard deviations below the mean); Br. Opp'n 22–24 (crediting testimony that Jenkins obtained a job but omitting the same witness's testimony that Jenkins was exploited by his employer).

In fact, the information Respondent handpicks from the record and presents without context serves only to raise questions that underscore the need for the hearing to which Jenkins is entitled under Alabama's permissive standard. *See Ex parte Perkins*, 851 So. 2d 453, 455–57 (Ala. 2002) (requiring only "any inference" or "indication" of intellectual disability for a hearing); Br. of Amici Curiae Sister Helen Prejean, Tim Shriver, et al. 5–17 (discussing example cases to demonstrate the function of and need here for a post-*Atkins* hearing); Br. of Amici Curiae Disability

Orgs. 7–10 (detailing the necessity of a post-*Atkins* hearing here for a legally and clinically sound determination of intellectual disability). Certainly none of that information, which Jenkins contests, precludes the possibility that he has intellectual disability. For example, Respondent cites school-age test scores that leave critical questions unanswered, such as whether the full-scale test was administered; whether the test was given individually or in a group setting; and whether the administrator was qualified to give a valid IQ test. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 40–42 (11th ed. 2010) (explaining that (1) full-scale IQ, comprised of verbal and performance tests, is the best indicator of cognitive ability; (2) valid intelligence assessments must be "individually administered"; and (3) assessing intellectual functioning requires "specialized professional training"). These questions can be answered only at a hearing. In addition, contrary to Respondent's position, *see* Br. Opp'n 22–25, neither the penalty-phase testimony nor the facts surrounding the crime preclude an inference of adaptive deficits, *see Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017) (clarifying that the "medical community focuses . . . on adaptive *deficits*," not perceived strengths); Br. of Amici Curiae Disability Orgs. 18 (discussing why clinical guidelines reject the use of crime-related facts for diagnostic purposes). As Judge Wilson noted below, courts cannot "make a medical diagnosis based on an insufficient record." Pet. App. 040a.

Finally, Jenkins has put forth sufficient evidence of juvenile onset to warrant a hearing. *See* Pet. 30 n.9. Respondent contends that the Eleventh Circuit "properly

conducted de novo review." Br. Opp'n 18. To the contrary, the court reviewed the district court's determination for clear error and ignored the fact that the district court had wrongly applied AEDPA deference. *See* Pet. 30 n.9; *see also* Pet. App. 031a. As the Eleventh Circuit acknowledged, "the record . . . contains evidence of Jenkins's childhood academic and social deficits." Pet. App. 031a.

This case is an ideal vehicle because the *Wilson* question is dispositive of whether Jenkins has the opportunity to prove his intellectual disability. Unless this Court grants certiorari, the Eleventh Circuit's unsanctioned § 2254(d) review, which disobeys this Court and splits from other circuits, will lead to the cruel and unusual execution of a person with intellectual disability before he has had his day in court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Mridula S. Raman
Counsel of Record
Ty Alper
Elisabeth A. Semel
DEATH PENALTY CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY
SCHOOL OF LAW
Berkeley, CA 94720
(510) 642-5748
mraman@berkeley.edu

Joseph T. Flood
SHELDON & FLOOD, P.L.C.
10621 Jones Street
Suite 301A
Fairfax, VA 22030