No. _____

In the Supreme Court of the United States

BURL CAIN, Warden,

Petitioner,

v.

KEVAN BRUMFIELD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

(1) In mental retardation evidentiary hearings, did the federal district court commit clear error (a) in refusing to allow the State to introduce the trial court record, (b) in limiting the State's presentation of evidence, (c) in failing to consider the facts of the crime as provided for in *State v. Dunn III*, 01-1635 (La. 5/11/10), 41 So.3d 454, (d) in failing to consider historical school records containing six mental health assessments/testing that did not diagnose mental retardation, and (e) in assessing credibility of witnesses?

(2) Did the federal appellate court err in failing to conduct an independent review as to whether Brumfield proved by a preponderance of the evidence that he is mentally retarded based on the voluminous documentary evidence and the entirety of the record including the state court record?

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This is a petition for a writ of certiorari from an application for federal habeas corpus relief on a state court conviction for first degree murder with a death penalty originally imposed.

The decision by the Louisiana Supreme Court on direct appeal is found at *State v. Brumfield*, 96-2667 (La. 10/20/98), 737 So.2d 660, *cert. denied* 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed.2d 362 (1999). Brumfield's post-conviction relief application was denied by the Louisiana Supreme Court. *Brumfield v. State*, 04-0081 (La. 10/29/04), 885 So.2d 580.

On federal habeas corpus relief, the district court held evidentiary hearings, found that Brumfield was intellectually disabled, and reversed the death penalty. *Brumfield v. Cain*, 854 F.Supp.2d 366 (USMD La. 2/23/12). The Fifth Circuit reversed and held the federal hearings were not properly held. *Brumfield v. Cain*, 744 F.3d.918 (5th Cir. 2014). This Court granted certiorari and held that Brumfield was entitled to have his intellectual disability claim considered on the merits in federal court. *Brumfield v. Cain*, ___ U.S. ___, 135 S.Ct. 2269, 192 L.Ed.2d 358 (2015). On remand, the Fifth Circuit affirmed the ruling of the district court because the lower federal court's determination that Brumfield is intellectually disabled is plausible and not clearly erroneous. *Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015). The State seeks a writ of certiorari from this decision.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit entered its judgment on December 16, 2015.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 states:

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. . . .

Federal Rule of Civil Procedure 52(a)(6) states:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE FACTS

On January 7, 1993, at approximately 12:10 am, Corporal Betty Smothers, a 36-year-old off-duty police officer, escorted Kimen Lee, the assistant manager of a Piggly Wiggly grocery store in Baton Rouge, to a bank across town to make the store's nightly deposit. When the police car approached the bank and backed into the night depository lane, Ms. Lee rolled down the passenger window to make the deposit. Two shooters

who had been lying in wait simultaneously converged on opposite sides of the car and began shooting rapid-fire. Corporal Smothers was struck in the hail of gunfire and slumped to the side motionless. Ms. Lee reached over Corporal Smothers' body and took control of the vehicle. Although she too had been shot, she managed to drive the car half a mile to a convenience store. Police and emergency medical services responded. Corporal Smothers was mortally wounded. Ms. Lee survived, despite having been shot four times in the crossfire.

Three days later, Eddie Paul told police Brumfield had murdered Corporal Smothers. Brumfield initially denied involvement, claiming he was with his brother. But once informed that his brother had not corroborated his alibi, Brumfield gave a videotaped statement admitting his involvement. Yet, Brumfield attempted to minimize his culpability by claiming he was the getaway driver while two others, West Paul and Henri Broadway, fired the shots that killed Corporal Smothers and wounded Ms. Lee.

Paul and Broadway identified Brumfield as Corporal Smothers' shooter. After authorities informed Brumfield of their statements, he gave a second videotaped interview wherein he admitted to shooting her. Brumfield described how he had been "scoping things out" in the preceding days and knew a Piggly Wiggly employee protected by a police officer made deposits nightly. He admitted he arrived at the bank before the nightly deposit and hid in the bushes waiting for the police car to arrive. He further admitted he had recently procured the car and two handguns to use in the robbery and disposed of them afterward.

The State charged Brumfield with first-degree murder. Through State funding, Brumfield obtained educational and medical records, interviewed potential witnesses, and hired a sociologist, Dr. Cecile Guin, and two neuropsychologists, Drs. Brian Jordan and John Bolter. Dr. Guin produced a thorough social history of Brumfield; Drs. Jordan and Bolter each produced comprehensive neuropsychological reports.

In addition to his taped confessions, the jury heard testimony that a few days before the murder, Brumfield told his pregnant girlfriend he would give her money before his anticipated incarceration set to begin January 13, 1993;[1] that Brumfield had been seen in Piggly Wiggly with Henri Broadway, who Ms. Lee identified as one of the shooters, an hour before the crime; that Brumfield asked his girlfriend to lie about his whereabouts during the time when the murder occurred; and that Brumfield told Eddie Paul after the murder that he had killed someone but the crime had been "a waste of time" because he made no money. Brumfield was convicted of first-degree murder.

The State sought the death penalty. The witnesses testified to Brumfield's crime spree in the weeks leading up to Corporal Smothers' murder.

Anthony Miller testified that on December 25, 1992, thirteen days before Corporal Smothers was murdered, Brumfield offered to give him a ride from a club to Baton Rouge. While in transit, Brumfield ordered

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[1] On October 13, 1992, Brumfield pled guilty to attempted possession of cocaine and felony theft of a gun; he was scheduled to be sentenced six days after Corporal Smothers was murdered. Sent. 15-16 (July 3, 1995).

Miller out of the car at gunpoint, robbed him of a gold chain, a jacket, and eighty dollars, put a gun to his head, and pulled the trigger; Mr. Miller survived only because Brumfield's gun misfired. Sent. 18-20.

Edna Perry and her daughter Trina Perkins testified that on January 2, 1993, five days before the murder, Brumfield robbed them at gunpoint while they were walking along North Boulevard in Baton Rouge. After having ridden in a car past Perry and Perkins, Brumfield exited the car and acted as if he had a foot injury. As Perry and Perkins walked by, Perry, fearing that "something was going to happen right then," pulled a knife out of her purse. Brumfield let them walk by but then returned to the car and followed them. As he drove alongside them, he put a sawed-off shotgun in Ms. Perry's face and said "hand it [her purse] over, bitch." Ms. Perry asked if she could keep pictures of her deceased son that were in her purse. Brumfield responded, "Bitch, you dead," and drove away. Sent. 31-32, 43-44. The State also called as witnesses Corporal Smothers' mother and her two sons, Warrick Dunn and Derrick Green. Each testified as to the impact of her death on the family and their difficulty living without her. Sent. 53-57, 59-60.

Brumfield's parents, brother, and fourth-grade teacher testified that through first and second grade he "was a straight 'A' student," but that problems started in the third grade when Brumfield's parents separated and an abusive stepfather entered the picture. While Brumfield was at times "a very affectionate, very loving child" who "loved to make people laugh," he also could be "completely disruptive" and "distracting [to] the

class." Brumfield was diagnosed with attention deficit disorder. Sent. 66-67.

Brumfield also called Dr. Cecile Guin, an L.S.U. social work professor. Dr. Guin conducted a "social history," wherein she tried to "find every single source of information" about Brumfield's life. Dr. Guin interviewed approximately thirty people, including Brumfield, his teachers, family, and officials at state agencies. She also reviewed "every single psychological report that was ever done on [Brumfield]." Sent. 112-13, 141.

Dr. Guin found that, although Brumfield had a low birth weight of 3.5 pounds, he was full-term and had a birth that was "normal in every other way." Sent. 114; Guin Report 1-2. Brumfield's early life was "probably the happiest time of his life," and Dr. Guin found no "medical records or anything that would indicate there was any trauma from after the time that he was born until age four or five." Sent. 117. Brumfield "did pretty well in the first and second grade," but by third grade his behavior had deteriorated. The timing corresponded with the breakup of the family and abuse from a stepfather. Sent. 118-19. During his childhood, Brumfield had multiple psychological evaluations, which revealed he had a "behavior disorder" and "attention deficit disorder." Brumfield worked at a restaurant for three months, but quit because drug dealing was more profitable. Brumfield had five children with three women. Sent. 138-39.

Last, Brumfield called Dr. John Bolter, a clinical neuropsychologist, to testify as an expert. Sent. 145. Brumfield had asked Dr. Bolter to perform "a neuropsychological evaluation to determine to what

extent [Brumfield] may be manifesting neurocognitive deficits associated with organic brain impairment." Bolter Report 1. Dr. Bolter thus administered a comprehensive battery of neuropsychological measures including the following tests:

- National Adult Achievement Reading Test (NAART)
- Wechsler Adult Intelligence Scale-Revised (WAIS-R)
- Wide Range Achievement Test-Revision 3 (WRAT-3)
- Lateral Dominance Test
- Mechanical Grip-Strength Test
- Name Writing Speed Test
- Finger Tapping Test
- Grooved Pegboard Test
- Luria Motor Skill Assessment
- Reitan-Klove Sensory-Perceptual Examination
- Seashore Rhythm Test
- Speech Sounds Perception Test
- Benton Facial Recognition Test
- Hooper Visual Organization Test
- Trail Making Test
- Stroop Neuropsychological Screening Test

- Intermediate Visual and Auditory Continuous Performance Test (IVA)
- Reitan-Indiana Aphasia Screening Test
- Clock Drawing Test
- Benton Controlled Oral Word Association Test
- Benton Visual Naming Test
- California Verbal Learning Test
- Wechsler Memory Scale-Revised (Logical Memory I and II, and Visual Reproductions I and II portions)
- Halstead Category Test

Dr. Bolter found Brumfield's motor and auditory functions were intact, he had normal language articulation, and he had an IQ score of 75. Dr. Bolter noted that Dr. Brian Jordan had "rated [Brumfield's] intelligence just a little higher." He agreed with Dr. Jordan's assessment that Brumfield had attention deficit disorder and an antisocial personality. Sent. 149. Dr. Bolter further found Brumfield's "problem solving, judgment, and reasoning skills are sufficient to meet the demands of everyday adulthood and he is not showing any decrement in the types of problems one would assume to see if they were suffering from an underlying organic basis or mental illness." Bolter Report 9.

The jury recommended a death sentence. Brumfield was sentenced to death on September 18, 1995.

STATEMENT OF THE CASE

Atkins hearings were held in federal district court during seven days in 2010.[2] On February 22, 2012, Judge Brady issued a ruling, finding Brumfield was intellectually disabled and could not be executed.

The State appealed. On February 28, 2014, after briefing and oral argument, the federal Fifth Circuit filed an opinion reversing the federal district court's grant of habeas corpus relief. *Brumfield v. Cain,* 744 F.3d 918 (5th Cir. 2014). The Fifth Circuit found that the district court should not have conducted a hearing, disregarded the evidence adduced at it, and upheld the state court's decision. The Fifth Circuit made it clear, however, that even if it "were to consider the new evidence presented to the district court, [it] likely would hold that Brumfield failed to establish an *Atkins* claim," *citing Dunn III*, 41 So.3d 454. *Brumfield*, 744 F.3d at 927, n. 8.

This Court granted certiorari and determined that Brumfield satisfied 28 U.S.C. § 2254(d)(2)'s requirements to be entitled to have his *Atkins* claim considered on the merits. Justice Breyer, who voted with the majority to remand the case for a decision on the merits, stated at oral argument: ". . .[B]ut if I had to decide at this moment whether there is enough evidence for you [the prosecutor] to win on the point is

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[2] Brumfield's first allegation of mental retardation came after this Court decided the case of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). No attorney ever representing Brumfield in his 1992 and 1994 felony pleas nor his homicide trial, nor any judge presiding over these matters accepting *Boykin* examinations ever raised the issue of mental retardation.

he intellectually disabled, I would say you win. If I decide—have to decide whether or not he presented enough evidence to get a hearing, I would say you lose." (SCOTUS oral argument, p. 33.) Justice Thomas, dissenting, pointed out that Brumfield's behavioral problems in school were due to

> "a conduct disorder that . . . progressed into an antisocial personality disorder." Record 276. The majority places special weight on Brumfield's placement in "special education" classes, ante, at 4, 13, n. 7, 14 15, but the record explains that he was placed in behavior disorder classes not because he had a low capacity to learn, but because he had a high capacity to make trouble, Record 3846-3847.

Brumfield v. Cain, 135 S.Ct. at 2293. Dr. Cecile Guin, who is not a physician, attributed Brumfield's bad classroom behavior in part to a learning disability, but "Dr. Guin was not qualified to make that diagnosis, and she acknowledged that the school had diagnosed him only with a behavioral disorder." *Id.*, n. 11.

On remand, the Fifth Circuit found that the federal court's determination that Brumfield was intellectually disabled was plausible and not clearly erroneous; therefore, the district court's opinion was affirmed. *Brumfield v. Cain*, 808 F.3d 1041 (5th Cir. 2015). The decision of the Fifth Circuit came fifteen days after oral argument, and the Fifth Circuit panel on remand was comprised of two out of three members of the original appellate panel.

The State hereby submits the decision of the Fifth Circuit was incorrect, the federal district court's

decision was not plausible in light of the record as a whole, which was never even considered in its entirety by the federal district court, and was clearly erroneous. This Court should reverse the decisions of the federal district court and Fifth Circuit and reinstate the jury's conviction of first degree murder with a sentence of death. Brumfield is not intellectually disabled.

ARGUMENT

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002), held that executing mentally retarded offenders is excessive under the Eighth Amendment. *Atkins* left to the states the task of developing appropriate ways to enforce the constitutional restriction against the execution of mentally retarded. The *Williams* court adopted the preponderance of the evidence standard for proving mental retardation. *State v. Williams,* 01-1650 (La. 11/1/02), 831 So.2d 835.

Williams found agreement that a diagnosis of mental retardation has three components: 1) sub-average intelligence, measured by objective standardized IQ tests; 2) significant impairment in several areas of adaptive skills; and 3) manifestations of this neuropsychological disorder in the developmental stage. *See* La. Code Crim. P. art. 905.5.1.

In *State v. Dunn III*, 01-1635 (La. 5/11/10), 41 So.3d 454, 471, the court noted: "It is also important to consider the defendant's behavior during the planning and commission of the instant crime as it relates to his adaptive skills functioning," and that planning, with its aspects of premeditation, is a clear indication of a lack of impulsiveness and non-leadership interactions

associated with mentally retarded individuals. *Dunn III*, 41 So.3d at 472.

A. Standard of Review

On remand, the Fifth Circuit stated that a determination of whether a defendant is intellectually disabled is reviewed for "clear error" and "[a] finding is clearly erroneous only if it is implausible in light of the record considered as a whole." *Brumfield v. Cain*, 808 F.3d 1041, 1057, *quoting St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006). The glaring error herein is that the "whole" record was never considered by the district court. During the federal hearings, the State attempted to enter the state court trial record into evidence, and the district court refused to allow the State to do so. (8/4/10 p. 95.) It was clear error for the State to have been thwarted in its ability to present its case during federal hearings.

Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." This Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948), discussed appellate review of a trial court's findings:

> Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the

> present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

In finding clear error in the trial court's determination to dismiss the government's case, the Court found that—as in the present case—the "government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents." *Id. Gypsum* found that if oral "testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact." *Id.*, 333 U.S. at 396. Rule 52(a) does not prohibit *de novo* review of errors of law or an independent review of mixed questions or findings of fact based on misunderstanding the governing law. *Bose v. Consumers Union of U.S.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1960 (1984). *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 105 S.Ct. 1504, 1512 (1985), reiterated the *Gypsum* standard; the trial judge cannot

> . . . insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story, or the story itself

> may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors, are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Anderson explains that the question is not whether the appellate court's interpretation of the facts is clearly erroneous, but whether the district court's finding was clearly erroneous. *Id.*, 470 U.S. at 577, 105 S.Ct. at 1513. *Anderson's* outcome is distinguishable from the present case. *Anderson* almost exclusively dealt with witnesses' credibility determinations. The present case involves voluminous historical school records, including six prior mental health assessments that found Brumfield not to be mentally retarded. Moreover, this habeas corpus proceeding involves mixed questions of law and facts, and the district court clearly erred not only in witnesses' credibility determinations but also in failing to apply state law that included consideration of the details of the crime.

Because the trial court record was disallowed, the following evidence was not before the federal court:

(1) Assistant District Attorney Charles Grey testified at trial that Brumfield was scheduled to be sentenced for two felony charges the week after the homicide.

(2) Cassandra Holmes, Brumfield's pregnant girlfriend, testified that Brumfield anticipated incarceration and before the crime vowed to find at least a thousand

dollars for her support, which provided a motive for the murder.

(3) Piggly Wiggly manager Vada Jones testified that the store to be robbed was the only one in their system to use the bank that became the crime scene. She testified when deposits would be made and when police officers would begin work. She saw codefendant Broadway and two other black males in Piggly Wiggly ten days before the murder when an officer was present.

(4) Sue Bernard testified she saw Brumfield and Broadway in the store seventy minutes before the homicide while Corporal Smothers was working. The federal district court erroneously said this testimony had nothing to do with adaptive skills. (7/12/10 p. 124.)

(5) Corporal Smothers was one of only two female officers who worked for this Piggly Wiggly store. Corporal Smothers always backed her police unit into the night depository lane and was the only security officer who made the deposits in this manner. Brumfield knew Corporal Smothers' procedures; therefore, he knew he could hide in the bushes at the bank in darkness without being seen in the police car's headlights.

(6) Eddie Paul testified he heard Brumfield planning the crime and saying it was a "waste" shortly after the murder.

(7) Ballistics/trajectory expert Pat Lane testified as to the convergence on the car by each shooter as they worked both independently and in tandem, thereby debunking the idea Brumfield was a gullible follower. This evidence showed Brumfield was not being instructed by Broadway.

(8) Coroner Alfredo Suarez, Jr. testified at trial as to the deadly accuracy of the six shots fired at Corporal Smothers. Five shots struck her in vital parts of her body.

(9) Disallowing the record prevented introduction of Brumfield's very competent testimony during his pretrial motion to suppress where he withstood rigorous cross-examination, asked the prosecutor to rephrase certain questions, and employed his right against self-incrimination at times.

(10) Disallowing the court record prevented introduction of the post-conviction relief hearing, wherein Brumfield berated the presiding judge. Brumfield, aware the mental retardation claim is being denied, knows that this same judge hearing his case is also the judge hearing the case of Derrick Todd Lee, a serial killer.

(11) The district court's refusal to allow testimony by corrections officers at the prison was clear error in contravention to state and federal law.

The district court committed clear error in curtailing or discounting testimony at the evidentiary hearings, including the following:

(1) The district court effectively dismissed the testimony of Corporal Smothers' son Warrick Dunn. On October 23, 2007, Warrick Dunn met with Brumfield at Angola State Penitentiary for approximately one and one-half hours. Warrick was surprised at the amount of information Brumfield knew about him and his family and said he believed Brumfield tracked his life on the internet. Warrick testified about his conversation with Brumfield concerning a previous encounter Brumfield had with Corporal Smothers, wherein Corporal Smothers caught Brumfield stealing and allowed him to return the merchandise and leave the store. Brumfield denied any involvement in murdering Warrick's mother, but Brumfield said he prayed for the entire Smothers family. Brumfield said God was watching over Warrick and it was time to move on with his life and have a family. Warrick characterized his meeting with Brumfield as having "a conversation like two adults." Brumfield said he had a daughter who was getting ready for college and that he wanted the best for her. Brumfield also told Warrick that if someone had killed Brumfield's mother, Brumfield would want retaliation. (8/4/10 pp. 49-60.)

The lower court in its ruling seemed to suggest that Warrick Dunn wanted to forgive Brumfield and not see the jury's verdict carried out. (2/23/12 ruling n. 31, p. 48.) This is absolutely an unfounded, false conclusion. Warrick Dunn testified for the State at the federal hearing. He never said he wanted to see reversal of the death penalty in this case and has always been supportive of the jury's decision. Any assumption otherwise is an unconscionable contortion of facts and without any basis.

(2) Dr. Bolter's testimony was restricted only to what was contained in his 1995 report. (8/4/10 pp. 19-20.) He was retained by Brumfield pretrial in 1995. He determined Brumfield had anti-social personality disorder. Brumfield was able to give Dr. Bolter a medical/social history, which could not have been provided by a retarded person. Dr. Bolter testified he had examined more than two hundred retarded people and never suspected intellectual disability with Brumfield. (8/4/10 pp. 3-47.)

(3) Lead Detective Jerry Callahan was not allowed to discuss the number of weapons and their calibers, among other facts, which would have clarified issues the court felt were unknown to him, as evidenced by the district court's opinion. (7/14/10 pp. 129-53.)

(4) The district court was clearly erroneous in failing to give proper weight to the unbiased academic and medical history of Brumfield,

> which was made prior to age eighteen by four psychologists and two psychiatrists and which refuted the testimony of Drs. Ricardo Weinstein and Victoria Swanson, who determined Brumfield was mentally retarded before she ever met him.

The district court found Drs. Weinstein and Swanson "more credible" that the state's witnesses. (2/23/12 ruling p. 52.) This credibility determination is overwhelmingly flawed, especially considering the facts that Drs. Weinstein and Swanson are active advocates against the death penalty.

Three experts testified for Brumfield at the federal hearings. The first was Dr. Stephen Greenspan, a psychologist who had never prepared a report herein and had never met Brumfield. Dr. Greenspan did not review academic or medical records. He did not ask to see trial transcripts or mitigating evidence presented at trial. He did not review Brumfield's January 12, 1993, videotapes. Dr. Greenspan stated he testified in the past for defendants eleven or twelve times—all in death penalty cases with three of those times involving Dr. Weinstein. He had never testified for the prosecution. He did admit, however, he did not think a mentally retarded person could engage in a complicated two-week crime spree as Brumfield did. Dr. Greenspan did not give an opinion as to Brumfield's mental status because he had not conducted a patient interview. He said he did not think it was "ethical" or "professionally responsible" for him to make a mental retardation diagnosis without ever meeting Brumfield. (7/12/10 pp. 5-19, 86.) Amazingly, this is exactly what defense expert Dr. Swanson did.

Brumfield's second expert witness was Dr. Ricardo Weinstein, a psychologist with only a forensic practice for the past seven or eight years. He received his doctorate from International College, which no longer exists. When it did exist from 1970 to 1986, it had no library, no classroom, and no departments. Students would merely find a tutor and be tested on a pass/fail system. Dr. Weinstein recalled the subject of his doctoral dissertation only after some difficulty. (7/12/10 pp. 219-29.) Dr. Weinstein makes his living by testifying in *Atkins* cases for the defense, and he has lectured on the defense circuit in the "Making the Case for Life" seminars. He was the first to diagnose Brumfield as mentally retarded in 2007 when Brumfield was thirty-four years old. He applied the "Flynn Effect" to Brumfield's IQ score even though defense expert Dr. Greenspan testified that the "Flynn Effect" is not applicable to individual scores but to societal norms only. Dr. Weinstein never got the required permission to administer mental retardation testing in Louisiana. Dr. Weinstein's use of ABAS questionnaires in this case was highly questionable. In concluding that Brumfield was mentally retarded, he did not review the entirety of the trial transcript, watch Brumfield's videotaped statements, read police reports, review Brumfield's correspondence, or request Brumfield's recorded phone conversations. He had difficulty in remembering Brumfield's school records. Dr. Weinstein created misleading documents by claiming in exhibit P-3 that a PPVT was an IQ test with a rank of 54. He later admitted this should not have been so represented when it was caught by Dr. Greenspan. He further admitted the 54 was not the only possible score, but that it could have been a 75 instead, which was more consistent with prior testing.

He also neglected to include a 1984 WAIS test by Dr. John Young, which found Brumfield's IQ to be in the dull normal range. (7/12/10 pp. 227-29; 7/13/10 pp. 88-10, 47, 59, 97, 104-13, 117-20, 176.) Moreover, Dr. Weinstein's testimony can be discounted because numerous courts have found his analysis not credible. S*ee United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 363 n.2, 374 (D.P.R. 2013); *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010); *Ortiz v. U.S.*, 2007 WL 7686126 (W.D. Mo. 2007), and *Pizzuto v. Blades*, 2012 WL 73236 (D.Id. 2012). His mental retardation diagnosis was truly an outlier and inconsistent with Brumfield's mental health evaluations since his youth.

Dr. Victoria Swanson, a licensed psychologist, stated she has testified as a defense witness about fifteen times in death penalty cases. She made a final opinion in this case that Brumfield was mentally retarded before she ever met Brumfield. (8/3/10 pp. 19-29.) She did not see Brumfield until two and one-half years after she wrote her report declaring Brumfield mentally retarded. Her diagnosis was built entirely on Dr. Weinstein's faulty methodology. (8/3/10 pp. 132-35.) On cross-examination, she agreed Dr. Weinstein's retrospective application of ABAS questionnaires was problematic. (8/3/10 p. 149.) She did not know the facts of this case, had not reviewed Brumfield's videotapes, and only knew the case involved a police officer with a famous son. Her opinion that Brumfield is mentally retarded remains in stark contrast to Brumfield's prior assessments wherein mental retardation was never diagnosed. (8/3/10 p. 179.)

State witnesses were well qualified and unbiased. Drs. Bolter and Jordan were initially defense trial

experts, and Drs. Hoppe and Blanche both stated they had no bias for the death penalty. Their personal views were in fact anti-death penalty in nature. Three of the state's seven witnesses were experts.

Dr. Donald Hoppe, a clinical psychologist who conducted testing of Brumfield, completed an undergraduate degree magna cum laude in psychology at University of New Orleans. He completed a doctorate in clinical psychology at Baylor University. He completed his internship at Johns Hopkins and a year of post-doctoral fellowship at Sheppard-Enoch Pratt Hospital in Baltimore. Dr. Hoppe testified he has had a clinical practice for more than twenty-seven years. In his private practice, he was seeing approximately forty to forty-five patients per week. Although he has examined prisoners and some death penalty defendants, that is not the primary focus of his practice. He is not affiliated with any death penalty groups. He has been retained by both the prosecution and the defense in his criminal cases. (7/14/10 pp. 155-64.) Dr. Hoppe was conversant with the facts of the homicide and prior offenses and read all pertinent portions of the trial testimony, including testimony of Brumfield's family, a fourth-grade teacher, and lay witnesses. Dr. Hoppe reviewed Brumfield's videotaped statements to police on three occasions, and unlike Dr. Swanson, he interviewed Brumfield before diagnosing him. He placed great weight on the extensive historical documents available in this case made since Brumfield was ten years of age. He reviewed all six evaluations showing Brumfield as capable of better work but for his hyperactivity, home conditions, aggressiveness, and bad behavior. These records never even suggested a hint of mental retardation. Dr. Hoppe placed weight on

the facts of the crime, which showed leadership, survival instincts, the ability to plan and weigh actions, the ability to perform conventional work, and the ability to choose drug dealing as a lifestyle. Dr. Hoppe administered an IQ test to Brumfield in prison on March 13, 2009. He used the most current version of the Wechsler Adult Intelligence scale so that any application of the "Flynn Effect" was not even arguably applicable. He agreed that Brumfield had a conduct disorder, an antisocial personality disorder, and no mental retardation. (7/15/10 pp. 30-66, 135-151.)

Dr. Robert Blanche testified as an expert forensic psychiatrist. He has an undergraduate degree from Rhodes College and a medical degree from L.S.U. in New Orleans. Dr. Blanche started his private practice in 1985 and became board certified in 1989. His career includes many distinctions, including medical director of the adolescent services program at Parkland Hospital in Baton Rouge, and he opened the first medical psychiatric unit of the Baton Rouge General Hospital in 1988. For ten years, he was medical director of a geriatric psychiatric unit at Summit Hospital. For the past ten to twelve years, he has operated day partial hospital programs, and for seven years he has served as the psychiatrist for the local parish prison. He is an associate professor of psychiatry at Tulane University. (7/15/10 pp. 168-77.) Although Dr. Blanche personally does not believe in the death penalty, he stated he had no preconceived notions about Brumfield. (7/15/10 p. 184.)

Dr. Blanche listed the voluminous amount of documents and other pieces of evidence he reviewed in order to form his opinion. (7/15/10 pp. 184-87.) Dr.

Blanche's opinion was that Brumfield's case was a "classic case of conduct disorder." (7/15/10, tr. p. 194.) He testified as to Brumfield's multiple previous evaluations. Dr. Blanche's exhaustive report concerning Brumfield's adaptive behavior and abilities was introduced as S-44, which states: "Kevan actually attained what can only be construed to be *normal functional adaptive skills* in the domains of conceptual, social, and practical skills, *given* his socio-cultural background and community for a young man in his age group." (Blanche report, 6.) Dr. Blanche's role as a psychiatrist was to determine how a client/patient functions in society, and he does not administer tests as a psychologist does. His work as a psychiatrist does not involve the "Flynn Effect," or red/green/blue books as previously alleged by Brumfield, but rather the DSM.

Dr. John Bolter, a prescribing psychologist, testified for the defense at trial and was called to testify by the State at the federal hearings. Dr. Bolter graduated from University of California at Berkeley, obtained a Master's degree in physiological psychology at University of the Pacific, and got his Ph.D. in neuropsychology at University of Memphis. He served his residency at Walter Reed Army Medical Center and obtained a post-graduate degree in psychopharmacology. He has held positions on several professional boards and is published. He has worked in the past with both the prosecution and defense but does not seek legal work. (8/4/10 p. 4-6.)

Before Dr. Bolter testified at trial, he sat with the defense attorney and informed counsel he did not think he could help Brumfield's case. (8/4/10 p. 15.) Judge

Brady's conclusion that Dr. Bolter "remembered little" about Brumfield due to destruction of Brumfield's file is misleading. (2/23/12 ruling p. 30.) Dr. Bolter recalled that Brumfield

> was cooperative when he was sitting in the room, the issue about taking off the handcuffs because the police officers were resistant to that that were there when we did the testing, that he was filling in the dots on the MMPI in a random fashion. That's a true/false questionnaire. And when caught about it, he smiled and he corrected it.

(8/4/10 p. 16.)

The court limited Dr. Bolter's testimony to his 1995 report (S-39). On May 31, 1995, Dr. Bolter examined Brumfield after being "asked to evaluate him from a neuropsychological perspective to see if he had any organic brain dysfunction, essentially." (8/4/10 pp. 19-22.) Brumfield was able to give Dr. Bolter a social, medical, and school background on himself. Likewise, Brumfield related his detailed family history. (8/4/10 pp. 24, 25-27.) Unlike the assertion made by Dr. Weinstein, Brumfield told Dr. Bolter that his mother had no history of psychiatric, drug, or alcohol problems. Brumfield told Dr. Bolter that his mother was hardworking, but his father was a roofer and essentially lazy. Brumfield said his stepfather beat him, and he believed "part of his difficulties in life have arisen as a result of his family structure or absence thereof and the beatings he endured at his stepfather's hands." (8/4/10 pp. 27-28.) Brumfield detailed his criminal history and said that he quit his legal

employment to pursue selling drugs and firearms to get more money. (8/4/10 pp. 29, 37.)

Dr. Bolter performed numerous tests on Brumfield when he was twenty-two years old. Dr. Bolter concluded: "I didn't see any clear evidence of organic brain dysfunction. I saw that he had what I thought was an attention deficit hyperactivity disorder and that he had learning—nonspecific learning difficulties. That he had borderline intellectual functioning, and that he had an antisocial personality." (8/4/10 pp. 31-38.) Dr. Bolter said he also gave Brumfield the Wechsler Adult Intelligence Scale—Revised Edition. Brumfield was determined to have a verbal IQ in the range of 79, a performance IQ in the range of 72, and a full-scale IQ in the range of 75. Additionally, Dr. Bolter concluded Brumfield had a conduct disorder. (8/4/10 pp. 34, 35.) Dr. Bolter stated he found nothing to suggest that Brumfield was mentally retarded. Furthermore, unlike Dr. Swanson, Dr. Bolter said he would never diagnose a person as mentally retarded without having met with that person first. (8/4/10 pp. 36-38.)

The federal district court's credibility determination regarding the experts who testified was clearly erroneous. The experts' resumes, along with the testimony, illustrate that the federal court decision in this regard was wrong.

The district court was clearly erroneous in failing to give proper weight to Brumfield's prison telephone conversations. The federal court implausibly determined that "[a] recording of Brumfield's outgoing phone calls from prison (Ex. S-35) shows nothing extraordinary that a normal ten-year-old child could

not do." (2/23/12 ruling p. 48.) This is an entirely unreasonable determination in light of the facts. Brumfield can be heard directing others to call third parties for him. He instructs "Trina" how to use the internet. Brumfield even instructs "Trina" to click the "music" tab on a website because Brumfield realizes she is mistakenly in the book section rather than in the music section. He asks others to send him money because he understands that it is tax refund time, and persons he is talking to will be getting refund checks.

Brumfield talks to a New Hampshire lady who sends him packages. He questions her about her current writing projects and even suggests that she write a book about him. Brumfield discusses garnishment of wages as a solution to her sister's problem with receiving child support payments. Brumfield is able to monitor his own language, depending on whom he is talking to. He speaks kindly and sympathetically with the New Hampshire woman, as well as with a sixty-four-year-old lady in a subsequent conversation, but repeatedly speaks profanely in his conversations with those he views as his contemporaries.

In another call, Brumfield explains the courthouse location for his upcoming hearings and correctly says that the building is on Florida Boulevard by the post office. Brumfield tells the mother of one of his children how to get a "kill switch" for the car and have it installed in the car's trunk rather than under the hood. He chastises his son about a smoking habit and obeying the son's mother. In other conversations, he instructs the caller how to get bench warrants cleared

to be eligible to be placed on his visitor's list in prison and explains the Angola telephone system.

Brumfield repeatedly instructs callers to get on the internet for him. When Brumfield told one female caller to go to "Amazon.com," she asks if she should "google it." Brumfield tells her: "Don't google it," and spells out "a-m-a-z-o-n.com" and "B-o-b M-a-r-l-e-y," for her to look up music CDs for him.

Brumfield surprises one female caller by his knowledge she is a newlywed. She asks, "How did you know that?" Brumfield responds: "My ears stay to the street. You know I know everything." When she tells Brumfield she is somewhat regretful about getting married, Brumfield tells her that if "the man's putting his hands on you" she should know he "still got some people out there." Brumfield inquires if she "s[aw] [him] in the newspaper."

Brumfield contacts a female and comments that it "seemed like your whole damn attitude changed when you found out it was me." She tells Brumfield she has no money, and Brumfield tells her "you're living" and "you're breathing." When the female tells Brumfield she is depressed, he responds incredulously: "You need to stop that shit. . . . Man, these motherfuckers are trying to kill me, and you are out there depressed?" Brumfield counsels her to "stop feeling sorry for [her]self."

These telephone calls show Brumfield can have normal conversations with others and can instruct others on court procedures, car mechanics, the internet, and a variety of topics. Brumfield has the ability to adjust his profanity to politeness when that fits his

agenda. Brumfield's conversations indicate his knowledge and intelligence does not fit into the range of mental retardation. The district court's viewpoint that any "ten year old" could have engaged in these conversations is untenable, clear error, and implausible. (8/4/10 pp. 83-94.)

The district court also improperly shifted the burden of proof to the State as follows:

> The State has introduced no evidence suggesting that Brumfield's mental health problems were caused by brain trauma or through another causative factor manifesting itself after he became an adult. Nor could the State's experts even pretend to know many of his etiological risks because they failed to interview anyone other than Brumfield himself.

(2/23/12 ruling p. 59.) It is clear that the state's experts thoroughly reviewed the record and concluded that it was not productive to interview Brumfield's relatives who would naturally be biased in his favor. Dr. Blanche's view he would not get "reliable information" from interviewing Brumfield's relatives was entirely reasonable. (7/16/10 p. 31.) Additionally, the State was not required to present evidence of adult brain trauma when the State's position was that Brumfield is not, was not, and never has been mentally retarded.

B. The Mental Retardation Determination

(1) IQ Tests

The record shows that Brumfield was subjected to no fewer than *six* intellectual assessments before the age of eighteen. Not one ever showed Brumfield was mentally retarded. These assessments consistently demonstrated that Brumfield had an IQ in the 70-85 range of general intelligence. (Blanche Report 4-7; Hoppe Report 7-9.) Even after Brumfield turned eighteen, none of the four doctors who administered IQ tests found an IQ below 70. (Hoppe Report 5; Jordan Report 4; Bolter Report 6; Weinstein Report 13.) In these assessments there was "not even a hint of [mental retardation], not even a rule-out or a question . . . . Nothing." (7/15/10 p. 53.)

The federal district court's consideration of the "Flynn Effect" was clearly erroneous. (2/23/12 ruling pp. 33-35.) Even Brumfield's expert Dr. Greenspan testified that the "Flynn Effect" is not applicable to individual scores but to societal norms only. (7/13/10 p. 47.) Brumfield did not satisfy the "intellectual disability" prong of Louisiana's test for intellectual disability.

(2) Adaptive Skills

Given his borderline IQ range, Brumfield would need to show adaptive skills that were "'substantially impaired" to be classified as intellectually disabled. *Dunn,* 41 So.3d at 470. Brumfield has not met this standard. Brumfield had adequate social skills, as he could communicate clearly with others, cooperatively play sports, and maintain personal relationships, as demonstrated by his five children with three women.

(Blanche Report 7-10; Hoppe Report 11.) *Dunn*, 41 So.3d at 470 (finding no intellectual disability where the defendant "lived with a girlfriend for some time" and was "described as a self-starter who worked well with others and on his own"). Brumfield also had adequate practical skills; he could drive a car, maintain a job, and had no trouble feeding, dressing, and caring for himself. (Blanche Report 7-10; Hoppe Report 11.) *Dunn,* 41 So.3d at 460 (finding no intellectual disability where "the defendant was capable of filling out a job application and obtaining a job" and did not have poor personal hygiene). Brumfield had adequate conceptual skills; he could sign consent forms, write letters, read books, and earn substantial sums dealing drugs. (Blanche Report 7-10; Hoppe Report 11.)

The district court and Fifth Circuit's reliance on self-serving testimony that Brumfield was slow in writing letters or had to use a guide for writing is clear error. (2/23/12 ruling, p. 43.) In particular, Brumfield's adaptive skills in planning the robbery (*e.g.*, scoping out the bank days in advance, renting a car off the street, and purchasing the handguns) and then attempting to escape punishment (*e.g.*, fleeing the scene, asking others to create alibis, disposing of the handguns and the car, and repeatedly lying to authorities) are strong evidence of satisfactory adaptive skills. *Supra* 1-4; *Dunn,* 41 So.3d at 472.

The federal court found "[t]he State does not contend that Brumfield has adequate reading abilities" and he had a "dismal" academic record. (2/23/12 ruling pp. 43-44.) This is also incorrect. School records show Brumfield never failed a grade, his problems in school were related to behavior and not a lack of mental

ability, and Brumfield's grades began to deteriorate when the breakup of his family occurred. Dr. Greenspan acknowledged that Brumfield had a fifth or sixth-grade reading level. (7/12/10 pp. 111-20; 7/13/10 p. 115.) Three dictionaries, a Bible, and *Twilight* books were found in Brumfield's prison cell. (8/3/10 pp. 100-02.)

The federal court also incorrectly found that "the record is barren of any testimony regarding his efficacy in drug transactions. . . . The point is that we simply have no testimony establishing what Brumfield did or did not do well during his drug dealing days." (2/23/12 ruling p. 46.) This, too, is clearly erroneous. Dr. Hoppe testified that hospital records showed Brumfield possessed $1,022.00 when he arrived at the hospital after being wounded during a drug transaction. Brumfield knew to give the money to the hospital employee to secure it in the hospital safe. (7/15/10 p. 45.) Dr. Hoppe also explained how Brumfield had a working knowledge about drug transactions, packaging drugs, and counting money. (7/15/10 pp. 41-44.)

The district court made gratuitous comments at the federal hearing that "I see cases almost on a weekly basis where people with mild mental retardation deal drugs. . . ." (8/3/10 p. 179.) These comments are indicative of a refusal to properly consider evidence the state presented concerning Brumfield's drug dealing, especially in light of the fact that only two to three percent of people in the United States are actually mentally retarded. (7/15/10 p. 40.)

The federal district court's conclusion that "nothing in the record suggested Brumfield 'led' this terrible scheme" is incorrect and clearly wrong. *See Brumfield*

v. Cain, 808 F.3d 1041, 1064. A critical problem is the federal district court refused to allow the state to introduce the trial court record in the federal proceedings. Had the federal district court allowed the trial court record to be admitted, the court would have known that (1) Brumfield is the person who procured the guns and car used in this crime, (2) the crime was complex, (3) Brumfield had engaged in a two-week crime spree involving vulnerable victims prior to the instant crime, and (4) Brumfield initially attempted to minimize his role in the instant crime once he was arrested. The facts of this crime—with its premeditated aspects—lack the impulsiveness and non-leadership interaction often associated with mentally retarded individuals, contrary to Dr. Weinstein's assertion Brumfield has limited insight and is unable to plan and organize.

Brumfield's profane, disruptive outburst during the state post-conviction ruling further evidences the fact Brumfield is not mentally retarded but has an impulsivity disorder as diagnosed in Brumfield's school records and by defense trial experts. Brumfield understood the ruling immediately without any explanation from others. He contemporaneously compared his case to another death penalty case he knew Judge Anderson was presiding over:

> The Defendant: Excuse me. May I say something? If you're going to deny all of this here, I don't even need to be here. You know.
>
> The Court: Well, you need to be there, and you need to be quiet or we are going to put you in the tank—

> The Defendant: I don't need to do nothing.
>
> The Court: --and you can listen to this.
>
> The Defendant: I don't need to do nothing. You're prejudiced against me. I know this. You ain't going to change your damn mind. I ain't going to sit here and let you deny all of this bullshit.
>
> The Court: You know what, you're right. You're not going to sit here.
>
> The Defendant: This is bullshit. That's right.
>
> The Court: We need to take him to the tank right now.
>
> The Defendant: This is bullshit. You know it, mother fucker. You're prejudiced. I know this. That's why you are doing all this against Todd Lee. You think I don't know? I know what kind of judge you is. You're a fucking house judge. That's right.

(10/23/03 PCR ruling p. 8.)

Brumfield's adaptive abilities are illustrated by the ways he adapted to diverse situations in his youth. He was able to care for himself, drive a car, have five children with three different women (none of whom had mental disabilities), enter into contracts, rent motel rooms, hold a restaurant job when he chose to, and plan and carry out multiple crimes within a short two-week period leading up to Corporal Smothers' murder. He reacted to state court proceedings in anger when

the court decision was going against his position. The federal court clearly erred in finding Brumfield lacks adaptive skills.

(3) Onset of Mental Retardation Before the Age of Eighteen

Brumfield failed to prove that his alleged mental retardation had an onset before the age of eighteen. The federal district court's finding otherwise is clearly erroneous and speculative.

Although Brumfield was examined beginning at the age of ten due to concerns by two teachers about his verbal and physical aggressiveness, mental retardation was never diagnosed. He was instead diagnosed as having a conduct disorder. No developmental delays are noted in the voluminous historical records. (7/16/10 pp. 12-13.) On the contrary, records show while he was of low average intelligence, he had excellent hygiene, took care of his own area, played sports with peers and even was deemed a leader at Christian Acres. (7/15/10 p. 158; 7/16/10 pp. 27, 49.) In fact, Dr. Guin's social history report contains a statement that Brumfield's "placement in a behavior disorder class was based on the fact that there was no evidence of mental retardation." (7/15/10 p. 151.)

The following chart illustrates the fact that Brumfield—in spite of several tests during his youth—was never diagnosed with mental retardation before he was eighteen years old:

FAILURE TO DIAGNOSE MENTAL RETARDATION BEFORE AGE 18

DATE/ BRUMFIELD'S AGE	DOCTOR PERFORMING TESTS	DIAGNOSIS
3/15/84 12 YEARS, 2 MOS.	DR. JOHN YOUNG Clinical Psychologist Margaret Dumas Mental Health	LEARNING DISABILITY Related to slowness in motor development [Weschler Child Scale – dull normal (low average) Bender Gestalt]
1/7/86 13 YEARS	DR. DOROTHY GAMMELL, PH.D. Clinical Psychologist, II Margaret Dumas Mental Health	CONDUCT DISORDER Undersocialized, Aggressive NO AXIS II DIAGNOSIS
	DR. YALAMANCHILI, MD Psychiatrist Margaret Dumas Mental Health	CONDUCT DISORDER Undersocialized, Aggressive

4/7/86 13 YEARS, 3 MONTHS	DR. ROY ALLEN, PH.D Greenwell Springs Hospital	_____ Severe MR MR Borderline _____X_____ LowAvg Avg Bright Memory, Thinking, Generally O.K.
8/4/86 13 YEARS, 7 MONTHS	DR. LYNN SIMON, MD Psychiatrist Greenwell Springs Hospital	CONDUCT DISORDER Undersocialized, Aggressive No AXIS II DIAGNOSIS

Moreover, Brumfield was never diagnosed with mental retardation in preparation for this capital murder trial in 1995, as this chart illustrates:

FAILURE TO DIAGNOSE MENTAL RETARDATION IN PREPARATION FOR CAPITAL MURDER TRIAL

DR. BRIAN JORDAN	(1) QTI – Low Average (2) MMPI Socio-Pathic Personality Disorder with poor impulse control (3) Anti-Social behavior as a way of life (4) Most of his criminal activities are probably thought through
DR. JOHN BOLTER (NAART) (WAIS-R) (WRAT-3)	Conduct Disorder that has progressed to anti-social personality disorder Borderline range of general intelligence Low Average – Borderline for basic academic skills

At the federal hearings, Dr. Hoppe testified that Brumfield's two videotaped statements when he was arrested on January 12, 1993, at the age of twenty, were extremely informative and significant regarding Brumfield's mental condition at that time. Dr. Hoppe testified that the videotapes were a "good snapshot of what the—this man's functioning was like at the time of the crime, within a few days of the crime." (7/15/10 p. 29.) Dr. Hoppe testified that the videotapes contradicted Brumfield's alleged inability to quantify, to understand directions, to remember, and to plan. Dr. Hoppe stated that Brumfield "described in great

detail his ability to do all of those things" in the tapes. (7/15/10 p. 30.) The police videotaped statements by Brumfield further show his ability to (1) think on his feet under pressure, (2) mitigate his role in the crime for self-preservation, and (3) recall events and communicate them in a normal manner.

Dr. Blanche testified that the school system did not diagnose mental retardation in Brumfield "because it wasn't there." (7/16/10 p. 36.) Dr. Blanche testified that the school system was particularly skilled in evaluating and identifying children with developmental delays, developmental disorders, and mental retardation because they wanted to be able to find that diagnosis in order to receive more services for the students. (7/16/10 p. 12.)

In this case, Dr. Weinstein has the unique distinction of being the first to diagnose Brumfield as being mentally retarded in 2007—post *Atkins*—when Brumfield was thirty-four years old. The district court clearly erred in finding that Brumfield is mentally retarded and the onset of the mental retardation occurred before the age of eighteen.

CONCLUSION

The state trial court's conclusion that Brumfield is not mentally retarded is correct. The federal district court's finding otherwise is not plausible and is clear error. Nor did Brumfield prove by a preponderance of the evidence that he is mentally retarded. The Fifth Circuit's decision upholding the federal district court's opinion that Brumfield is mentally retarded is incorrect and should be overturned by this Honorable Court.

The judgment of the state court, along with the death penalty in this matter, should be reinstated.

Respectfully Submitted,

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APPENDIX

APPENDIX

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APPENDIX A

REVISED February 10, 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30256

[Filed December 16, 2015]

KEVAN BRUMFIELD,
Petitioner - Appellee

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent – Appellant

Appeal from the United States District Court
for the Middle District of Louisiana

Before KING, CLEMENT, and ELROD, Circuit Judges.

KING, Circuit Judge:

Petitioner–Appellee Kevan Brumfield was convicted of first degree murder and sentenced to death in 1995. Following state court proceedings, Brumfield filed a petition for a writ of habeas corpus in the district court, arguing that he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is intellectually disabled. The district court found that the state court erred by not holding an *Atkins*

hearing on whether Brumfield was intellectually disabled. Following a multi-day hearing in 2010, the district court granted Brumfield a writ of habeas corpus, finding that he was intellectually disabled under Louisiana's statutory definition of intellectual disability. Without reaching the merits of Brumfield's claim that he is intellectually disabled, this court reversed the district court's judgment. This court held that because Brumfield had failed to satisfy the requirements of 28 U.S.C. § 2254(d), the district court should not have reached the merits of his *Atkins* claim. The Supreme Court reversed and remanded, holding that Brumfield had indeed satisfied the requirements of 28 U.S.C. § 2254(d) and that he was thus entitled to have his claim of intellectual disability under *Atkins* evaluated on the merits. On remand, we review for clear error the district court's determination that Brumfield is, in fact, intellectually disabled. Because the district court's determination that Brumfield is intellectually disabled is plausible in light of the record as a whole, its determination is not clearly erroneous. Accordingly, we AFFIRM the ruling of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts and procedural history of this case are recounted exhaustively in prior opinions. *See Brumfield v. Cain*, 135 S. Ct. 2269 (2015) [hereinafter *Brumfield (S. Ct.)*]; *Brumfield v. Cain*, 744 F.3d 918 (5th Cir. 2014) [hereinafter *Brumfield (5th Cir.)*]; *Brumfield v. Cain (Brumfield II)*, 854 F. Supp. 2d 366 (M.D. La. 2012); *Brumfield v. Cain* (*Brumfield I*), No. CIV.A.04-787JJB-CN, 2008 WL 2600140 (M.D. La. June 30,

2008); *State v. Brumfield*, 737 So. 2d 660 (La. 1998) [hereinafter *Brumfield (La.)*]. We recount the facts and procedural history as relevant to the limited question before us today.

A. The Original Crime and State Court Proceedings

On January 7, 1993, Petitioner–Appellee Kevan Brumfield and an accomplice, Henri Broadway, opened fire on a Baton Rouge Police Department vehicle driven by Corporal Betty Smothers. Smothers was escorting Kimen Lee, an assistant manager at the grocery store where Smothers worked part time as a security guard, as Lee made the grocery store's nightly bank deposit. Brumfield fired seven rounds from the left side of the police cruiser, and Broadway fired five rounds from the right side. Lee survived, but Smothers did not. Baton Rouge police officers arrested Brumfield for Smothers' murder on January 11, 1993. When police interrogated Brumfield, he initially denied any involvement in Smothers' murder and claimed that he had been with his brother at the time. After Brumfield's brother denied that claim, Brumfield gave a videotaped statement admitting that he drove the getaway car but denying that he murdered Smothers. Later, Brumfield gave another videotaped statement where he admitted to being in the bank parking lot and firing shots at the police car.

Following a multi-week trial in June and July of 1995, a jury found Brumfield guilty of first degree murder. He was subsequently sentenced to death on July 3, 1995. Brumfield appealed his conviction, but the Supreme Court of Louisiana affirmed the state trial court. *Brumfield (La.)*, 737 So. 2d at 662, 671. And the

Supreme Court of the United States denied his petition for certiorari thereafter. *Brumfield v. Louisiana*, 526 U.S. 1025 (1999).

In March 2000, Brumfield filed for postconviction relief with a state trial court before the Supreme Court of the United States issued its decision in *Atkins*, 536 U.S. at 321, prohibiting the execution of intellectually disabled criminals.[1] Brumfield later amended his state petition to assert an *Atkins* claim and argued that he was entitled to an evidentiary hearing on his intellectual disability claim.[2] Brumfield requested funds to develop his claim, but the state trial court denied his petition in its entirety on October 23, 2003. Brumfield then filed a writ with the Supreme Court of Louisiana, alleging, *inter alia*, that the trial court erred by failing to hold an *Atkins* hearing. That court denied the writ without explanation. *Brumfield v. State*, 885 So. 2d 580, 580 (La. 2004).

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[1] Consistent with the Supreme Court's guidance, we use the term "intellectually disabled" instead of "mentally retarded." The two terms describe "identical phenomen[a]." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

[2] Brumfield provided the following evidence of his intellectual disability:

> 1) his IQ score, obtained prior to trial, of 75; 2) his slow progress in school; 3) his premature birth; 4) his treatment at multiple psychiatric hospitals; 5) various medications he was prescribed; and 6) testimony that he exhibited slower responses than "normal babies," suffered from seizures, and was hospitalized for months after his birth.

Brumfield (5th Cir.), 744 F.3d at 921 (footnotes omitted).

B. Federal District Court Proceedings

Following the Supreme Court of Louisiana's dismissal of his appeal, Brumfield petitioned the United States District Court for the Middle District of Louisiana for a writ of habeas corpus, asking the court "to declare him [intellectually disabled] and ineligible for the death penalty under *Atkins*." *Brumfield II*, 854 F. Supp. 2d at 370. Brumfield filed an amended petition in 2007 re-raising his *Atkins* claim, supported by expert findings developed with federal funding. A magistrate judge recommended that, although the state court's refusal to grant an *Atkins* hearing was "reasonable and in accordance with clearly established federal law," the district court should consider the additional evidence Brumfield presented in his amended habeas petition. The magistrate judge explained that Brumfield had demonstrated cause for failing to provide the state court with expert evidence because the state court denied him funding to develop this evidence. The magistrate judge further reviewed the additional evidence submitted by Brumfield and concluded that he had established a *prima facie* case of intellectual disability and was thus entitled to an *Atkins* hearing. The district court adopted the magistrate judge's report and recommendation and held an *Atkins* hearing July 12–16 and August 3–4, 2010, discussed in detail below. *Brumfield II*, 854 F. Supp. 2d at 370.

In its opinion granting Brumfield a writ of habeas corpus, the district court first addressed the legal prerequisites to a federal habeas hearing before addressing the substance of Brumfield's *Atkins* claim. *Brumfield II*, 854 F. Supp. 2d at 373, 384. Under the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brumfield could obtain federal habeas relief only if, in rejecting his claim, the state court's decision "was either 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Brumfield (S. Ct.)*, 135 S. Ct. at 2275 (quoting 28 U.S.C. § 2254(d)(1), (2)). The district court found that denying Brumfield an evidentiary hearing without providing him with the funds to develop his *Atkins* claim "represented an unreasonable application of then-existing due process law as determined by the Supreme Court" and therefore satisfied § 2254(d)(1). *Brumfield II*, 854 F. Supp. 2d at 383–84. The district court also concluded that the state trial court's denial of an *Atkins* hearing "suffered from an unreasonable determination of the facts in light of the evidence presented . . . in violation of § 2254(d)(2)." *Id.* at 379.

The district court then analyzed the merits of Brumfield's *Atkins* claim. In determining whether Brumfield is intellectually disabled—and therefore barred from being sentenced to death under Louisiana law, La. Code Crim. Proc. Ann. art. 905.5.1(A)—the district court relied heavily on the American Association on Intellectual and Developmental Disabilities' (AAIDD's)[3] *Mental Retardation: Definition, Classification, and Systems of Support* (10th ed. 2002) [hereinafter *Red Book*], which "contains the current,

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[3] The AAIDD was formerly known as the American Association on Mental Retardation (AAMR).

consensus definition of [intellectual disability]," as "Louisiana law tracks the clinical definition provided by the [*Red Book*]." *Brumfield II*, 854 F. Supp. 2d at 385–86. To establish an intellectual disability, the district court explained, "Brumfield bears the burden of proving by a preponderance of the evidence that he meets the statutory definition." *Id.* at 385 (citing La. Code Crim. Proc. Ann. art. 905.5.1(C)(1)).

All of the experts who testified in this case agreed on the relevant criteria for diagnosing intellectual disability.[4] Consistent with the guidance from the United States Supreme Court and the Louisiana Supreme Court and La. Code Crim. Proc. Art. 905.5.1, the experts agreed that an intellectual disability diagnosis requires satisfying a three part test: "(1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." *Brumfield (S. Ct.)*, 135 S. Ct. at 2274 (quoting *State v. Williams*, 831 So. 2d 835, 854 (La. 2002)). Each expert also agreed that the diagnosis of intellectual disability is guided by the same relevant psychological and medical texts authored by the American Psychiatric Association (APA) and AAIDD. *See generally* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) [hereinafter *Green Book*]; *Red Book*; AAMR, *User's Guide: Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002)

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[4] At the *Atkins* hearing, the district court heard testimony from six expert witnesses—three each for Brumfield and the State—and several other witnesses.

[hereinafter *User's Guide*]; APA, *Diagnostic and Statistical Manual of Mental Disorders* (rev. 4th ed. 2000) [hereinafter *DSM-IV-TR*]. While the experts agreed on the criteria for diagnosing intellectual disability, they disagreed on whether Brumfield met those criteria.

1. Brumfield's Three Expert Witnesses

The asserted role of Brumfield's first expert, Stephen Greenspan, Ph.D.,[5] was to educate the court on intellectual disability. While Greenspan did not evaluate whether Brumfield was intellectually disabled, the district court held that Greenspan "is one of the foremost [intellectual disability] experts in the country." *Brumfield II*, 854 F. Supp. 2d at 386. Greenspan testified generally as to the "proper use of the AAIDD's clinical standards in making diagnoses of [intellectual disability]." *Id.*

Beginning with the subaverage intelligence prong of the intellectual disability test, Greenspan explained that psychologists originally used an IQ score of 70 as the cutoff for determining whether an individual had an intellectual disability, but because of advances in scientific and statistical methods, the AAIDD uses "75 as the upper ceiling now" for a diagnosis of intellectual disability. Commenting on potential factors that may affect the validity of an individual's IQ score, Greenspan explained that if an individual is

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[5] Greenspan is a licensed psychologist, obtained his Ph.D. in 1976, and (at the time of the hearing), was employed as a visiting professor at the University of Colorado Medical School. The district court accepted him as an expert in intellectual disability and adaptive behavior. *Brumfield II*, 854 F. Supp. 2d at 386.

"malingering," which refers to intentionally performing poorly on a test, an IQ test score may not be valid. He further explained that consistently receiving the same IQ score across multiple tests generally rules out malingering by an individual. When Greenspan examined the IQ scores from Brumfield's previous tests, the scores "[told him] that [the test subject] here . . . clearly me[t] prong one because all of these scores [we]re in the mild [intellectual disability] range." Greenspan also noted that an individual's IQ tends to remain stable over time, implying that Brumfield, absent some incident that lowered his IQ, has always had an IQ in the intellectually disabled range.

When discussing the second prong of the intellectual disability test—whether an individual has impairments in adaptive behavior[6]—Greenspan explained that "adaptive functioning usually would determine whether somebody is really [intellectually disabled]" when a person's IQ is close to the cutoff for an intellectual disability diagnosis. "Adaptive behavior has to do with how one functions in the real world . . . outside of the testing situation." Adaptive behavior includes three domains: the practical domain, the social domain, and the conceptual domain. The practical domain concerns daily living skills, the social domain concerns whether an individual can conform to the rules of society, and the conceptual domain concerns quasi-academic skills applicable to the real world, such as telling time. A diagnosis of intellectual disability requires "at least one . . . major domain of a relative

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[6] "Adaptive behavior," "adaptive functioning," and "adaptive skills" are used interchangeably in both professional psychology circles and during the district court's *Atkins* hearing.

impairment." However, Greenspan was careful to note that an impairment in one domain of adaptive behavior does not require the complete absence of adaptive behaviors in that domain and that it does not preclude the possibility that an individual possesses some strengths in particular areas.

To measure adaptive behavior in an individual, psychologists administer tests, such as the Adaptive Behavior Assessment System (ABAS) questionnaires, to people who know or knew the individual being evaluated for an intellectual disability. Greenspan emphasized that "the more people you can talk to, the better picture you get of an individual." He also noted the importance of interviewing the subject himself. Greenspan testified that when sufficient records are available, reviewing all of the available information can shed light on whether an individual has deficits in adaptive functioning. He further noted that reviewing records is important when evaluating whether an individual satisfies the third prong of an intellectual disability diagnosis—manifestations prior to the age of 18. Additionally, Greenspan explained that the presence or absence of "maladaptive behavior" is not relevant to the diagnosis of intellectual disability. Maladaptive behavior involves a "person act[ing] out" by, for example, "attack[ing] other people" and is "not used diagnostically."

Brumfield's second expert, Ricardo Weinstein, Ph.D.,[7] evaluated Brumfield for intellectual disability.

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[7] Weinstein received his Ph.D. in 1971, and at the time of the hearing, he practiced forensic psychology. The district court accepted him as an expert in intellectual disability and forensic

During the course of his evaluation, Weinstein met with Brumfield on at least three separate occasions for between five and seven hours each time, administered psychological tests, and performed a clinical interview with Brumfield. Weinstein also reviewed school records, medical records, and other records relevant to Brumfield's past. Finally, Weinstein interviewed at least 14 different individuals who knew Brumfield. Based on his evaluation, Weinstein diagnosed Brumfield as intellectually disabled.

Focusing on the first criterion for intellectual disability, Weinstein administered two IQ tests to Brumfield in 2007. *Id.* at 389. Brumfield scored a 72 (95% confidence interval of 69–77) on the Stanford-Binet V and a 70 (95% confidence interval of 65–75) on the C-TONI. Both of these scores fall within the intellectually disabled range and thus meet the first prong of the intellectual disability test. Weinstein also noted that Brumfield's scores on previous IQ tests were consistent with an intellectual disability diagnosis.[8] Specifically, a 1995 administration of the WAIS-R by then-defense expert Dr. Bolter resulted in a score of 75 (95% confidence interval of 70–80), and a 2009 administration of the WAIS-IV by State's expert Dr. Hoppe yielded a score of 70 (95% confidence interval of

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neuropsychology. *Id*. Although the State questioned his credentials, correctly pointing out that he received his Ph.D. from a non-traditional school that is no longer in operation, we note that he is licensed by the State of California and completed a post-doctoral certificate at the Fielding Institute.

[8] Based on other psychological testing, Weinstein ruled out malingering as a possible explanation for Brumfield's IQ scores.

67–75). Because all four of Brumfield's full-scale IQ scores fell within the intellectually disabled range, Weinstein concluded that Brumfield had satisfied the first requirement for an intellectual disability diagnosis.

With respect to his evaluation of Brumfield's adaptive functioning, Weinstein explained that his job as a psychologist "is to identify deficits," and not to identify strengths in adaptive behavior, as "the issue . . . of . . . strengths is not relevant." His evaluation of Brumfield's adaptive functioning included his interviews with Brumfield and his review of relevant records. Additionally, Weinstein administered ABAS questionnaires to six people who knew Brumfield during his developmental years. However, because Weinstein admitted that the results of the ABAS questionnaires were "not very reliable,"[9] the district court "f[ound] these tests to be of little or no value," and did not rely on them in reaching its conclusion on Brumfield's intellectual disability. *Id.* at 393. The court did, however, consider Weinstein's interviews with the people to whom he administered the ABAS questionnaires and at least eight other individuals, as well as his review of the records.

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[9] As Weinstein explained, the ABAS was designed to be used contemporaneously while he was "trying to see how Mr. Brumfield functioned prior to the age of 18," which required him to "ask[] people to remember how [Brumfield] functioned" in the past. Because "these backward-looking questions rely principally upon the memories of the test-takers regarding Brumfield's abilities dating back 15–20 years," *id.* at 393, the scores derived from the ABAS are not, in Weinstein's opinion, very reliable.

Based on these interviews and his review of school, hospital, and group home records, Weinstein "identif[ied] very significant deficits in all three domains" of adaptive behavior. First, Weinstein noted that Brumfield was developmentally delayed. For example, Brumfield was "two years behind his chronological age in terms of achievement or even grade levels." Weinstein also noted impairment in Brumfield's "visual motor coordination." In particular, "Brumfield's writing abilities are severely limited." According to Weinstein, to write a letter Brumfield "needs to have a guide" and "uses a piece of cardboard that he puts underneath the line" in order to write in a straight line. Brumfield "takes . . . a very long time to write a letter"; in fact, a one page letter "take[s him] several days to write." When writing, Weinstein noted, Brumfield "gets assistance from people in death row."

With respect to Brumfield's behavior in the community, Weinstein testified that after "look[ing] at the records [and] talk[ing] to people," he concluded that Brumfield "had problems with attention" and "with language comprehension." Weinstein also concluded that Brumfield never learned any skills that could lead to gainful employment. Although Brumfield quit his job in order to sell drugs so that he could make more money, Weinstein stated that this did not suggest that Brumfield was able to obtain or maintain gainful employment.

Commenting on the third prong of the intellectual disability inquiry, Weinstein noted that many of the adaptive behavior deficits, such as Brumfield's academic progress lagging two years behind his age, were present during Brumfield's developmental years.

Although not part of the intellectual disability diagnosis, Weinstein pointed to several risk factors present in Brumfield's history that support the conclusion that Brumfield manifested symptoms of an intellectual disability before he turned 18. For example, Brumfield's mother "had psychiatric problems and was being medicated" and did not have "access to prenatal care . . . until she was about six months pregnant."

Brumfield's third expert, Victoria Swanson, Ph.D., also evaluated him for intellectual disability.[10] Swanson initially reviewed Brumfield's records, particularly his school records, and the reports of other experts. Based on this review, she confirmed the earlier diagnosis of intellectual disability. Although she did not meet with Brumfield prior to confirming his intellectual disability diagnosis, she later met with him for five hours, interviewed people familiar with Brumfield during his developmental years, and broadened her review of the records. Swanson stated that nothing she reviewed or learned after writing her report changed her opinion or diagnosis.

After reviewing all of the full-scale IQ scores Brumfield had received, Swanson opined that all of his scores fell within the range of intellectual disability and therefore concluded that Brumfield had satisfied

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[10] Swanson is a licensed psychologist in the State of Louisiana, and received her Ph.D. from Louisiana State University (LSU) in 1999. She has over 20 years of experience working with intellectually disabled patients. She also assisted the Louisiana legislature in drafting the bill that eventually became the statute governing intellectual disability at issue in this case. The district court accepted Swanson as an expert in intellectual disability and psychology.

the first prong of the intellectual disability test. Turning to the second prong—adaptive behavior—Swanson discussed Brumfield's educational history extensively. In 1983, two teachers referred Brumfield for an evaluation within the school system. As part of this evaluation, Brumfield took a number of psychological tests, which indicated that Brumfield was functioning academically between 20 and 41 months behind his chronological age.[11] Based on the results of this evaluation, Brumfield was given the "exceptionality of behavior disorder" and placed into a classroom setting appropriate for students with this disorder.[12] After spending three years in the special education classroom, Brumfield again took a number of psychological tests. Explaining these tests, Swanson noted that "there hasn't been any progress academically over the three years that [Brumfield] continued to be in [the behavior disorder] class, and he

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[11] The Illinois Test for Polylinguistic Abilities indicated that he was functioning at an age level 41 months behind his chronological age, the Peabody Picture Vocabulary Test indicated Brumfield was 20 months below his chronological age level, and the Woodcock Language Proficiency Battery indicated Brumfield lagged approximately 24 months behind his chronological age. As measured by the Woodcock-Johnson Psychoeducational Battery in 1983, Brumfield's reading level fell into the seventh percentile.

[12] Swanson explained that individuals can have both a behavior disorder and an intellectual disability. Moreover, "[t]here is a high instance of aggression amongst students with [intellectual disability]" because they "are being asked to do things that they can't do," which leads to frustration and aggression. When a student has both a behavior disorder and an intellectual disability, she explained, schools often place the student into the behavior disorder classroom.

seems to have plateaued at about the same grade level." She further opined that Brumfield did not make any progress in the behavior disorder classroom because he, in fact, suffered from an intellectual disability. Explaining that students with behavior disorder typically catch up to their peers once their behavioral needs are met, Swanson stated that Brumfield simply plateaued between a fourth and sixth grade level, which was "consistent with a person with [an intellectual disability] more so than with a person who is just behaviorally disordered."

Swanson also discussed Brumfield's reading and writing skills at length. She noted that, while in prison, Brumfield possessed both elementary-school-level and collegiate dictionaries, but he was only able to effectively use the elementary-school-level dictionary. Discussing his reading ability more generally based on her interview with Brumfield, she said "he was able to read 60 words a minute, which is extremely low for someone his age, but would be consistent for someone with a fourth grade reading level trying to read at the tenth." Based on her evaluation of Brumfield, Swanson opined that "a diagnosis of [intellectual disability] would be appropriate for [Brumfield]. He meets criteria one; he meets criteria two, and . . . there's evidence of deficits in at least two areas prior to the age of 18."

2. The State's Three Expert Witnesses

The State's first expert was Donald Hoppe, Psy.D.[13] Hoppe explained that his primary role in evaluating Brumfield "was the administration of IQ testing in determining an IQ range." Hoppe administered the WAIS–IV, which is one of the "gold standard" IQ tests, to Brumfield on March 13, 2009. On this test, Brumfield obtained a full-scale IQ score of 70 with a 95% confidence interval of 67 to 75. Hoppe explained that these "results are not that different from the results of Dr. Weinstein's testing," suggesting that the IQ scores obtained by both Hoppe and Weinstein are credible. Hoppe noted that he believed "that these scores represent the low end of what Mr. Brumfield's intellectual range is" because "with more effort, his scores would have been higher." However, Hoppe explicitly agreed that Brumfield meets the first requirement of an intellectual disability diagnosis based on the IQ test he administered and the previous scores that were consistently between 70 and 75.

Although his primary role was to administer IQ testing to Brumfield, Hoppe also reviewed the available records from Brumfield's past and commented generally on whether Brumfield is intellectually disabled.[14] Hoppe noted that Brumfield had taken an

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[13] Hoppe received his doctorate from Baylor University in 1981 and is a licensed psychologist in the State of Louisiana. He estimated that he has performed "hundreds, if not thousands" of IQ tests over his career. The district court accepted Hoppe as an expert in "clinical and forensic psychology."

[14] Hoppe did not interview anyone familiar with Brumfield. He only reviewed written records.

IQ test in 1984, and although no actual score was included in the records concerning the test, a report indicated that Brumfield scored in the "dull normal" range which implied a score between 80 and 89. Hoppe further noted that although Brumfield had been evaluated previously by psychologists and psychiatrists, he was only diagnosed with conduct disorder,[15] never with an intellectual disability.

Hoppe also discussed Brumfield's past as it related to the adaptive functioning prong of the intellectual disability test. Discussing Brumfield's two videotaped confessions to the police following the murder of Corporal Smothers, Hoppe stated that these were "good snapshot[s] of what . . . [Brumfield] was functioning like at the time of the crime." Hoppe noted that Brumfield appeared to be quick-thinking and gave a "detailed description of the streets in Baton Rouge," which was not consistent with his having an intellectual disability. With respect to the crime itself, Hoppe agreed that it was fairly complicated, requiring planning and coordination. Hoppe also explained that Brumfield's previous criminal behavior was important to his conclusion that Brumfield has no intellectual disability. Brumfield appeared to pick "weak victims" in several successive crimes, suggesting that he has the capacity to plan and organize.

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[15] Conduct disorder is, essentially, the childhood version of antisocial personality disorder. "The essential feature of conduct disorder is a repetitive pattern of behavior in which the basic rights of others or major age-appropriate norms or rules are violated," i.e., conduct disorder is characterized by aggressive behavior.

Discussing earlier details of Brumfield's life, Hoppe opined that Brumfield's lack of long-term employment, his lack of a checking account, and the fact that he never entered into a contract, could result from Brumfield being lazy or the fact that he was only 20 years old when he was arrested. He stated that these factors did not necessarily suggest that Brumfield has an intellectual disability. Hoppe also stated that drug dealing is "a form of employment" and that selling drugs requires a skill set that is not necessarily compatible with an intellectual disability diagnosis.

The State's second expert, Robert V. Blanche, M.D.,[16] testified primarily as to whether Brumfield had deficits in adaptive functioning. Although Blanche evaluated Brumfield for intellectual disability, he had never heard of the AAMR/AAIDD, *Red Book*, *Green Book*, or *User's Guide* before his deposition in this case and "was thus unfamiliar with [the AAIDD's] diagnostic definitions."[17] *Id*. at 388. He stated that instead of the AAIDD's materials and definitions, psychiatrists rely on the *DSM-IV* instead. In explaining his evaluation of Brumfield, Blanche noted that he was not familiar with the standard adaptive behavior scales used by psychologists and had received no formal training in administering psychological testing.

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[16] Blanche received his M.D. from LSU Medical School in 1981 and, at the time of the hearing, worked part time as a psychiatrist in the East Baton Rouge Parish jail, where he identified prisoners in need of mental health care. The district court accepted him as an expert in forensic psychiatry.

[17] Blanche admitted this in a deposition that took place in January 2010.

In conducting his evaluation, Blanche did not interview anyone other than Brumfield himself, noting that he did not "feel that [he] would get reliable information" from such interviews. Therefore, beyond his interview with Brumfield, Blanche's inquiry into Brumfield's adaptive functioning was limited to the available written records. In the records Blanche reviewed, there was no diagnosis of intellectual disability prior to the *Atkins* hearing despite multiple evaluations by psychologists and psychiatrists in the past. Blanche explained that Brumfield's case was "a classic case of conduct disorder" and noted that, while many of the psychologists and psychiatrists who had previously evaluated Brumfield had diagnosed him with some form of conduct disorder, none of them had diagnosed him with an intellectual disability.

Reviewing Brumfield's records from the several group homes where he resided over the years, Blanche recalled a number of reports that Brumfield participated in sports and other group activities. Assessing the two videotaped confessions Brumfield gave to the police following Corporal Smothers' murder, Blanche noted that Brumfield had no problems explaining himself to the police even in the face of complex questions. Based on Brumfield's description of the events leading up to Smothers' murder, Blanche concluded that the crime clearly involved planning, as Brumfield "scoped out [the] situation." Additionally, Blanche explained that Brumfield's other behaviors in the community, though often illegal, also demonstrated his adaptive behavior. For example, Brumfield chose to deal drugs instead of working a typical job not because he was unable to work a typical job but because dealing drugs was more lucrative. Similarly, Brumfield was

able to "rent" a car by offering its owner drugs in exchange for the use of the car. Based on his review of the available records, Blanche concluded that, "to a reasonable medical certainty, [Brumfield] is not [intellectually disabled]."

Despite this conclusion, Blanche admitted, on cross-examination, that "[Y]eah. I think he has some weaknesses. And in adaptive functioning that there are some—there are some, I will call it deficient. But to how significant they are, is, I think, a question." He further agreed that Brumfield possesses weaknesses in several domains of adaptive functioning. Identifying specific weaknesses, Blanche stated that Brumfield's impulsivity fits into the social domain of adaptive behavior and his inability to follow rules fits into the practical domain of adaptive behavior.

The State's final expert, John Bolter, Ph.D.,[18] had previously evaluated Brumfield in 1995, written a report based on that evaluation, and testified in the penalty phase of Brumfield's original trial. However, all of Bolter's original records and raw data from his 1995 evaluation were destroyed. Bolter stated he remembered little about Brumfield's 1995 evaluation and did not independently recall which materials he reviewed as part of that evaluation. Over Brumfield's objection, the court accepted Bolter as an expert but restricted his testimony to the scope of his 1995 report. *Id*. at 388.

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[18] Bolter received his Ph.D. from the University of Memphis, and at the time of the hearing was a practicing clinical neuropsychologist.

In preparing his report, Bolter administered "a standard neuropsychological battery of tests to explore . . . brain function, assessing things such as visual spatial skills, language functioning, memory abilities, conceptual or executive functions, motor functions, and basic sensory perception functions." Based on the tests he ran, Bolter "didn't see any clear evidence of organic brain dysfunction." He "saw that [Brumfield] had what [Bolter] thought was an attention deficit hyperactivity disorder and . . . nonspecific learning difficulties . . . borderline intellectual functioning, and . . . an antisocial personality." Bolter also administered the WAIS-R to Brumfield to measure his IQ. His full-scale IQ score was "in the range of 75" which put Brumfield in the "borderline mentally defective range." Based on this test and all of the information available to him in 1995, Bolter did not diagnose Brumfield with an intellectual disability.

3. Other Witnesses and Expert Materials

In addition to its three experts, the State called five other witnesses to testify at Brumfield's *Atkins* hearing. Warrick Dunn was Corporal Smothers' oldest son. Dunn met with Brumfield on October 23, 2007. Commenting on Brumfield's verbal abilities, Dunn stated that the two of them "had a conversation like two adults" and agreed that Brumfield was able to express himself well. Jerry Callahan, a retired Baton Rouge Police Department lieutenant, was the lead investigator of Corporal Smothers' murder. Callahan interrogated Brumfield and was responsible for videotaping Brumfield's two confessions. Callahan stated that during the five hours he spent with Brumfield, Brumfield never had any problems

communicating and, in fact, "communicated easily." None of the State's final three witnesses testified substantively on Brumfield's intellectual disability.

In addition to his three testifying experts, Brumfield also relied on a report compiled by James Merikangas, M.D.[19] In his report, Merikangas stated that a neurological examination of Brumfield revealed no acquired brain damage or ongoing disease. The district court recognized that the implication of this report is that Brumfield's cognitive deficiencies stem from an underlying disability, as no physical damage to Brumfield's brain explains his problems. Additionally, the report implies that these deficiencies have been present for the entirety of Brumfield's life, as no physical damage occurring after his developmental years explains his problems.

4. The District Court's Conclusion on Intellectual Disability

Beginning with the first prong of the intellectual disability test, the district court found that, based on its analysis of Louisiana law and the mental health literature, "an IQ score of 75 or below does not preclude a finding of mild [intellectual disability] for *Atkins* purposes." *Brumfield II*, 854 F. Supp. 2d at 389. After listing Brumfield's scores on previous IQ tests, the court explained that his "scores consistently show him scoring between 70 and 75 on various IQ tests, a range which falls squarely within the upper bounds of mild [intellectual disability] according to the AAIDD's

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[19] Merikangas received his M.D. in 1969 and is board certified in neuropsychiatry.

clinical definition." *Id.* at 389–90. Further, the court noted that "[e]very expert that has testified in this matter has admitted that Brumfield meets the intellectual functioning prong of the [intellectual disability] test as set forth in La.C.Cr.P. art. 905.5.1(H)(1)." *Id.* at 390.

Turning to the second prong and relying on the *Red Book*, the court explained that "Prong Two involves an assessment of Brumfield's adaptive skills in the areas of conceptual, social, and practical skills" and that "[h]e must show a significant limitation in at least one of those three domains to satisfy the adaptive skills prong." *Id.* at 392 (citing *Red Book*, *supra*, at 14). "Without reliable standardized measures available, the [district c]ourt [relied] on the testimony of the expert witnesses and their reports, the [c]ourt's independent evaluation of Brumfield's social, educational, medical, and criminal histories, and a common sense appraisal of Brumfield's actions and abilities." *Id.* at 393. In doing so, the district court remained cognizant that an intellectual disability "is ruled in by areas of impairment but is not ruled out by areas of competence" and that "'people with [intellectual disabilities] are complex human beings' who may have 'strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Id.* (quoting *Red Book*, *supra*, at 8). The court further noted that it "must take into account the retrospective diagnostic guideline admonishing practitioners to 'not use past criminal behavior or verbal behavior to infer [a] level of adaptive behavior.'" *Id.* (quoting *Red Book*, *supra*, at 22). However, the court recognized the "propensity of Louisiana courts to take such maladaptive criminal behavior into account when discussing the adaptive

skills prong of the [intellectual disability] test." *Id.* at 394.

"With these important precepts in mind," the district court evaluated each of the three domains of adaptive behavior under the AAIDD guidelines. *Id.* at 396. The court began with the conceptual skills, or "functional academics," domain. *Id.* First, the court found that "Brumfield's writing abilities are severely limited," as he "cannot write freehand" and "takes an inordinate amount of time to write a simple, one-page letter." *Id.* Second, Brumfield does not have adequate reading abilities, as he reads at "a fourth grade level." *Id.* Third, "Brumfield has a dismal record of academic accomplishments in the classroom." *Id.* And Brumfield "reached a plateau somewhere between the fourth and sixth grade, which is where mildly [intellectually disabled] individuals generally fall." *Id.*

Based on the procedural posture of this case, the district court noted that it was required to "view, more or less in isolation, whether Brumfield [met] the clinical criteria." *Id.* at 401. In weighing the credibility of the experts in this case, the district court ultimately found the testimony of Weinstein and Swanson more credible than the testimony of Blanche on the second prong of the intellectual disability test.[20] *Id.* Blanche "lacked basic knowledge about the AAIDD's standards until he was deposed in this case shortly before the hearing." *Id.* Blanche also "failed to conduct interviews with anyone other than Brumfield himself, which [ran]

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[20] The State's other expert, Hoppe, did not make any determinations on whether Brumfield had significant limitations in adaptive behavior.

afoul of the basic guidelines for retrospective diagnoses." *Id.* Beyond the expert testimony, the court held that it could not "accord great weight to the facts of the crime, even though they must be taken into account, because the diagnostic guidelines for assessing maladaptive behavior as a part of adaptive skills ha[d] not been sufficiently shown to be present in th[e] case." *Id.*

"Ultimately, the [district c]ourt f[ound] that, based on the credibility of petitioner's witnesses combined with the documented problems with the bases of testimony by the State's experts, Brumfield [showed] by a preponderance of the evidence that he ha[d] significantly limited conceptual skills." *Id.* "[O]n balance, the evidence [demonstrated that Brumfield met] the AAIDD's definition of [intellectual disability] with respect to the conceptual domain of adaptive behavior." *Id.* "Because Brumfield's deficit in conceptual skills satisfie[d] Prong Two of the [intellectual disability] test, the [district c]ourt [conducted] only a brief review of the other two domains."[21] *Id.*

The district court next addressed the final prong of the intellectual disability test: whether the disability manifested prior to age 18. *Id.* at 403. The court credited Weinstein's unrebutted testimony that "there

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[21] Analyzing the social skills domain, the court found that "[o]n balance, this domain [was] a close call, but [it] d[id] not find Brumfield [met] the criteria for a significant overall deficit in the domain of social skills." *Id.* at 402. Considering the practical skills domain, the court found that "Brumfield ha[d] not met his burden of showing he ha[d] significant deficits in practical skills." *Id.* at 403.

is no question that [Brumfield] had very serious problems from very early on in life." *Id.* Swanson reached a similar conclusion in her report. *Id.* Merikangas evaluated Brumfield in 2007 and concluded that he had no "acquired brain damage or ongoing disease that might negate the existence of an organic reason for Brumfield's [intellectual disability]." *Id.* While Brumfield was evaluated during his youth by "no less than six doctors," none of whom diagnosed him as intellectually disabled, "Swanson [gave] the [c]ourt a compelling reason to not draw a negative inference due to the lack of childhood diagnosis." *Id.* at 403–04.

Additionally, "[e]tiological factors appear[ed] to bolster the conclusion that Brumfield was and is [intellectually disabled]."[22] *Id.* at 404. Weinstein testified that Brumfield's mother "took psychotropic medication during her pregnancy" and that Brumfield weighed only "three and a half pounds" and suffered fetal distress at birth. *Id.* "The etiological risk factors, along with Brumfield's school and medical records, indicate[d] that his mental health problems and developmental delays occurred prior to adulthood." *Id.* at 405. "Based on the showing of substantial

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[22] As Greenspan explained, "[e]tiology has to do with cause and effect or things that put the person at risk that could explain why he became [intellectually disabled]." Greenspan further explained that "for the most part, when we talk about etiology, we are talking about something biological," such as "an infection or a brain malformation that came about in utero . . . [or] some physical cause that organically places the person at risk" of developing an intellectual disability. Environmental causes of intellectual disability also exist, such as severe child abuse; and some etiological risk factors are both environmental and biological such as "oxygen deprivation at birth, or a low birth weight."

intellectual functioning and adaptive behavior deficiencies detailed above, the [district c]ourt credit[ed] the testimony of Brumfield's experts and f[ound that] Brumfield ha[d] met his burden to show by a preponderance of the evidence that those deficits occurred before he turned 18." *Id.* Because the district court concluded that Brumfield was intellectually disabled, it granted his petition for a writ of habeas corpus, rendering him ineligible for execution. *Id.* at 405–06.

C. Proceedings in the Fifth Circuit and Supreme Court

The State timely appealed the district court's grant of the writ to this court. *Brumfield (5th Cir.)*, 744 F.3d at 922. This court reversed the district court, concluding that Brumfield's habeas petition did not satisfy either of § 2254(d)'s requirements. *Id*. at 927. First, because this court determined that none of the Supreme Court's precedents required a state court to grant an *Atkins* petitioner funds to develop his claim, it rejected the district court's conclusion that the state court had unreasonably applied clearly established federal law. *Id.* at 925–26. Second, because this court's "review of the record persuade[d it] that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing," it held that the state court's decision did not rest on an unreasonable determination of the facts. *Id.* at 926. Having concluded that Brumfield failed both of the requirements of 28 U.S.C. § 2254(d), this court did not review the district court's determination that Brumfield was intellectually disabled. *Id.* at 927. However, in a footnote, this court noted that "[e]ven if we were to consider the new

evidence presented to the district court, we likely would hold that Brumfield failed to establish an *Atkins* claim." *Id.* at 927 n.8.

The Supreme Court granted certiorari and vacated this court's decision on June 18, 2015, in a 5–4 decision. *Brumfield (S. Ct.)*, 135 S. Ct. at 2283. The Court explained that to obtain an *Atkins* evidentiary hearing, a defendant in Louisiana must "put forward sufficient evidence to raise a 'reasonable ground' to believe him to be intellectually disabled." *Id.* at 2274 (citing *Williams*, 831 So. 2d at 861). The Court held that the state court's refusal to grant Brumfield an *Atkins* hearing rested on two unreasonable factual determinations that related directly to the three-part test for intellectual disability. *Id.* at 2276–82. First, the Court noted that "the state court apparently believed" that Brumfield's IQ score of 75 and an expert witness's testimony that he "may have scored higher on another test . . . belied the claim that Brumfield was intellectually disabled because they necessarily precluded any possibility that he possessed subaverage intelligence." *Id.* at 2277. However, the Court explained, "this evidence was entirely consistent with intellectual disability." *Id.* The Court further explained—relying on its prior decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), and Louisiana statutory law and caselaw—that "Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability." *Id.* at 2278. "To conclude . . . that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts." *Id.*

Second, the Court held that the state court unreasonably determined that "the record failed to raise any question as to Brumfield's 'impairment . . . in adaptive skills.'" *Id.* at 2279. Even under the interpretation of the second prong of the intellectual disability test "most favorable to the State," the Court held that it was unreasonable for the state court to conclude that Brumfield lacked deficits in adaptive behavior. *Id.* at 2279–81. The Court noted a number of examples of Brumfield's deficits in the state trial court record. *Id.* at 2279–80. For example, when Brumfield was born, he had a low birth weight and "slower responses than other babies." *Id.* at 2279. Brumfield was placed "in special classes in school and in multiple mental health facilities." *Id.* One report from one of these facilities "questioned his intellectual functions," and Dr. Bolter noted that Brumfield had only a "fourth-grade reading level . . . with respect to 'simple word recognition,'" and did not even reach that level with respect to "comprehension." *Id.* at 2280. "All told," the Court concluded, "the evidence in the state-court record provided substantial grounds to question Brumfield's adaptive functioning" because "[a]n individual, like Brumfield, who was placed in special education classes at an early age, was suspected of having a learning disability, and can barely read at a fourth-grade level, certainly would seem to be deficient in both '[u]nderstanding and use of language' and

'[l]earning.'"[23] *Id.* (alteration in original) (citation omitted).

Finally, with respect to the third prong of the test, the Court noted that "the state trial court never made any finding that Brumfield had failed to produce evidence suggesting he could meet this age-of-onset requirement." *Id.* at 2282. Therefore, there was no "determination on that point to which a federal court had to defer in assessing whether Brumfield satisfied § 2254(d)." *Id.* The Court noted that "[i]f Brumfield presented sufficient evidence to suggest that he was intellectually limited, as we have made clear he did, there is little question that he also established good reason to think that he had been so since he was a child." *Id.* at 2283. Based on its conclusion that the state trial court decision "was based on an unreasonable determination of the facts in light of the evidence," 28 U.S.C. § 2254(d)(2), the Supreme Court held that "Brumfield ha[d] satisfied the requirements of § 2254(d)." *Brumfield (S. Ct.)*, 135 S. Ct. at 2283. Accordingly, the Court reversed the judgment of this court and remanded the case for further proceedings. *Id.* The sole remaining issue on remand is whether the

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[23] The Court also noted that:

> An individual who points to evidence that he was at risk of "neurological trauma" at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot "process information," has raised substantial reason to believe that he suffers from adaptive impairments.

Id. at 2281.

district court clearly erred when it found Brumfield was intellectually disabled, as the Supreme Court held that Brumfield had satisfied § 2254(d) and that Brumfield "was therefore entitled to have his *Atkins* claim considered on the merits in federal court." *Id.* at 2273.

II. STANDARD OF REVIEW

"[T]he determination of whether a defendant is [intellectually disabled] is inherently an intensively factual inquiry." *State v. Williams*, 22 So. 3d 867, 887 (La. 2009); *see also State v. Turner*, 936 So. 2d 89, 98 (La. 2006). Because intellectual disability is a factual finding, this court reviews a district court's determination that an individual is intellectually disabled for clear error.[24] *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007).

"A finding is clearly erroneous only if it is implausible in the light of the record considered as a whole." *Id.* (quoting *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006)); *see also Anderson v. City of Bessemer City,* 470 U.S. 564, 573 (1985) ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." (quoting *United States v. United*

[24] The State never mentions the standard of appellate review in its brief, and despite direct questions at oral argument, the State refused to acknowledge the appropriate standard of review. In its brief and also at oral argument, the State argued that the district court refused to introduce the state trial court record into evidence when, in fact, the district court allowed the State to introduce the vast majority of the state court record into evidence.

States Gypsum Co., 333 U.S. 364, 394–95 (1948))). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. The Supreme Court has explained that:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Id. at 575. This court "cannot second guess the district court's decision to believe one witness' testimony over another's or to discount a witness' testimony," and is thus "reluctant to set aside findings that are based upon a trial judge's determination of the credibility of witnesses." *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 375 (5th Cir. 2000).

III. INTELLECTUAL DISABILITY

Although the determination of whether an individual has an intellectual disability under *Atkins* is necessarily a question for the court to decide, this determination is heavily informed by clinical standards and guidelines. In *Atkins*, when the Supreme Court left to states the task of implementing its holding that intellectually disabled individuals may not be executed,

it cited with approval the clinical standards of the AAIDD and APA. *Atkins*, 536 U.S. at 308–09, 317. The Supreme Court of Louisiana first implemented the *Atkins* mandate in *Williams*, 831 So. 2d at 835. Noting that the *Atkins* Court adopted a "'clinical definition' of [intellectual disability]," the Supreme Court of Louisiana explicitly relied on the definition of intellectual disability developed by the AAIDD and the APA in crafting the test for intellectual disability. *Id.* at 852.

Following *Atkins* and *Williams*, Louisiana enacted a statute providing that "[n]otwithstanding any other provisions of law to the contrary, no person who is [intellectually disabled] shall be subjected to a sentence of death." La. Code Crim. Proc. Ann. art. 905.5.1(A). The statute defining intellectual disability at the time of the *Atkins* hearing provided as follows:

> (1) "[Intellectual disability]" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

La. Code Crim. Proc. Ann. art. 905.5.1(H).[25] As Swanson stated in her testimony and as the district court noted, this definition tracks the *Red Book*'s definition of intellectual disability. The *Red Book* provides that "[intellectual disability] is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as

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[25] The Louisiana legislature amended the statute in June 2014, which currently reads as follows:

> A. Notwithstanding any other provisions of law to the contrary, no person with an intellectual disability shall be subjected to a sentence of death.
>
> . . .
>
> H. (1) "Intellectual disability", formerly referred to as "mental retardation", is a disability characterized by all of the following deficits, the onset of which must occur during the developmental period:
>
> (a) Deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.
>
> (b) Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility; and that, without ongoing support, limit functioning in one or more activities of daily life including, without limitation, communication, social participation, and independent living, across multiple environments such as home, school, work, and community.

La. Code Crim. Proc. Ann. art. 905.5.1. The district court relied on the older version of the statute, and we do the same here. However, we note that while the new statute is worded differently, the test for intellectual disability remains largely unchanged.

expressed in conceptual, social, and practical adaptive skills," and that "[t]his disability originates before age 18." *Red Book*, *supra*, at 1. Since this statute was enacted, the Supreme Court has reiterated that "[t]he clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." *Hall*, 134 S. Ct. at 1999. In this case, the Supreme Court again cited with approval the clinical guidelines on intellectual disability. *Brumfield (S. Ct.)*, 135 S. Ct. at 2274, 2278. Therefore, the district court properly relied on the clinical guidelines of the AAIDD and APA in assessing whether Brumfield satisfied the statutory test for intellectual disability, and we similarly look to these guidelines in our review of the district court's decision. In reviewing the district court's decision, we address *seriatim* the three prongs of the test for intellectual disability.

A. First Prong: Intellectual Functioning

The assessment of an individual's intellectual functioning requires the administration of standardized intelligence testing. "The 'significant limitations in intellectual functioning' criterion for a diagnosis of intellectual disability is an IQ score that is approximately two standard deviations below the mean, considering the standard error of measurement for the specific instruments used." *Green Book*, *supra*, at 31; *accord Red Book*, *supra*, at 58 ("[T]he 'intellectual functioning' criterion for diagnosis of [intellectual disability] is approximately two standard deviations below the mean, considering the [standard error of measurement] for the specific assessment instruments used."). As Greenspan explained, IQ tests are normalized so that the mean score is 100 and the

standard deviation is 15; thus, two standard deviations below the mean equates to a score of 70. This is consistent with the assessment of Louisiana law by the Supreme Court of the United States, as it explained that, "[t]o qualify as 'significantly subaverage in general intellectual functioning' in Louisiana, 'one must be more than two standard deviations below the mean for the test of intellectual functioning.'" *Brumfield (S. Ct.)*, 135 S. Ct. at 2277 (quoting *Williams*, 831 So. 2d at 853).

Although a score of 70 is two standard deviations below the mean score, both the Supreme Court of the United States and the Louisiana Supreme Court have rejected a bright-line numerical cutoff for intellectual disability. *See Hall*, 134 S. Ct. at 1996; *Williams*, 22 So. 3d at 888. As the Supreme Court of the United States explained in *Hall*, "[t]he concept of standard deviation describes how scores are dispersed in a population," but "[s]tandard deviation is distinct from standard error of measurement, a concept which describes the reliability of a test." 134 S. Ct. at 1994. The Court further explained that the standard error of measurement "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* at 1995. Therefore, "an individual's score is best understood as a range of scores on either side of the recorded score." *Id.* Thus, scores higher than 70 can satisfy the first prong of the intellectual disability test. The Supreme Court in *Hall* explicitly rejected the contention that an IQ score of 75 precludes the possibility of an intellectual disability diagnosis. *Id.* at 1996. Similarly, the Louisiana Supreme Court in *State v. Dunn (Dunn III)*, 41 So. 3d 454, 470 (La. 2010), stated that "[t]he ranges associated with the two scores

of 75 brush the threshold score for [an intellectual disability] diagnosis." Moreover, the AAIDD recognizes that a score of 75 is consistent with an intellectual disability. *Red Book*, *supra*, at 59; *see also DSM-IV-TR*, *supra*, at 41–42.

In this case, the district court concluded that Brumfield satisfied the first prong of the intellectual disability test based on his IQ scores. As found by the district court, Brumfield's IQ test scores were as follows:

> — In a 1995 WAIS–R test administered by then-defense expert Dr. Bolter, he scored a 75, with a 95% confidence interval of 70–80.
> — In a 2007 Stanford–Binet V test administered by petitioner's expert, Dr. Weinstein, he scored a 72, with a 95% confidence interval of 69–77.
> — In a 2007 C–TONI test administered by Dr. Weinstein, he scored a 70, with a 95% confidence interval of 65–75.
> — In a 2009 WAIS–IV test administered by the State's expert, Dr. Hoppe, he scored a 70, with a 95% confidence interval of 67–75.

Brumfield II, 854 F. Supp. 2d at 389–90. All four of the confidence intervals (the range of scores calculated from the standard error of measurement) surrounding Brumfield's full-scale IQ scores include scores of 70 or below, and therefore satisfy the first prong of the intellectual disability test based on how both the Supreme Court and Supreme Court of Louisiana have

analyzed IQ scores in the past.[26] Even ignoring the confidence intervals, no score exceeds 75, and the Supreme Court noted in *Atkins*, *Hall*, and *Brumfield (S. Ct.)*, that a score of 75 can satisfy the first prong of the intellectual disability test. *Brumfield (S. Ct.)*, 135 S. Ct. at 2278; *Hall*, 134 S. Ct. at 1996; *Atkins*, 536 U.S. at 309 n.5. Moreover, every single expert agreed that Brumfield's scores satisfied the first prong of the intellectual disability test.[27] As this court noted in *Rivera*, 505 F.3d at 361, "[a] finding is clearly erroneous only if it is implausible in the light of the record considered as a whole." Given that all of Brumfield's reported IQ scores fell at or below 75 and that the experts' conclusions were based on these scores, the district court's conclusion that Brumfield met the first criterion for an intellectual disability

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[26] Weinstein explained that as long as the lower bound of the confidence interval includes a score of 70 or less, an individual can satisfy the first prong of the intellectual disability test.

[27] The district court, experts, and parties discussed the import of the "Flynn effect," which describes the phenomenon whereby the American public's score on any given IQ test increases by approximately three points per decade. *Brumfield II*, 854 F. Supp. 2d at 391. "Thus, when an older test is used to measure a test subject, the subject's IQ score may be artificially inflated because that test was normalized using a past sample of Americans." *Id.* at 391. To correct for the Flynn effect, a test subject's score may be adjusted downward by 0.30–0.33 for every year that has elapsed since the test was normalized. *Id.* The State correctly points out that the Fifth Circuit has not recognized the Flynn effect. *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006); *see also In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007). It is not necessary to decide whether to recognize the Flynn effect in this case, however, as Brumfield's scores satisfy the first prong of the intellectual disability test without a Flynn effect adjustment.

diagnosis is not implausible and therefore is not clearly erroneous.

The State argues that "assessments consistently demonstrated that Brumfield had an IQ in the 70-85 range." However, the State does not point to specific IQ scores which demonstrate that Brumfield's IQ fell within this range. Presumably, it refers to the tests administered to Brumfield in the 1980s. As Weinstein explained, no actual IQ scores from these tests were reported anywhere in Brumfield's records; instead, the reports based on these IQ tests provided only descriptions of the ranges into which Brumfield's scores fell. For example, Weinstein explained that one report described Brumfield's IQ score as falling into the "dull normal" range, which Weinstein further explained corresponded to a score between 80 and 89. The district court's discrediting of this range of scores in favor of reported, full-scale IQ scores was not clear error, as the Supreme Court similarly disregarded supposedly higher IQ scores when no actual score was provided. *See Brumfield (S. Ct.)*, 135 S. Ct. at 2278–79. Moreover, multiple expert witnesses discredited this range of scores in favor of the reported scores, and this court "cannot second guess the district court's decision to believe one witness' testimony over another's or to discount a witness' testimony." *Canal Barge*, 220 F.3d at 375.

The State also argues that Brumfield's scores may be explained by his low effort on the IQ tests. However, the experts in this case—including the State's expert who administered IQ tests—also administered tests for malingering and found that Brumfield was, in fact, not malingering. Moreover, Greenspan explained that

Brumfield's consistent scores across multiple tests over multiple years ruled out malingering. We decline the State's invitation to second guess the district court's decision to believe the multiple experts who stated that Brumfield's scores were not a product of malingering. Accordingly, we find no clear error in the district court's finding that Brumfield satisfied the first prong of the intellectual disability test.

B. Second Prong: Adaptive Behavior

"Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." *Green Book*, *supra*, at 43; *see also Red Book*, *supra*, at 73. Under the AAIDD's definition,[28] a diagnosis of intellectual disability requires that an individual have significant limitations in at least one of the three domains of adaptive skills—conceptual, social, and practical skills.[29] *Red Book*, *supra*, at 14. The district

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[28] The district court correctly noted that, as with the intellectual functioning prong, the AAIDD prefers that practitioners employ standardized testing to evaluate adaptive functioning. *See Red Book*, *supra*, at 76. However, utilizing standardized testing, such as the ABAS questionnaires administered by Weinstein, is difficult in situations requiring a retrospective diagnosis. In these situations, the district court correctly explained that the *User's Guide*, *supra*, at 17–22, calls for additional inquiry into the subject's past and interviews alongside the types of questionnaires used in situations of contemporaneous diagnosis. That additional inquiry and those interviews were conducted by two of Brumfield's experts in this case.

[29] Neither the State nor Brumfield contests the use of the "three domain" test on remand. The State structures its argument that Brumfield has no deficits in adaptive skills around this test.

court found that Brumfield showed significant limitations in the conceptual domain but not in the social or practical domains. *Brumfield II*, 854 F. Supp. 2d at 396–403.

The first deficit the court found in the conceptual domain was Brumfield's writing abilities, as Brumfield could not write in a straight line without an aid, took an "inordinate amount of time to write a simple, one-page letter," and relied on the assistance of other inmates when writing letters. *Id.* at 396. In coming to this conclusion, the district court relied on Weinstein's testimony, and in concluding that the State's reliance on the "quality of his expressions in his prison correspondence is misplaced," the court credited the testimony of Swanson. *Id.* The court next found that Brumfield's reading skills were deficient. *Id*. The court explained that after listening to Brumfield read some of his letters, Swanson concluded he read at approximately a fourth grade level. *Id.* Finally, the district court found that "Brumfield has a dismal record of academic accomplishments." *Id*. The court relied on the testimony of Weinstein, who stated that Brumfield was always behind in school because of developmental delays, and Swanson, who noted that Brumfield "reached a plateau somewhere between fourth and sixth grade, which is where mildly [intellectually disabled] individuals generally fall." *Id.*

In reaching its conclusion that Brumfield demonstrated significant limitations in the conceptual skills domain, the district court carefully explained its reasoning, identified the specific evidence it relied upon, and specifically credited the testimony of certain experts. Because nothing in the district court's

reasoning suggests its conclusion "is implausible in the light of the record considered as a whole," *Rivera*, 505 F.3d at 361 (quoting *St. Aubin*, 470 F.3d at 1101), and because this court must give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses," *Anderson*, 470 U.S. at 573 (quoting Fed. R. Civ. P. 52(a)), we hold that the district court's finding is not clearly erroneous. Brumfield was only required to demonstrate significant limitations in one of the three domains of adaptive behavior to satisfy the legal and clinical tests for intellectual disability. Thus, the district court's finding that Brumfield met "the AAIDD's definition of [intellectual disability] with respect to the conceptual domain of adaptive behavior," *Brumfield II*, 854 F. Supp. 2d at 401, was sufficient for the district court to conclude that Brumfield had satisfied the second prong of the intellectual disability test.

In challenging the district court's conclusion, the State argues that Brumfield's academic problems, which led to his being placed in special education classes, stemmed primarily from his behavior problems and conduct disorder, not an intellectual disability. However, the district court credited the testimony of Swanson, who explained that, at the time Brumfield attended school, school systems were urged to substitute diagnoses of conduct disorder for intellectual disability essentially for political reasons.[30] *Id.* at 397.

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[30] The district court explained that:

> Swanson [gave] the Court a compelling reason to not draw a negative inference due to the lack of childhood [intellectual disability] diagnosis. She points out that

Moreover, the Supreme Court noted that "[t]he diagnostic criteria for [intellectual disability] do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder." *Brumfield (S. Ct.)*, 135 S. Ct. at 2280 (quoting *DSM-IV-TR*, *supra*, at 47). Both the State and Brumfield tell "coherent and facially plausible stor[ies]," *Anderson*, 470 U.S. at 575, as either behavioral problems or an intellectual disability could explain all or some of Brumfield's poor academic record. "When 'the district court is faced with testimony that may lead to more than one conclusion, its factual determinations will stand so long as they are plausible—even if we would have weighed the evidence otherwise.'" *Heck v. Triche*, 775 F.3d 265, 284 (5th Cir. 2014) (quoting *Nielsen v. United States*, 976 F.2d 951, 956 (5th Cir. 1992)); *see also Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

The State also points to elements of Brumfield's past that it argues demonstrate adaptive functioning.

> during Brumfield's school years in the late 1970s, African–Americans males were b[e]ing disproportionately diagnosed with [intellectual disabilities]. School officials, psychologists, and appraisal teams were accordingly cautious not to over-represent black males as being [intellectually disabled] and were instead urged to consider other alternatives that would avoid placing the [intellectually disabled] label on them. Swanson confirmed that East Baton Rouge Parish schools, which Brumfield attended, had received this admonition.

Id. at 404.

For example, Blanche testified that Brumfield "owned" a car, engaged in cash transactions by renting motel rooms, and helped his girlfriend financially. Although the district court acknowledged these activities, among others, it explained that "[m]ildly [intellectually disabled] people generally have mental ages ranging from seven to eleven," and "[i]t is not inconceivable for someone around the age of ten to have the mental capacity" to engage in these types of activities. *Brumfield II*, 854 F. Supp. 2d at 398.

The State also argues that Brumfield's activities while in prison belie any intellectual disability, as he wrote letters, possessed books (including two dictionaries), and explained complex tasks to people over the phone. With respect to Brumfield's writing letters, the district court credited the testimony of Weinstein and Swanson that "Brumfield requires assistance from other death row inmates to write his letters, . . . and thus the reliance by the States' experts on the quality of his expressions in his prison correspondence is misplaced." *Id*. at 396. The court further found that, based on Swanson's testimony, "[t]he reading materials in his prison cell are targeted to middle school audiences and are consistent with someone who has [an intellectual disability]." *Id*. Finally, with respect to Brumfield's phone calls, the district court found that they were "simply not sufficient to show adaptive strength in communication abilities," and that "one or two instances of him exhibiting oral communication skills expected of adults could hardly be said to outweigh the other documented adaptive weaknesses in the conceptual domain," as "strengths can coexist alongside weaknesses." *Id*. at 399. Although the evidence emphasized by the State

tends to undermine the district court's conclusion that Brumfield had significant limitations in adaptive functioning, we are "not entitle[d to]. . . reverse the finding of the trier of fact" even if we "would have weighed the evidence differently." *Anderson*, 470 U.S. at 573–74. Because nothing the State emphasizes establishes that the district court's account of the evidence is implausible, we hold that the district court's finding—that Brumfield's poor academic performance and his deficiencies in reading and writing constitute deficits in adaptive behavior—is not clearly erroneous. *See id*. at 573–74 ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

Furthermore, we note that the district court's finding is not clearly erroneous because it has more evidentiary support than prior cases in which this court upheld a district court's intellectual disability determination. In *Wiley v. Epps*, 625 F.3d 199, 219–22 (5th Cir. 2010), this court found no clear error when a district court held that petitioner Wiley had an intellectual disability based on deficits in functional academic skills, communication, and self-direction. In that case, Wiley was evaluated four separate times with conflicting results. *Id.* at 219–21. Based on these results and evidence that he struggled academically while in the military, the district court found that he was deficient in the area of functional academic skills. *Id.* at 221. This court refused to reverse the district court because doing so would essentially substitute the opinion of the State's expert for Wiley's experts. *Id.* at

218. As the district court was in a better position to judge the credibility of the experts, this court declined to reverse the district court. *Id.* In *Rivera*, the district court found that Rivera had "adaptive limitations," including "consistent[] . . . academic problems." 505 F.3d at 362. After remarking that the district court "is in a better position than this court to judge and weigh the credibility of the witnesses who testified," this court declined to find a clear error. *Id.* at 363. However, neither *Wiley* nor *Rivera* involved Louisiana law.

Dunn III, on the other hand, did involve Louisiana law, and this court noted previously that, based on this case, it would likely determine that the district court erred in finding Brumfield intellectually disabled,[31]

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[31] The State argues that the district court failed to consider other Louisiana cases addressing the question of how to factor criminal behavior into an evaluation of an individual's adaptive functioning. However, the court recognized the "propensity of Louisiana courts to take such maladaptive criminal behavior into account when discussing the adaptive skills prong of the [intellectual disability] test." *Brumfield II*, 854 F. Supp. 2d at 394. Addressing this propensity, the district court identified five cases where the Supreme Court of Louisiana "affirmed on direct appeal a jury's assessment of death in the penalty phase of the trial where the [intellectual disability] issue was actually litigated." *Id.*; *see generally Williams*, 22 So. 3d 867; *State v. Anderson*, 996 So. 2d 973 (La. 2008); *State v. Lee*, 976 So. 2d 109 (La. 2008); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Brown*, 907 So. 2d 1 (La. 2005). However, the district court found these cases distinguishable because the Supreme Court of Louisiana was required under *Jackson v. Virginia*, 443 U.S. 307 (1979), to apply a different standard of review than the standard that applies to *Atkins* hearings. *Brumfield II*, 854 F. Supp. 2d at 394. The court found that *Dunn III* "[was] the only Louisiana Supreme Court case on point." We agree and find no error with the manner in which

Brumfield (5th Cir.), 744 F.3d at 927 n.8. In that case, the Supreme Court of Louisiana reviewed a trial court's determination that Dunn was not intellectually disabled following an *Atkins* hearing. *Dunn III*, 41 So. 3d at 455–56. Dunn had reported IQ scores of 70, 78, and 78. *Id.* at 462–63. Multiple experts administered ABAS scales, but like this case, the evidence on Dunn's adaptive behavior conflicted. *Id.* at 463–70. After reviewing that evidence, the court noted that "[i]t is also important to consider the defendant's behavior during the planning and commission of the instant crime as it relates to his adaptive skills functioning." *Id.* at 471. In evaluating Dunn's crime, the court found that "the evidence at trial established defendant engaged in the leadership and planning of a major bank robbery" and held that the defendant's planning "with its premeditative aspects, clearly lacks the impulsiveness and non-leadership interactions associated with [intellectually disabled] persons" based on "the firmly established facts of this case." *Id.* at 471–72.

The district court carefully considered this case and concluded that it could consider "evidence of the criminal action in the overall assessment if 'firmly established facts' show[ed] clear instances of premeditation and leadership." *Brumfield II*, 854 F. Supp. 2d at 395. In considering the evidence of Brumfield's criminal activity, the district court concluded that it was not sufficient to demonstrate an absence of deficits in the conceptual skills domain, *id.* at 398–401, and that nothing in the record suggested

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the district court factored Brumfield's criminal behavior into its analysis of his adaptive functioning.

Brumfield "'led' this terrible scheme." *Id.* at 400. The district court further reasoned that even if the crime involved planning and premeditation by Brumfield, "this particular instance [should not be] sufficient to overwhelm the other demonstrated showings of adaptive deficits in conceptual skills." *Id.*

Beyond the facts of Smothers' murder, the State argues that other aspects of Brumfield's criminal history demonstrate that he does not have significant limitations in adaptive functioning. First, the State contends that Brumfield's two confession videos show his composure under pressure, ability to lie, and think quickly. However, the district court credited Swanson's testimony that, in the first tape, Brumfield responded to cues from police and that, in the second tape, Brumfield spoke more quickly because he was more familiar with the topic at that point. *Id.* Second, the State argues that Brumfield's history of drug dealing and other criminal behavior demonstrates his ability to plan, his ability to handle complex transactions, and his adaptive functioning generally.[32] Although the State is correct that Brumfield dealt drugs in the past, the court noted that "[t]he record is barren of any testimony regarding his efficacy in drug transactions," *id.* at 398, and both Greenspan and Weinstein testified that Brumfield's drug dealing was not inconsistent with an intellectual disability diagnosis. Third, the State argues that Brumfield's ability to avoid the police after his crime demonstrates adaptive functioning, but

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[32] The State notes that Brumfield demonstrated an ability to choose weak and vulnerable victims for his past crimes. We see nothing in the record concerning this ability that demonstrates clear error on the part of the district court.

the district court found that "[w]hile evading police and avoiding capture can exhibit raw physical skills, at other times those acts are just as consistent with primal survival instincts as they are with callous, cold-blooded calculation." *Id*. at 399.

Overall, the district court considered the facts surrounding Smothers' murder as well as Brumfield's other criminal activities. Thus, while the district court considered similar evidence as the trial court in *Dunn III*, it simply reached a different conclusion. Although this difference in findings based on relatively similar evidence certainly weighs against the conclusion that Brumfield is intellectually disabled, it does not necessarily demonstrate that the district court clearly erred based on the record before it. The *Dunn III* court recognized that trial courts are called on "to make exceedingly fine distinctions" between those who are mildly intellectually disabled and those who are not. *Dunn III*, 41 So. 3d at 469. We agree with the *Dunn III* court on this point. Accordingly, we decline to disturb the "exceedingly fine distinctions," *id.*, the district court made in this "intensively factual inquiry," *Williams*, 22 So. 3d at 887. Even if we were to disagree about how to weigh the evidence in this case, the clear error standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

C. Third Prong: Onset during Developmental Years

The final prong of the intellectual disability test requires that the disability manifest before the age of 18. The district court did not clearly err in finding that

Brumfield's disability manifested during his developmental years. In fact, one of the principal findings of the district court with respect to Brumfield's deficits in the conceptual skills domain—his poor academic record while in school—necessarily involved finding that the disability manifested before age 18. *Brumfield II*, 854 F. Supp. 2d at 396. Similarly, the district court credited Swanson's testimony that while in the eighth grade, Brumfield read at only a third grade level. *Id.*

Although none of the IQ tests was administered to Brumfield prior to the age of 18, Greenspan testified that IQ scores remain stable over time. Additionally, Merikangas evaluated Brumfield and found no physical problems with his brain that would explain his consistent IQ scores between 70 and 75, meaning that Brumfield's disability stems from some underlying problem he has had all of his life. Finally, the district court pointed to etiological factors such as, *inter alia*, Brumfield's low birth weight, fetal distress at birth, and family history of intellectual disability. *Id.* at 404–05. Although not dispositive, these factors certainly bolster the court's conclusion that Brumfield's intellectual disability manifested during his developmental years. *Id.* at 405.

D. Expert Credibility and Brumfield's Medical History

On remand, the State correctly highlights a number of weaknesses in Brumfield's expert witnesses that undermine their credibility. For example, Greenspan never evaluated Brumfield, Weinstein obtained his Ph.D. from an unaccredited institution, and Swanson diagnosed Brumfield prior to meeting with him.

However, the district court explicitly weighed the credibility of different witnesses. *Id.* at 401. For example, the court pointed out that Blanche "lacked basic knowledge about the AAIDD's standards until he was deposed in this case shortly before the hearing," *id.* at 401, and that Hoppe failed to interview anyone other than Brumfield, *id.* at 387 n.21. Giving "due regard" to the "opportunity of the trial court to judge the credibility of the witness[es]," *Anderson*, 470 U.S. at 573 (quoting Fed. R. Civ. P. 52(a)), we decline to disturb the district court's findings, s*ee also Dunbar Med. Sys. Inc. v. Gammex Inc.*, 216 F.3d 441, 453 (5th Cir. 2000) ("The burden of showing that the findings of the district court are clearly erroneous is heavier if the credibility of witnesses is a factor in the trial court's decision." (quoting *Coury v. Prot*, 85 F.3d 244, 254 (5th Cir. 1996))).

All of the experts in this case agreed that Brumfield had never been diagnosed with an intellectual disability prior to the *Atkins* hearing, and the district court was rightly wary about a "made-for-litigation diagnos[i]s." *Brumfield II*, 854 F. Supp. 2d at 404. However, Swanson gave the court "a compelling reason to not draw a negative inference due to the lack of childhood diagnosis" by explaining the political incentives in place at the time Brumfield was in school. *Id.* In doing so, Swanson told a "coherent and facially plausible" story. *Anderson*, 470 U.S. at 575. Therefore, the district court's refusal to give preclusive effect to the lack of a previous diagnosis of intellectual disability is not clearly erroneous. *Id.*

Overall, while the State points to evidence that undermines the district court's conclusion that

Brumfield is intellectually disabled, it has not pointed to sufficient evidence to establish that the district court's finding of intellectual disability was not "plausible in light of the record viewed in its entirety." *Id.* at 574. Therefore, we hold that the district court committed no clear error.

IV. CONCLUSION

In this case, we are called upon to determine whether the district court's conclusion that Brumfield is intellectually disabled is clearly erroneous, i.e., whether we have a firm and definite conviction that the district court made a mistake here. Both the State and Brumfield present plausible views of the evidence, although, on balance, Brumfield's witnesses were somewhat stronger and presented a slightly more compelling view. Given that there are two permissible views of the evidence here and the Supreme Court's guidance that the choice by a trier of fact between two permissible views of the evidence cannot be clearly erroneous, we find no clear error in the district court's conclusion that Brumfield is intellectually disabled.

Because the State has not demonstrated clear error on the part of the district court, we AFFIRM the ruling of the district court that Brumfield is intellectually disabled and, accordingly, ineligible for execution.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 12-30256
D.C. Docket No. 3:04-CV-787

[Filed December 16, 2015]

KEVAN BRUMFIELD,
Petitioner - Appellee

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent - Appellant

Appeal from the United States District Court
for the Middle District of Louisiana, Baton Rouge

Before KING, CLEMENT, and ELROD, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12-30256

[Filed February 28, 2014]

KEVAN BRUMFIELD,
Petitioner-Appellee

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,
Respondent-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

Before STEWART, Chief Judge, and KING and CLEMENT, Circuit Judges.

CARL E. STEWART, Chief Judge:

IT IS ORDERED that the opinion previously filed in this case, *Brumfield v. Cain*, No. 12-30256, 740 F.3d 946 (5th Cir. Jan. 8, 2014), is WITHDRAWN. The following opinion is substituted therefor:

The State of Louisiana appeals the district court's imposition of a permanent injunction, enjoining the State from executing Petitioner-Appellee Kevan Brumfield. The district court granted habeas relief in

favor of Brumfield, finding that he is mentally retarded[1] and therefore ineligible for execution based on *Atkins v. Virginia*, 536 U.S. 304 (2002). For the reasons stated herein, we REVERSE the district court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Trial and Direct Appeal

In 1995, a jury convicted Brumfield of the first degree murder of a Baton Rouge police officer—Corporal Betty Smothers—and sentenced him to death. The Louisiana Supreme Court affirmed his conviction on direct appeal. *State v. Brumfield*, 737 So. 2d 660 (La. 1998). He appealed to the United States Supreme Court, but it denied his petition for a writ of certiorari. *Brumfield v. Louisiana*, 526 U.S. 1025 (1999).

B. State Post-Conviction Proceedings

In 2000, Brumfield filed for post-conviction relief in Louisiana state court alleging, *inter alia*, that he was ineligible for execution due to insanity. In his petition, he also requested funds to further develop his claims. Before the state court considered Brumfield's petition, the Supreme Court issued its decision in *Atkins*, which

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[1] As some of our sister Circuits have noted, the preferred terminology for mental retardation is now "intellectual disability." *See Pizzuto v. Blades*, 729 F.3d 1211, 1214 n.1 (9th Cir. 2013) (citation omitted); *Hooks v. Workman*, 689 F.3d 1148, 1159 n.1 (10th Cir. 2012) (citation omitted). Nevertheless, because mental retardation is used by the parties and the applicable legal authority, we use mentally retarded throughout our opinion.

prohibited the execution of mentally retarded criminals. Brumfield then amended his state petition to assert an *Atkins* claim and that he was entitled to an evidentiary hearing on his mental retardation claim. As evidence of his claim, Brumfield provided the following: 1) his IQ score, obtained prior to trial, of 75; 2) his slow progress in school;[2] 3) his premature birth;[3] 4) his treatment at multiple psychiatric hospitals; 5) various medications he was prescribed; and 6) testimony that he exhibited slower responses than "normal babies," suffered from seizures,[4] and was hospitalized for months after his birth. In the petition, Brumfield again requested funds to develop his claims.

On October 23, 2003, the state trial court conducted a hearing on Brumfield's pending petition. At the hearing, the trial court denied Brumfield's petition in its entirety and stated as to the *Atkins* claim:

> I guess the biggest [issue] we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that

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[2] There was testimony that Brumfield read on a fourth grade level, was placed in special education classes, and was diagnosed with a learning disability.

[3] We note that, while Brumfield claimed he was born prematurely, this assertion is contradicted by the record. However, he accurately stated that his birth weight was 3.5 pounds.

[4] This assertion is also belied by the record, which only reflects that one seizure occurred.

> everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that [] is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue—there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found [Brumfield] had an IQ of over—or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hadn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to [an *Atkins*] hearing based on all of those things that I just set out.

The trial court did not address Brumfield's request for funding, and Brumfield's counsel did not raise the issue or specifically object to the court's failure to address it.

Brumfield then filed a writ with the Louisiana Supreme Court, alleging, *inter alia*, that the district court erred in failing to hold an *Atkins* hearing because he had presented substantial evidence supporting the

claim. In the application, Brumfield requested an *Atkins* hearing as well as funding. The Louisiana Supreme Court denied petitioner's writ without explanation. *Brumfield v. State*, 885 So. 2d 580 (La. 2004).

C. Federal Post-Conviction Proceedings

On November 4, 2004, Brumfield timely filed a petition for a writ of habeas corpus with the federal district court. The petition asserted, among other things, that the state court erred in failing to grant relief as to Brumfield's *Atkins* claim and in failing to hold an *Atkins* hearing. Brumfield also requested funds to enable him to properly present his claims.

After Brumfield filed his petition, the district court appointed counsel, and the Federal Public Defender Board provided expert funding. In 2007, Brumfield amended his petition to incorporate the expert findings. The magistrate judge ("MJ") issued a Report and Recommendation, which first found, when considering the evidence Brumfield submitted to the state court, the state court's refusal to grant an *Atkins* hearing to be "reasonable and in accordance with clearly established federal law." However, the MJ concluded that it should consider the additional evidence Brumfield presented in his amended habeas petition. In the MJ's view, Brumfield demonstrated cause for failing to provide the state court with the new evidence because he did not have the requisite funding. Additionally, if Brumfield was barred from presenting the new evidence, he would be prejudiced due to a state statute of limitation. After reviewing the additional evidence, the MJ concluded that Brumfield had established a prima facie case of mental retardation

such that he was entitled to an *Atkins* hearing. The district court adopted the MJ's report and recommendations, and it held a six-day *Atkins* evidentiary hearing in 2010.

On February 22, 2012, the district court granted Brumfield's petition for a writ of habeas corpus on the ground that he is mentally retarded and therefore ineligible for execution. The district court then issued a permanent injunction, forbidding the State from executing Brumfield. The State timely appealed.[5]

II. DISCUSSION

On appeal, the State first argues that the district court erred by failing to give the proper deference to the state court's denial of Brumfield's request for an *Atkins* hearing. The district court therefore erred, in the State's view, by holding an evidentiary hearing. Alternatively, the State contends that, even if this court were to consider the evidence produced in the federal evidentiary hearing, Brumfield has not proven that he was mentally retarded. We address each argument in turn.

A. Standard of Review

When considering an appeal from a district court's grant of habeas relief, this court reviews issues of law de novo and findings of fact for clear error. *Wiley*, 625 F.3d at 204–05 (citing *Fratta v. Quarterman*, 536 F.3d 485, 499 (5th Cir. 2008)). The Antiterrorism and

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[5] Because the State is the appellant, no Certificate of Appealability is required. *Wiley v. Epps*, 625 F.3d 199, 204 n.2 (5th Cir. 2010); Fed. R. App. P. 22(b)(3).

Effective Death Penalty Act ("AEDPA") limits the ability of a federal court to issue a writ of habeas corpus to a state prisoner where the prisoner's claim was "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 131 S. Ct. 770, 784–85 (2011). This is true whether the state court addresses all, some, or none of a prisoner's claims. *See Johnson v. Williams*, 133 S. Ct. 1088, 1094 (2013).

When a state court adjudicates a prisoner's claim on the merits, a federal habeas court "shall not" grant the prisoner's writ of habeas corpus unless the state court's ruling:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under § 2254(d)(1), the law must be "clearly established in the holdings of [the Supreme] Court" at the time of the state court's decision. *Harrington*, 131 S. Ct. at 785 (citation omitted). "[A]n *unreasonable*

application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citation omitted). "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." *Harrington*, 131 S. Ct. at 786 (internal quotation marks and citation omitted) (first alteration in original). "[A] habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* A state court's decision is not entitled to AEDPA deference under § 2254(d)(1) "if the state court correctly identifies the governing legal principle from the Supreme Court's decisions, but unreasonably applies it to the facts of the particular case" or if the state court "extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Chester v. Thaler*, 666 F.3d 340, 344 (5th Cir. 2011) (alteration in original) (citations and internal quotation marks omitted).

Under § 2254(d)(2), "relief may not be granted unless the decision was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. A factual determination made by a state court must be rebutted by clear and convincing evidence." *Id.* at 348 (quoting *Clark v. Quarterman*, 457 F.3d 441, 443 (5th Cir. 2006)) (internal quotation marks omitted). "The

question of whether a defendant suffers from mental retardation involves issues of fact, and thus is subject to a presumption of correctness that must be rebutted by clear and convincing evidence under Section 2254(e)(1)." *Id.* (quoting *Maldonado v. Thaler*, 625 F.3d 229, 236 (5th Cir. 2010)) (internal quotation marks omitted).

B. Applicable Law

The Supreme Court "did not provide definitive procedural or substantive guides for determining when a defendant is mentally retarded." *Hearn v. Thaler*, 669 F.3d 265, 272 (5th Cir. 2012) (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)) (internal quotation marks omitted). Instead, the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [the] execution of sentences." *Atkins*, 536 U.S. at 317 (internal quotation marks and citation omitted). Therefore, we examine Louisiana law to determine whether Brumfield established the prerequisites of an *Atkins* claim.

Louisiana defines mental retardation as "a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years." La. Code Crim. Proc. art. 905.5.1(H)(1). The Louisiana Supreme Court has held that the confidence range associated with an intellectual quotient ("I.Q.") score of 75 "brush[es] the threshold score for a mental retardation diagnosis; however, it is possible for someone with an I.Q. score higher than 70 to be considered mentally retarded if his adaptive

functioning is substantially impaired." *State v. Dunn* (*Dunn III*), 41 So. 3d 454, 470 (La. 2010).

Adaptive functioning "refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Id.* at 463 (internal quotation marks and citation omitted). The Louisiana Supreme Court has recognized "six major life activities related to adaptive functioning: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living." *Id.* (citation omitted). This prong is satisfied when there are "significant limitations in . . . at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety . . . ." *Id.* at 459

In *State v. Dunn* (*Dunn II*), 974 So. 2d 658, 662 (La. 2008) (per curiam), the Louisiana Supreme Court held that the procedure it explained in *State v. Williams*, 831 So. 2d 835 (La. 2002) governed cases in which the issue of whether to hold an *Atkins* hearing is raised post-trial. That is, a defendant must first "come forward with some evidence to put his mental condition at issue." *State v. Dunn* (*Dunn I*), 831 So. 2d 862, 884 (La. 2002). The defendant must undergo a mental examination "[i]f the court has reasonable ground to doubt whether the defendant is mentally retarded." *Id.* Essentially, "[t]he defendant [must] come forward with some evidence initially to put his or her mental condition at issue." *Dunn III*, 41 So. 3d at 461. Then,

the "defendant must prove his or her mental retardation by a preponderance of the evidence." *Id.*

C. Analysis

We first consider whether the state court's judgment was "on the merits" as contemplated by § 2254(d). We agree with the district court that the state court's decision was "on the merits." 28 U.S.C. § 2254(d). The state court did not cite any procedural grounds relating to Brumfield's mental retardation claim in its decision or at its hearing.[6] Therefore, the state court's determination is due AEDPA deference unless an exception under §§ 2254(d)(1)–(2) applies. Because no exception applies, we hold that the state court's judgment was entitled to AEDPA deference.

1. 28 U.S.C. § 2254(d)(1)

The district court erred in its determination that the state court decision was not entitled to AEDPA deference. In the district court's view, the state court was required to provide Brumfield with the funds necessary to develop his claims. However, there is no Supreme Court decision that has held that prisoners asserting *Atkins* claims are entitled to expert funds to make out a prima facie case. Rather than present cases holding that Brumfield was entitled to funding to

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[6] Even though the state court did not discuss Brumfield's funding request, we presume that its denial of funds was also a decision "on the merits." *See Johnson*, 133 S. Ct. at 1096 ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.").

develop his prima facie case, the district court faulted the state court for failing to extend the due process precepts in *Atkins*, *Ford*, and *Panetti* to encompass this aspect of due process. *See Chester*, 666 F.3d at 344 (holding that a state court's decision is not entitled to AEDPA deference under 2254(d)(1) where the court "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply").

The district court's holding was an unwarranted extension of Supreme Court jurisprudence. *See id.* at 345 ("The first step in determining whether a state court unreasonably applied clearly established federal law is to identify the Supreme Court holding that the state court supposedly unreasonably applied."). Under *Panetti v. Quarterman*, 551 U.S. 930 (2007), and *Ford v. Wainwright*, 477 U.S. 399 (1986), a court is explicitly required to provide an "opportunity to be heard" once the prisoner has made a "substantial threshold showing of insanity." *Panetti*, 551 U.S. at 949 (internal quotation marks and citation omitted). This includes the opportunity to submit expert evidence. *Id.* at 951. However, nowhere does the Supreme Court hold that this opportunity requires the court or the state to provide the prisoner with funds to obtain this expert evidence. Nor has this circuit recognized that such an established federal right exists. *See Morris v. Dretke*, 413 F.3d 484, 501 (5th Cir. 2005) (Higginbotham, J., concurring) ("[T]he State was within its rights to deny [the petitioner] assistance in obtaining intellectual testing [in order to make out a prima facie case of mental retardation].").

We have explained the due process rights due "under *Ford*[:] [o]nce a prisoner seeking a stay of execution has made a 'substantial threshold showing of insanity,' the protection afforded by procedural due process includes a 'fair hearing' in accord with fundamental fairness." *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007) (second alteration in original) (quotation omitted). Similarly, "[t]he lesson we draw from *Panetti* is that, where a petitioner has made a prima facie showing of retardation . . . the state court's failure to provide him with the opportunity to develop his claim deprives the state court's decision of the deference normally due." *Id.* Thus, the strictures of procedural due process associated with *Ford* and *Panetti* attach only *after* a prisoner has made a "substantial threshold showing." Accordingly, we hold that the state court did not violate § 2254(d)(1).[7]

2. 28 U.S.C. § 2254(d)(2)

Similarly, the state court's judgment did not violate § 2254(d)(2). Our review of the record persuades us that the state court did not abuse its discretion when it denied Brumfield an evidentiary hearing. The district court erroneously found that the state court rested its

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[7] Unlike the situation before us in *Wiley*, 625 F.3d 199, there is no violation of due process that would render deference to the state court inappropriate. In *Wiley*, because the state court failed to follow its own procedure, we held that the state court was not due deference under AEDPA. *Id.* at 211. Conversely, neither Brumfield nor the district court could point to any state law or procedure violated by the state court when it denied his *Atkins* claim and request for funds. The cases relied on by Brumfield and the district court simply do not support their contention that the state court strayed from the applicable Louisiana law on this issue.

ruling on Brumfield's adaptive skills and faulted the state court for failing to provide Brumfield with the requisite funding. The district court also chided the state court for relying on evidence presented for mitigation purposes and deciding Brumfield's claim based on a record which failed to discuss all of the necessary elements. In addition, the district court concluded that the state court wrongly used competency evidence to determine Brumfield's *Atkins* claim.

Contrary to the district court's ruling, the state court considered both the intellectual functioning and adaptive behavior prongs of Louisiana's test for mental retardation. The state court noted that of the two I.Q. tests, one returned a score of 75 and the other returned "a little bit higher I.Q." The state court then properly considered the evidence of adaptive functioning that Brumfield presented. The state court concluded that Brumfield had not "demonstrated impairment in adaptive skills." The district court criticized the state court for not analyzing each sub-factor of the adaptive skills prong, but there is no requirement that the state court articulate all of its reasons. Notably, no one testified that Brumfield was mentally retarded. Indeed, the record showed that at least one doctor diagnosed him with attention-deficit disorder and an anti-social personality. There was also testimony that Brumfield was capable of daily life activities such as working and establishing relationships. Based on the evidence in the record, we conclude that the state court did not clearly err in determining that Brumfield failed to satisfy his burden under Louisiana law of placing his mental condition at issue. *See State v. Tate*, 851 So.2d 921, 942 (La. 2003) (holding that the defendant failed "to

establish reasonable grounds that [he] may be mentally retarded"). Thus, the state court's decision does not fall under the exceptions in § 2254(d) and was entitled to AEDPA deference.

In sum, the district court erred when it failed to give the proper AEDPA deference to the state court's decision. Because the state court's judgment was entitled to AEDPA deference, "there was no reason for the district court to conduct an evidentiary hearing." *Blue v. Thaler*, 665 F.3d 647, 661 (5th Cir. 2011). Accordingly, it was error for the district court to conduct such a hearing, and we therefore disregard the evidence adduced for the first time before the district court for purposes of our analysis under § 2254(d). *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2010) ("[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."); *Blue*, 665 F.3d at 655–56 ("*Pinholster* prohibits a federal court from using evidence that is introduced for the first time at a federal-court evidentiary hearing as the basis for concluding that a state court's adjudication is not entitled to deference under § 2254(d).").[8]

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's grant of habeas relief in favor of Brumfield.

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[8] Even if we were to consider the new evidence presented to the district court, we likely would hold that Brumfield failed to establish an *Atkins* claim. *See Dunn III*, 41 So.3d 454 (holding, under similar circumstances, that the defendant failed to carry his burden of establishing that he was mentally retarded).

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 04-787-JJB-CN

[Filed February 23, 2012]

KEVAN BRUMFIELD	)
	)
VERSUS	)
	)
BURL CAIN, Warden,	)
Louisiana State Penitentiary	)
	)

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Before the Court is Kevan Brumfield's petition for a writ of habeas corpus filed against Burl Cain, the warden of the Louisiana State Penitentiary in Angola, Louisiana. Brumfield asks this Court to declare him mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Docs. 111, 121). His petition is opposed by the State of Louisiana. (Doc. 118). The Court held an *Atkins*[1]

[1] *Atkins* hearings assess evidence of a person's intellectual functioning, adaptive skills, and personal history to determine whether the person is mentally retarded.

evidentiary hearing on the issue of petitioner's mental retardation[2] on July 12-16 and August 3-4, 2010.

I.

Petitioner Kevan Brumfield was convicted in Louisiana state court of the 1993 murder of a Baton Rouge police officer and sentenced to death by a jury in 1995. *State v. Brumfield*, No. 1-93-865 (19th Judicial District Court, East Baton Rouge Parish, Louisiana) (Tyson, J.). The Louisiana Supreme Court affirmed his conviction on direct appeal. *State v. Brumfield*, 737 So.2d 660 (La. 1998). The United States Supreme Court denied his petition for a writ of certiorari. *Brumfield v. Louisiana*, 526 U.S. 1025 (1999).

Brumfield is in the custody of the State of Louisiana by virtue of his incarceration at the Louisiana State Penitentiary in Angola. In 2000, he filed for post-conviction relief in Louisiana state court, alleging among other things that he has was ineligible for execution by reason of insanity and mental incompetency. *State of Louisiana ex rel. Brumfield v. Cain*, No. 1-93-865 (19th Judicial District Court, East Baton Rouge Parish, Louisiana). Brumfield's petition

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[2] The term "mental retardation" has fallen out of favor with clinical psychologists, some of whom now prefer the term "intellectual disability." However, because the relevant statutes and precedents speak in terms of mental retardation, the Court does so as well. *See State v. Corey Williams*, 831 So. 2d 835, 838 n.2 (La. 2002), *superseded by statute in part by* La. C.Cr.P. art. 905.5.1 (describing the court's deference to existing terms in the evolving forensic psychology field).

relied on evidence submitted at his sentencing hearing. (*See* Post-Conviction Petition, Vol. PC).[3]

On June 16, 2003, within a year of the date the Supreme Court barred executing mentally retarded persons in its 2002 *Atkins* decision, Brumfield amended his state post-conviction petition, asserting an *Atkins* claim for the first time. (Amended Post-Conviction Petition, Vol. PC). The State filed an answer, arguing that the evidence from the penalty phase of the trial on which Brumfield relied was insufficient to state a *prima facie* case necessary to trigger an *Atkins* evidentiary hearing. (Answer to Amended Petition, Vol. PC, pp. 1-6). On September 23, 2003, Brumfield replied to the State's answer, contending the State's response for denying an evidentiary hearing did not comport with precedent. (Brumfield's Reply to State's Answer to Amended Petition, Vol. PC, pp. 1-2).

The state habeas court tasked with assessing Brumfield's post-conviction petition denied him an evidentiary hearing on the *Atkins* issue. (Transcript of State Post-Conviction Hearing on October 23, 2003, Vol. PC, p. 2) (Anderson, J.)). In so doing, the state habeas court mooted Brumfield's pending requests for funding to develop his *Atkins* claim. (*See* Initial State Court Petition for Post-Conviction Relief, Vol. PC, ¶¶ 32(p), 36-37 (describing lack of funds to retain

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[3] The entirety of the state court record (Doc. 3) is available only in hard paper form. The trial on the guilt and sentencing phase is catalogued in 16 volumes (cited as, *e.g.*, "Vol. IV," etc.). Several supplementary volumes detail the docket activity prior to and after trial. Finally, a post-conviction volume (cited as "Vol. PC") contains the record from Brumfield's state habeas proceedings.

experts to conduct neurological examinations of Brumfield); Expedited Motion for Order on Petition for Post-Conviction Relief, Vol. PC, ¶¶ 3-7; Amended State Court Petition for Post-Conviction Relief, Vol. PC, ¶¶ 104-05) (seeking funds to retain experts for evaluating Brumfield in variety of areas); Reply to State's Answer to Amended Petition, Vol. PC, ¶ 10 (reiterating need for expert funding)). At the same hearing, the state trial court summarily denied Brumfield's petition in its entirety. (Transcript of State Post-Conviction Hearing on Oct. 23, 2003, Vol. PC, pp. 1-16). The Louisiana Supreme Court likewise denied review of the state habeas judge's rulings. *State ex rel. Brumfield v. Cain*, 885 So.2d 580 (La. 2004).

On November 4, 2004, petitioner timely filed his petition for a writ of habeas corpus in this Court. (Doc. 1). On November 1, 2007, petitioner amended his petition after finally receiving funding to develop certain of his habeas claims for relief, including his *Atkins* claim. (*See* Doc. 30, pp. 1-6 (recounting the various failures of the Louisiana Indigent Defense Assistance Board, Brumfield's previous counsel, to provide adequate funding, as recognized by the Louisiana Supreme Court in *State ex rel. Williams v. State*, 888 So.2d 792 (La. 2004)). Following answers by the State, the magistrate judge issued a report and recommendation that Brumfield's habeas petition be denied in full except to the extent that Brumfield was entitled to an evidentiary hearing on his *Atkins* claim. (Doc. 37).

Following objection by the State and oral argument on the issue, this Court approved and adopted the magistrate judge's report and recommendation in full.

(Doc. 43). The Court then held its *Atkins* evidentiary hearing from July 12-16 and August 3-4, 2010. Petitioner filed his post-hearing brief (Doc. 111), the State filed its opposition brief (Doc. 118), and petitioner filed a reply brief (Doc. 121) on November 21, 2011, which submitted the matter to this Court.

II.

Despite having already held an evidentiary hearing on petitioner's *Atkins* claim, the State asserts newly-decided cases of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit have changed the law and altered the propriety of that action. Because such a claim, if true, would preclude reaching the merits of petitioner's *Atkins* claim, the Court proceeds to address this matter. The Court will treat the State's briefing on the issue as a motion for reconsideration in light of the newly-issued decisions.

A. The Magistrate Judge's Report and Recommendation Adopted by This Court

The magistrate judge's report and recommendation (Doc. 37) outlined the reasons for granting petitioner an *Atkins* hearing. Because Brumfield's sentence predated *Atkins* and his post-conviction application in state court relied on evidence introduced at Brumfield's sentencing hearing, the magistrate judge assessed that evidence and agreed with the state habeas judge that Brumfield failed to meet his burden of presenting sufficient facts to put his mental retardation at issue. (Doc. 37, p. 20). Furthermore, the magistrate judge,

citing *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005)[4], raised but did not decide whether the newly-presented evidence of mental retardation in Brumfield's federal habeas petition "merely supplemented" rather than "fundamentally altered" his mental retardation claim under the exhaustion requirement. (*Id.* pp. 22-31). Instead, the report concluded that petitioner's failure to adequately develop his claims in state court resulted from the state court's refusal to grant him funds to develop expert testimony necessary to substantiate his *Atkins* claim. (*Id.* pp. 30-32). The magistrate judge found that Brumfield's diligence in consistently pressing his *Atkins* claim in the state habeas court, coupled with the state court ignoring his multiple requests for funding for expert assistance in developing his claim, satisfied the cause and prejudice test. (*Id.*). Moreover, because the magistrate judge found the additional evidence contained in Brumfield's amended federal habeas petition constituted a *prima facie* showing under *Atkins*, the report recommended this Court conduct an evidentiary hearing. (*Id.* p. 32).

The State objected to the report's conclusion that an evidentiary hearing was warranted. (Doc. 38). It first argued that under *Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007), Brumfield's newly-presented evidence of mental retardation "fundamentally altered" his

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[4] *See also Moore v. Quarterman*, 491 F.3d 213 (5th Cir. 2007); *Kunkle v. Dretke*, 352 F.3d 980 (5th Cir. 2003); *Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003); *Dowhitt v. Johnson*, 230 F.3d 733 (5th Cir. 2000) (cases determining whether evidence in a federal habeas petition "fundamentally altered" or "merely supplemented" a claim from state habeas proceedings for purposes of AEDPA's exhaustion requirement).

Atkins claim, rendering it unexhausted.[5] The State also argued that since Brumfield failed to make a reasonable showing of mental retardation to the state habeas court, it correctly found he failed to present a *prima facie* case as required by Louisiana law, which is entitled to a presumption of correctness.[6] The Court held oral argument on the matter, agreed with the magistrate judge (Minute Entry for June 30, 2008, Doc. 42), and issued a ruling adopting the report as its decision (Doc. 43).

B. Legal Prerequisites to a Federal Habeas Hearing

Federal habeas law precludes federal courts from re-adjudicating a claim that was adjudicated on the merits in state court unless the state court decision

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[5] Unexhausted claims, like procedurally defaulted claims, may nonetheless be excused and thus properly raised in a federal habeas petition if the petitioner "can demonstrate cause … and actual prejudice." *Moore*, 491 F.3d at 220 (quoting *Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001)).

[6] Crucially, the State did not attempt to justify the state habeas court's failure to consider Brumfield's funding requests, nor did it attempt to show that Brumfield did not meet the cause and prejudice test. (*See* Objection to Report, Doc. 38). As the standard notice attached to the report and received by the State notes, "[t]he failure of a party to file written objections to the proposed findings, conclusions, and recommendation contained in a Magistrate Judge's Report and Recommendation … shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge that have been accepted by the District Court." (Magistrate Judge's Report, Doc. 37, p. 1 (citing 28 U.S.C. § 636(b)(1))). The parties therefore agree that, for purposes of 28 U.S.C. § 2254(e)(2), Brumfield has satisfied that test, and the Court agrees.

was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Even a state court adjudication found incorrect under federal standards does not necessarily suffice in meeting this statutory standard; the state court action must also be objectively unreasonable such that fair-minded jurists would agree on the impropriety of the state court decision. *Harrington v. Richter*, -- U.S. --, 131 S.Ct. 770, 785-86 (2011). In all inquiries under § 2254(d), federal review is confined to the record before the state court. *Cullen v. Pinholster*, -- U.S. --, 131 S.Ct. 1388, 1398 (2011); *Richter*, 131 S.Ct. at 785.

State court factual determinations are presumed correct unless a petitioner overcomes that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The interplay between § 2254(d)(2) and (e)(1) has been the subject of much spilled ink, but the Supreme Court has not definitely decided the issue.[7] It has, however, made clear that the two inquiries do not merge. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

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[7] *See Valdez v. Cockrell*, 274 F.3d 941, 951, n. 17 (5th Cir. 2001) (holding that § 2254(e)(1)'s presumption of correctness applies to particular factual findings which a petitioner must overcome by clear and convincing evidence as to that particular factual finding but that the standard in § 2254(d)(2) applies to the overall state court decision in light of the facts it finds).

A habeas applicant who "failed to develop the factual basis of a claim in State court" may nevertheless obtain an evidentiary hearing on the claim if "a factual predicate [] could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(ii). This factual proffer, as a pre-requisite to a hearing, must "be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B); *see also Michael*[8] *Williams v. Taylor*, 529 U.S. 420, 432 (2000) ("Under … § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."). Thus, the "cause and prejudice" inquiry of § 2254(e)(2) only attaches to claims that have been procedurally defaulted, not claims decided on the merits. *Michael Williams*, 529 U.S. at 434 (rejecting a reading of § 2254(e)(2) that would encompass diligently-pursued claims that remained factually undeveloped due to the fault of another party or the court). The fundamental "distinction between a prisoner who is at fault and one who is not," *id.* at 435, is the line which determines whether a "cause and prejudice" inquiry is necessary under § 2254(e)(2), and diligence marks the touchstone

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[8] The Court cites the petitioner's first name from that case for two reasons: (1) to distinguish the case from *Terry Williams v. Taylor*, 529 U.S. 362 (2000), another U.S. Supreme Court case decided the same term; and (2) to distinguish the case from the other two *Williams* cases cited in this opinion that come from the Louisiana Supreme Court: *State v. Corey Williams*, 831 So.2d 835 (La. 2002) and *State v. Shedran Williams*, 22 So.3d 867 (La. 2009).

for determining whether an undeveloped factual record stands attributable to the prisoner's "failure" to pursue it, *id.* at 434 ("[T[he opening clause of § 2254(e)(2) codifies [the previously recognized] threshold standard of diligence….").

Traditional analysis in the Fifth Circuit found that a person who neither had their claims decided on the merits nor who procedurally defaulted through their own lack of diligence needed only to satisfy Rule 8 of the Federal Rules Governing Section 2254 Cases, *see, e.g., Guidry v. Dretke*, 397 F.3d 306, 323 (5th Cir. 2005), and pre-AEDPA case law, *see, e.g., Townsend v. Sain*, 372 U.S. 293 (1963), to receive a federal hearing. However, the *Guidry* decision has been abrogated by the Supreme Court's recent clarification of the interplay of §§ 2254(d) and 2254(e)(2) in *Pinholster* as recognized in *McCamey v. Epps*, 658 F.3d 491, 497, n. 1 (5th Cir. 2011). The precise contours of when an evidentiary hearing may be granted have become less clear, but the general trend has diminished the vitality of the pre-AEDPA *Townsend* factors and emphasized the rarity in which federal hearings should occur. *See, e.g., McCamey*, 658 F.3d 491.

While *Michael Williams* has not been overruled, its explicit holding that § 2254(e)(2) only applies to petitioners who did not diligently attempt to factually develop their claims in state court must be evaluated in light of *Pinholster*'s murky statements regarding the interaction of § 2254(d) and § 2254(e)(2). Textually, the provisions seem to apply only in mutually exclusive situations, as *Michael Williams* pointed out, but lately the Supreme Court seems to have implied that the "cause and prejudice" standard codified in § 2254(e)(2)

nonetheless may apply even to claims that have already met one of the § 2254(d) standards. *See Pinholster*, 131 S.Ct. at 1401 ("Section 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief.… At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." (citation omitted)); *id.* at 1412 (Breyer, J., concurring in part and dissenting in part) ("[Section] 2254(d)(1) does not leave AEDPA's hearing section, § 2254(e), without work to do…. If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed."). *See also Schriro v. Landrigan*, 550 U.S. 465, 468 (2007) ("In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court.") *and Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir. 2005) (holding that cases which do not present procedural defaults do not fall under § 2254(e)(2) and thus the propriety of granting a federal hearing is governed by pre-AEDPA jurisprudence). While *Michael Williams* is still good law and thus it appears that §§ 2254(d) and (e)(2) govern different situations, even in *Pinholster*'s wake, a federal hearing may in any event be granted under

§ 2254(e) when the traditional "cause and prejudice" factors have been met.[9]

Either way, the first level of inquiry requires a determination of whether the state court's disposition of Brumfield's *Atkins* claim rested on a state procedural ground—which would then trigger the "cause and prejudice" inquiry of § 2254(e)(2) that the State does not contest Brumfield satisfies—or was made on the merits, which would present a straightforward assessment under § 2254(d).

The totality of the state habeas court's analysis of Brumfield's *Atkins* claim is as follows:

> [T]here are several issues we need to take up. I guess the biggest one we need to address is the claims of mental retardation and *Atkins* and whether or not the defendant is entitled to a hearing to determine that issue, and I've read the cases that were cited and also both sides' arguments, and even in *Atkins* it is clear that everybody that's facing the death penalty is not entitled to an *Atkins* hearing.
>
> The cases say that that's to be taken up on a case-by-case method, and the burden of proving that that is an issue that needs to be addressed is on the defendant here. I've looked at the application, the response, the record, portions of the transcript on that issue, and the evidence

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[9] To reiterate, the State did not object to the magistrate judge's findings and conclusion regarding Brumfield's satisfaction of the cause and prejudice test under § 2254(e)(2), making re-analysis of that issue unnecessary.

> presented, including Dr. Bolter's testimony, Dr. Guinn's testimony, which refers to and discusses Dr. Jordan's report, and based on those, since this issue – there was a lot of testimony by all of those in Dr. Jordan's report. Dr. Bolter in particular found he had an IQ of over – or 75. Dr. Jordan actually came up with a little bit higher IQ. I do not think that the defendant has demonstrated impairment based on the record in adaptive skills. The doctor testified that he did have an anti-social personality or sociopath, and explained it as someone with no conscience, and the defendant hasn't carried his burden placing the claim of mental retardation at issue. Therefore, I find he is not entitled to that hearing based on all of those things that I just set out.

Transcript of Post-Conviction Hearing of Oct. 23, 2003, Vol. PC, pp. 3-4.

In the absence of any cited procedural grounds, the Supreme Court has directed federal habeas courts to presume the issue was resolved on the merits. *Richter*, 131 S.Ct. at 784-85. Clearly, there is no reason to conclude this was merely a procedural default. The state habeas judge's discussion hinges on Brumfield's lack of evidence to establish a *prima facie* case of mental retardation on the adaptive skills prong of the test defined in Louisiana law. The denial of the *Atkins* hearing by the state post-conviction court was a determination on the merits which is reviewed under § 2254(d).

C. The State Court Made a Merits Decision on Brumfield's Atkins Claim by Unreasonably Applying Clearly Established Supreme Court Precedent, Thereby Violating Section 2254(d)(1).

Normally, federal habeas courts owe substantial deference under AEDPA to state court factual findings. 28 U.S.C. § 2254(e)(1). However, when a state court unreasonably applies federal law as an antecedent to a factual determination of a defendant's claim, no AEDPA deference is due the state court's factual determination. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (holding that a state court's failure to hold an evidentiary hearing when presented with a substantial showing of incompetency deprived defendant of due process and thus unreasonably applied clearly established federal law). In this case, the state habeas judge's refusal to grant an evidentiary hearing based on Brumfield's failure to present a *prima facie* claim of mental retardation (which on the whole may be a mixed question of fact and law but, for purposes of this case, will be presumed a purely factual inquiry) rested on an unreasonable application of clearly established Supreme Court law, which deprives the state habeas court's determination of AEDPA deference. *See Wiley v. Epps*, 625 F.3d 199, 207 (5th Cir. 2010).

In *Wiley*, the Fifth Circuit found that when a petitioner presents a *prima facie* case of mental retardation but is nevertheless denied a state court hearing on the issue, the state court's determination of the mental retardation issue does not deserve deference under the AEDPA. 625 F.3d at 207. The Fifth Circuit noted that *Atkins* "was decided against the

backdrop of the Supreme Court's and lower court's due process jurisprudence." *Id.* (quoting *Rivera v. Quarterman*, 505 F.3d 349, 358 (5th Cir. 2007)). This jurisprudence included *Ford v. Wainwright*, 477 U.S. 399 (1986), which required a hearing in accord with fundamental fairness and procedural due process for defendants making a showing of insanity. *Id. Rivera* held that a *prima facie* showing of mental retardation in state court requires it to provide a full and fair evidentiary hearing. 505 F.3d at 357-58. Using these teachings, *Wiley* set out a framework for analysis: a federal habeas court must decide if a *prima facie* case of mental retardation under state law (pursuant to *Atkins*) was presented to the state court, which triggers the requirement for a full evidentiary hearing. 625 F.3d at 207. If the petitioner did so but did not receive a hearing, the state court acted unreasonably in light of clearly established federal law and consequently loses AEDPA deference. *Id.* at 207-08.

Brumfield presents an even stronger case for denying AEDPA deference than was found in *Rivera* or *Wiley*. Here, the state court denied Brumfield even the *opportunity* to develop his *prima facie* case. The state habeas court ignored at least four clear pleas for funding to retain experts to evaluate Brumfield and develop his then-pending claims. If *Rivera*, *Panetti*, and *Wiley* deny AEDPA deference based on the state court erroneously failing to grant a hearing to assess a properly made *prima facie* case, then *a fortiori* a petitioner who is denied even the chance to make such a case deserves the same treatment. Accordingly, the state court violated Brumfield's due process guarantees when it failed to allow him adequate funding to retain experts to address his claim. *Cf. Coleman v. Zant*, 708

F.2d 541, 548 (11th Cir. 1983) (holding that when a state court denies an indigent petitioner with the funds necessary to develop adequate evidence to support a habeas claim, that denial fails to accord a "full and fair" hearing under *Townsend v. Sain*).[10] This denial came in the face of clearly established federal law as determined by the Supreme Court circa October 23, 2003, the date the state habeas court denied Brumfield's *Atkins* claim and, in so doing, essentially ignored and mooted his pending requests for expert funding. Specifically, both *Atkins* and *Ford* had been decided and clearly established before that date.

This jurisprudential backdrop should not have been ignored by the state habeas court, and failure to grant the expert funding (or allow counsel time to obtain such funding from another source) constituted not just a violation of general federal due process law, but also a stark departure from clearly established state law as determined by the Louisiana Supreme Court. As noted above, the Louisiana Supreme Court in *State ex rel. Williams v. State*, 888 So.2d 792 (La. 2004), eventually recognized the frustrating situation petitioners such as Brumfield found themselves in when represented by *pro bono* counsel. The Louisiana Indigent Defense Assistance Board (LIDAB) has been delegated

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[10] A full and fair hearing is no longer necessarily a prerequisite for AEDPA deference, *see Valdez v. Cockrell*, 274 F.3d 941, 946 (5th Cir. 2001), but that is because a full and fair hearing on a post-conviction claim no longer serves as a requirement of due process or § 2254, *see, e.g., Richter*, 131 S.Ct. at 784, *not* because due process is wholly inapplicable in the post-conviction setting. When due process has been violated by a state court, AEDPA simply does not require deference be given to subsequent state court determinations related to that violation. *Panetti*, 551 U.S. at 953.

statutory authority to provide Louisiana state habeas petitioners with counsel, and they contracted with the Capital Post-Conviction Project of Louisiana (CPCPL) to provide such services. LIDAB had a rule prohibiting *pro bono* counsel handling capital post-conviction cases from getting funds for expert witnesses from LIDAB, which drew the interest of the Court. 888 So.2d at 797. LIDAB immediately changed its rule and permitted *pro bono* counsel to acquire funds to retain expert assistance in capital post-conviction cases. While the state habeas court did not have the benefit of that guidance, there existed a litany of Louisiana Supreme Court cases addressing the necessity of giving post-conviction petitioners time and funding to develop claims. *See, e.g., State ex rel. Cage v. Butler*, 593 So.2d 375 (La. 1992); *State ex rel. Deboue v. Whitley*, 592 So.2d 1287 (La. 1992); *State v. Brown*, 566 So.2d 967 (La. 1990). These Louisiana cases do not establish a § 2254(d)(1) violation, of course, but they do illustrate the gravity of the due process violation.

This Court remains keenly aware of *Atkins*' admonition that "[n]ot all people who claim to be mentally retarded will be so impaired," 536 U.S. at 317, as to fall within the class of persons for whom a hearing must be held. Clearly, because the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction," *id.*, it also left to the States the ability to perform a meaningful screening of such claims. Having a *prima facie* prerequisite to obtaining a full hearing makes eminent sense, lest every death row inmate bring an *Atkins* claim simply to delay their execution. *See Corey Williams*, 831 So.2d at 858, n. 33 ("There is no

automatic right to a hearing on the issue of mental retardation… .").

Likewise, requiring some rudimentary, preliminary showing of a colorable mental retardation claim in order to obtain expert funds to more fully explore the issue also seems reasonable. *Cf id.* (holding that the "reasonable grounds" test to show a *prima facie* case and trigger an *Atkins* evidentiary hearing requires a defendant to come forward "with some evidence to put his mental condition at issue"); *see also State v. Campbell*, 983 So.2d 810, 826, n. 9 (La. 2008) (refusing to allow hearing on mental retardation issue despite an IQ test of 67 because "the defendant refused point-black to participate in evaluations [by State experts] designed to determine whether he is mentally retarded").

But as this case illustrates, wholly ignoring clear requests for funding to retain experts—based presumably, though the Court cannot know because the state court never supplied a reason, on the same reasons why the state court denied the claim in its entirety—shows this silent denial to be a particularly cruel and unreasonable catch-22: without expert funding, no *prima facie* showing is likely possible, yet without a *prima facie* showing, no expert funding is forthcoming. The state habeas court's imposition of this catch-22 finds no support in any precedent and sharply diverges from clearly established rules for the provision of due process of law.

Thus, this Court is convinced that the denial of Brumfield's *Atkins* claim in the state habeas court, coupled with its silent denial of his request for funding to retain experts to factually develop his claim, was

based on the state habeas court's unreasonable application of clearly established federal due process law as determined by the Supreme Court in *Atkins* and *Ford v. Wainwright* (and later confirmed by *Panetti*) at the time the state habeas court rendered its decision, in violation of § 2254(d)(1). Its decision was not only incorrect, but unreasonable, meaning that fair-minded jurists would agree the state court's determination was incorrect. *Richter*, 131 S.Ct. at 785-86.

Moreover, in this instance, the due process rules that were clearly established, both then and now, were not broad.[11] The due process rules violated here were tailored to address specific situations in which habeas petitioners proffered, or claimed an ability to proffer once given the opportunity, substantial showings of ineligibility for the death penalty based on clearly delineated requirements for *prima facie* showings. The state habeas court's two-fold denial on the merits of Brumfield's *Atkins* claim and silent denial of his request for funding to develop that claim represented an unreasonable application of then-existing due process law as determined by the Supreme Court, which thus deprives that decision of AEDPA deference. This Court was convinced at that point that petitioner's *Atkins* claim showed a reasonable likelihood of success, permitting an adjudication of Brumfield's *Atkins* claim on the merits by virtue of § 2254(d)(1).

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[11] The amount of latitude state courts have corresponds with the specificity of the rule: "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

D. The State Court Made a Merits Decision on Brumfield's Atkins Claim That Was an Unreasonable Determination of the Facts in Light of the Evidence Presented to the State Court, Thereby Violating Section 2254(d)(2).

For similar reasons, the state habeas court's decision on the merits of Brumfield's *Atkins* claim suffered from an unreasonable determination of the facts in light of the evidence presented in the state habeas proceedings in violation of § 2254(d)(2). Review is limited to the record before the state court. *Richter*, 131 S.Ct. at 785. Federal courts must give deference to state court determinations of historical fact under § 2254(e)(1).[12] *Valdez v. Cockrell*, 274 F.3d 941, 948, n. 12 (5th Cir. 2001) (noting that conclusions of law and mixed questions of law and fact are examined under § 2254(d)(1)). When evaluating the different prongs of a mental retardation inquiry, it appears that state court determinations of each prong are considered historical fact determinations that are reviewed for clear error and thus receive the full benefit of § 2254(e)(1). *See, e.g., Williams v. Quarterman*, 293 Fed.Appx. 298, 308 (5th Cir. 2008) (construing a Texas state court's evaluation of the mental retardation prongs under the *Briseno* decision to be purely factual determinations reviewable for clear error); *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) (same). Because the state habeas court in this instance clearly

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[12] In pertinent part, the statute informs federal courts that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

pinned its decision on the adaptive skills prong, Brumfield must show by clear and convincing evidence that this determination was wrong.

At least one circuit court has explicitly held that a state habeas court is objectively unreasonable under § 2254(d) when dispositively crediting evidence of mental retardation, received only as a mitigating factor during sentencing in the pre-*Atkins* era, when resolving a full *Atkins* claim in a state habeas court without benefit of a full evidentiary hearing. *Allen v. Buss*, 558 F.3d 657, 661-65 (7th Cir. 2009) (citing *Hall v. Quarterman*, 534 F.3d 365, 371-72 (5th Cir. 2008)).

The Fifth Circuit in *Hall v. Quarterman* further noted that paper hearings may deprive a petitioner of a full and fair hearing, mentioning that they are particularly inappropriate when the state habeas judge faces a different constitutional standard than the sentencing judge did. 534 F.3d at 371-72. Similarly, *Perillo v. Johnson*, 79 F.3d 441, 446-47 (5th Cir. 1996) discussed the adequacy of paper hearings in satisfying the pre-AEDPA constitutional standard for a "full and fair hearing," the existence of which determines whether the state court's determination receives the presumption of correctness in the first place. *But see Valdez v. Cockrell*, 274 F.3d 941, 949-51 (5th Cir. 2001) (holding that a full and fair hearing is not a precondition to giving state courts AEDPA deference). Regardless of *Perillo*'s current standing in light of AEDPA, it appears the law still treats the sufficiency of paper hearings on a case-by-case basis. One important benchmark is whether the state habeas judge is the same judge who presided over the petitioner's trial. *Perillo*, 79 F.3d at 446. *See also*

Murphy v. Johnson, 205 F.3d 809, 816 (5th Cir. 2000) (discussing how summary denial by a state court may entitle a petitioner to an evidentiary hearing in federal court).

In this case, the state habeas judge, Judge Anderson, did not conduct Brumfield's capital trial in state district court, which was handled by the late Ralph Tyson—a beloved, recently-departed colleague on this Court. Under *Hall* and *Perillo*, because the state habeas judge was both a different person than the state trial judge and had to apply a new constitutional standard which was not previously available at trial, no presumption of sufficiency attaches to the paper hearing. Of course, while a change in judicial identity does not on its own alter the reasonability analysis or diminish the presumption of correctness accorded the factual findings, it nonetheless does inform the Court's view of the state habeas court's actions. The Supreme Court's decision in *Richter* is not to the contrary insofar as it does not discuss whether summary dispositions must be viewed through the same lens based on the identity of the state trial and habeas judges.

As the state habeas court itself explained, its review of the *Atkins* claim was limited to the record developed in the sentencing phase of Brumfield's trial, which included the following specific pieces of evidence: the testimony of Dr. John Bolter, the testimony of Dr. Cecile Guin, and a report issued by a Dr. Jordan.[13]

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[13] As counsel have advised the Court, Dr. Jordan's report was never submitted into evidence at any stage of the state court proceedings—both at trial and post-conviction—but it was discussed in Dr. Bolter's submitted expert report (State Trial

Reliance on these pieces of evidence alone, regardless of their intrinsic value, renders the state habeas court decision dubious in and of itself, for several reasons. And when the evidence is actually examined, it is clear that the state habeas court transgressed the bounds of reasonableness in denying Brumfield an evidentiary hearing.

First, the state sentencing took place in 1995, several years before the *Atkins* decision in 2002. During the sentencing phase, neither defense counsel nor the trial court had the benefit of the *Atkins* decision, which may have altered the strategic choices of the defense in deciding not to present mitigating evidence that Brumfield was mentally retarded. *See Atkins*, 536 U.S. at 320 (holding that as a mitigating factor, mental retardation often serves as a "two-edged sword that may enhance the likelihood" of wrongful execution because jurors may be more inclined to find that individual dangerous); *State v. Corey Williams*, 831 So.2d 835, 856, n. 31 (La. 2002)[14] (pointing out why

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Record, Vol. II, pp. 267-276) and in the live testimony of both Dr. Bolter and Dr. Guin (State Sentencing Record, Vol. XVI, pp. 3857-3910). The Jordan report was submitted to this Court during its evidentiary hearing, but its content is irrelevant in determining the propriety of the state court action under *Pinholster* since it was not in the state court evidentiary record.

[14] *Corey Williams* and *State v. Dunn*, 831 So.2d 862 (La. 2002) ("*Dunn I*") were issued on the same day and dealt with much the same issues, namely, establishing an interim set of procedures for courts to follow in *Atkins* situations until the Louisiana legislature spoke on the issue. While La. C.Cr.P. art. 905.5.1 certainly superseded the inconsistent portions of *Corey Williams* and *Dunn*, as recognized in *State v. Turner*, 936 So.2d 89, 95 (La. 2006), those

counsel may avoid introducing mental retardation as a mitigating factor); *see also id.* at 856-57 ("[M]ost significantly, *Atkins* changed what would be considered relevant. Prior to the trial, mental retardation was merely a factor in mitigation. Post *Atkins*, mental retardation is a complete prohibition against imposition of the death penalty according to the United States Supreme Court."). At least one member of the Fifth Circuit has concluded that, based upon this language, Louisiana courts cannot rely upon mental retardation evidence presented for mitigation as evidence of *Atkins* mental retardation. *Hall*, 534 F.3d at 392 (Higginbotham, J., concurring in part and dissenting in part) (citing *Corey Williams*, 831 So.2d at 856-57). While that conclusion may not be treated as a *per se* rule in the Louisiana courts on direct review, *see State v. Manning*, 885 So.2d 1044 (La. 2004) (declining on direct review to remand for *Atkins* hearing based on State's evidence introduced during pre-*Atkins* sentencing), this case comes before the Court on federal collateral review following state collateral review. And as the cases discussed below will demonstrate, *Manning* at the very least is limited to factual scenarios where the mental retardation issue was actually presented to a jury, even if as mitigating evidence instead of *Atkins* evidence, because Louisiana courts do not tolerate mere mitigation evidence presented on another issue to be used to decide an *Atkins* issue.

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decisions retain vitality and have provided guidance in determining questions the statute does not answer. *State v. Dunn*, 974 So.2d 658, 661-62 (La. 2008) ("*Dunn III*") (recognizing the limited scope of art. 905.5.1 and applying *Corey Williams* to cases in a post-verdict posture).

Second, the state habeas court had adequate notice that its determination was factually unreasonable in light of the multiple funding requests for the development of expert testimony on Brumfield's habeas claims. The inexplicable decision to ignore these requests—either because the state habeas judge thought them meritless or unimportant or simply failed to realize they had been made, this Court can only guess—on its face makes the denial of Brumfield's *Atkins* claim unreasonable. The record before the state court on October 23, 2003 demonstrates that Brumfield had not made out a *prima facie* case of mental retardation, (*see* Magistrate Judge's Report, Doc. 37), but that in itself is both unremarkable and predictable. Finding that Brumfield failed to establish his *prima facie* case was not the unreasonable factual determination; rather, it was the state court's failure to realize Brumfield had no chance to do so, based on its denial of funds, that comprises the unreasonable determination here.

Third, the state habeas judge hinged his conclusion that Brumfield was not entitled to a hearing on the adaptive skills prong of the mental retardation test that Louisiana law spells out. Not only is this the murkiest and most subjective part of the mental retardation test, as will be made clear below in Part III, but it requires exhaustive factual specificity since so many factors[15] can influence "adaptive behavior as

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[15] The AAIDD 9th Edition mentions no less than ten factors, and a petitioner must show significant limitation in two of them to qualify as mentally retarded. The AAIDD 10th Edition groups those factors into conceptual, social, and practical domains and

expressed in conceptual, social, and practical adaptive skills." La. C.Cr.P. art. 905.5.1(H)(1). As mentioned above, reliance on record evidence from a pre-*Atkins* sentencing already makes this determination somewhat dubious. When a Louisiana state court relies on record evidence from a pre-*Atkins* sentencing that, *on its own terms, does not even relate to mental retardation*, it cannot be deemed to have made a reasonable factual determination as a matter of law.

The case coming closest to validating the State's position, *State v. Manning*, 885 So.2d 1044 (La. 2004), simply does not stand for the blanket proposition that "where the record provides sufficient evidence negating a contention that a defendant is mentally retarded, an evidentiary hearing is unnecessary to further litigate [sic] is already established." (State's Objection to Magistrate Judge's Report, Doc. 38, p. 6). In *Manning*, the Louisiana Supreme Court affirmed on direct review a murder conviction and capital sentence. 885 So.2d at 1057. In the *Manning* Court's discussion of the defendant's *Atkins* claim, 885 So.2d at 1106-07, the Court simply notes that conflicting testimony was presented at sentencing, with one expert opining that defendant was "mildly retarded or at least slow learner level" and another stating that "he functioned in the 'just below average' range." *Id.* at 1107. In reviewing the defendant's conduct during the investigation, the Court found on the record before it that he failed to demonstrate a reasonable likelihood of mental retardation. *Id. Manning* thus dealt with a situation where, at the very least, evidence of mental retardation

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requires a petitioner to show significant limitation in one of the overall domains to qualify as mentally retarded.

was squarely put before the state trial court at sentencing. While the State correctly points out that the defendant in *Manning* had been sentenced prior to *Atkins*, it fails to note the crucial difference: the *Manning* defendant actually presented evidence of mental retardation to the jury, whereas here Brumfield did not. Moreover, *Manning* came to the Louisiana Supreme Court by way of direct review, which necessarily limited its scope to matters directly litigated, whereas post-conviction review is the proper forum for raising a broader array of claims, including mental retardation issues not submitted to the jury at trial. *Cf. State v. Holmes*, 5 So.3d 42, 99 (La. 2008) (Calogero, C.J., dissenting) (arguing that an adequately developed record regarding mental retardation, even if not submitted to the jury under La. C.Cr.P. art. 905.5.1, should be reviewable on direct appeal instead of relegating that determination to a post-conviction proceeding, the course the *Holmes* majority required the defendant to pursue).

Fourth, even assuming for the sake of argument that it was not clear legal error to extrapolate *Atkins* evidence on mental retardation from pre-*Atkins* mitigating evidence on competency (the impropriety of which is shown below), the actual evidence elucidated at the sentencing hearing simply does not dovetail with the factors Louisiana courts use to assess mental retardation. The Louisiana legislature enacted La. C.Cr.P. art. 905.5.1 during the 2003 regular session as Act No. 698 (House Bill No. 1017), which it approved on June 27, 2003. Because no effective date was provided in that Act, the Court assumes its provisions were effective immediately. *See Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1069 (5th Cir. 1982) ("As

a general rule, a new statute should apply to cases pending on the date of its enactment … unless manifest injustice would result, or there is a statutory directive or legislative history to the contrary." (quotation marks and citations omitted)). Since La. C.Cr.P. art. 905.5.1(H)(1) simply defines adaptive behavior as "expressed in conceptual, social, and practical adaptive skills," Louisiana courts have looked to the AAIDD's clinical definitions for guidance in determining which skills are relevant. *See Corey Williams*, 831 So.2d 835, 852-54 (noting the U.S. Supreme Court adopted the AAMR's (now the AAIDD's) clinical definition and finding Louisiana's then-existing statutory definition comported with the consensus definition of mental retardation exhibited in the AAMR's definition). A review of the sentencing phase transcript from Brumfield's trial shows that several factors relevant to the adaptive skills prong—including but not limited to (1) his ability to sustain interpersonal relationships, (2) his ability to maintain self-esteem, (3) whether he is gullible or naïve, and (4) whether he has any practical skills—are simply lacking in discussion or even mention. (Transcript of Sentencing Phase, Vol. XVI, pp. 3857-3910). Based on what testimony the state trial court actually heard, it was unreasonable and unfair for the state habeas judge to conclude Brumfield lacked deficits in adaptive skills when entire areas of adaptive skills were not discussed.

Finally, and fatally for the state habeas court's determination, the Louisiana Supreme Court has conclusively determined the impropriety of collapsing a competency inquiry with a mental retardation inquiry. In *State v. Holmes*, 5 So.3d 42, 58 (La. 2008), the Court stated:

> *Equating competency*, which addresses a defendant's ability to understand the proceedings and to assist in her own defense, see La.Code Crim. Proc. art. 641, *with mental retardation*, which acts as a mitigating circumstance exempting a defendant from the death penalty, constitutes an hyperbole and *does not accord with this state's well-accepted jurisprudence*. (emphasis added).

The *Holmes* Court went on to cite several cases from the late 1970s and early 1980s to support its conclusion, thus showing that that jurisprudence had sufficiently developed by the time the state habeas judge made his decision. *Holmes* repeats the same admonition the Louisiana Supreme Court has previously given on conflating the two separate inquiries. *See State v. Turner*, 936 So.2d 89, 96 (La. 2006) ("*[E]quating competency* to stand trial *with mental retardation* as an absolute bar to subjection to the death penalty *is a stretch at best*.") (emphasis added). These holdings irrefutably establish the error of the state habeas court and therefore prove, at the very least, that using pre-*Atkins* sentencing evidence related to competency cannot be permitted when deciding an *Atkins* issue. Thus, because the state habeas court reached the merits of Brumfield's *Atkins* claim by relying exclusively on testimony and neuropsychological reports on the issue of competency while knowing Brumfield never had an opportunity to gain funding to hire experts to help support his claim of mental retardation, Brumfield has furnished clear and convincing evidence the state habeas court made an unreasonable determination of the facts in light of

the record evidence (or lack thereof) before it in violation of § 2254(d)(2).

As the preceding discussion illustrates, the issues of factual unreasonableness under § 2254(d)(2) and legal unreasonableness as measured by then-existing Supreme Court law under § 2254(d)(1) inextricably intertwine in this case. Whichever way the state court's determination is sliced, though, the result the law compels this Court to reach remains the same. If the Court's inquiry looks only at the facts in evidence which the state habeas court reviewed, a common sense appraisal of that evidence convincingly shows that the standards relevant to a competency inquiry simply do not equate with the standards relevant to a mental retardation inquiry. That alone makes it a convincing case for an unreasonable factual determination, a conclusion simply bolstered by reviewing Louisiana law, *see State v. Holmes*, 5 So.3d at 58, and federal law, *see, e.g., Atkins*, 536 U.S. at 320-21; *Allen v. Buss*, 558 F.3d 657, 661-65 (7th Cir. 2009); *Hall v. Quarterman*, 534 F.3d 365, 371-72 (5th Cir. 2008). The facial unreasonableness of the state court's factual determination under § 2254(d)(2)—non-retardation based on the ill-suited proxy of competency—is further compounded when taking into account the repeated requests Brumfield lodged with the state court seeking funding for expert evaluation. On the other hand, when looking only at the legal standards used and/or complied with by the state court, it is clear that due process was denied Brumfield. Whether viewed as an action which (1) simply ignored *Atkins*'s admonition not to use mitigating evidence as determinative (made even more egregious because the mitigating evidence related to competency, not mental retardation), or (2) failed to

follow due process law as established by *Ford v. Wainwright* to grant an evidentiary hearing when a *prima facie* case was presented it (and thus eviscerated due process by preventing Brumfield the opportunity to develop such a *prima facie* case), the state court unreasonably applied those established Supreme Court standards and violated § 2254(d)(1).

The State therefore cannot show that newly-decided cases which constitute binding precedent on this Court make its previous determination to hold an evidentiary hearing improper. Its converted motion for reconsideration is therefore DENIED, and the Court reaffirms its finding that the evidentiary hearing was properly held as detailed in magistrate judge's report and recommendation and supplemented by this ruling.

III.

Having rejected the State's converted motion to reconsider the propriety of the evidentiary hearing the Court already conducted, the Court now deals with the merits of Brumfield's *Atkins* claim.

A. Louisiana Law Has Adopted the Definition of Mental Retardation Contained in the AAIDD's 10th Edition.

In *Atkins v. Virginia*, the United States Supreme Court concluded that capital punishment of a mentally retarded person violates the Eight Amendment's prohibition against cruel and unusual punishment. 536 U.S. 304, 321 (2002). However, the *Atkins* Court left to the States the task of defining mental retardation. *Id.* at 317. The Court did discuss with approval the clinical standards used by the American Association on Mental

Retardation (AAMR, hereinafter "AAIDD")[16] and the American Psychiatric Association (APA). *Id.* at 308-09, n. 3. Because there appears to be a dearth of Fifth Circuit cases which apply Louisiana law[17] to an *Atkins* claim, the Court pauses to detail Louisiana statutory and case law, which provide an explanation of the legal framework Louisiana has elected to use pursuant to the *Atkins* mandate.

In confirming its compliance with the *Atkins* decision, the legislature ensured that, "[n]otwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death." La. C.Cr.P. art. 905.5.1(A). Article 905.5.1(H) of the Louisiana Code of Criminal Procedure provides the operative definition the Court must apply:

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[16] *Atkins* cited the AAMR's clinical standard as set forth in Mental Retardation: Definition, Classification, and Systems of Support (9th ed. 1992). The AAMR later changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). They have also subsequently updated their text in a 10th Edition, published in 2002, and now an 11th Edition, re-titled as Intellectual Disability: Definition, Classification, and Systems of Support, published in 2010. The 11th Edition makes largely cosmetic changes in terminology, as the change in title reflects.

[17] The Fifth Circuit has decided a litany of cases expounding upon the *Atkins* standard in light of Texas law, *e.g., Hall v. Quarterman*, 534 F.3d 365 (5th Cir. 2008); *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), and at least one in light of Mississippi law, *Wiley v. Epps*, 625 F.3d 199 (5th Cir. 2010). However, this Court is not aware of any Fifth Circuit decision construing Louisiana law on mental retardation.

(1) "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

(2) A diagnosis of one or more of the following conditions does not necessarily constitute mental retardation:

(a) Autism.
(b) Behavioral disorders.
(c) Cerebral palsy and other motor deficits.
(d) Difficulty in adjusting to school.
(e) Emotional disturbance.
(f) Emotional stress in home or school.
(g) Environmental, cultural, or economic disadvantage.
(h) Epilepsy and other seizure disorders.
(i) Lack of educational opportunities.
(j) Learning disabilities.
(k) Mental illness.
(l) Neurological disorders.
(m) Organic brain damage occurring after age eighteen.
(n) Other handicapping conditions.
(o) Personality disorders.
(p) Sensory impairments.
(q) Speech and language disorders.
(r) A temporary crisis situation.

> (s) Traumatic brain damage occurring after age eighteen.

La. C.Cr.P. art. 905.5.1(H). Brumfield bears the burden of proving by a preponderance of the evidence that he meets the statutory definition. *Id.*, art. 905.5.1(C)(1).

Louisiana law tracks the clinical definition provided by the AAIDD in Mental Retardation: Definition, Classification, and Systems of Support (10th ed. 2002) (hereinafter, "10th Edition").[18] The 10th Edition provides:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

(10th Edition, Petitioner's Ex. 11, at p. 1). But the AAIDD also presents five assumptions that guide application of the clinical definition. Crucially, it notes that individual "limitations often coexist with strengths" and counsels that with appropriate supports, a mentally retarded person's functioning can generally improve. (*Id.*).

The 10th Edition, published in 2002, contains the current, consensus definition of mental retardation,

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[18] The 10th Edition was introduced into evidence as Petitioner's Ex. 11 (hereinafter cited as "Ex. P-11"). The User's Guide to the 10th Edition, an important supplemental aid, was introduced into evidence as Petitioner's Ex. 13. The 11th Edition was introduced into evidence as Petitioner's Ex. 12.

which the Louisiana legislature adopted. (*See* Swanson Testimony, Doc. 106, p. 26 (detailing the drafting history of La. C.Cr.P. art. 905.5.1)). Therefore, reference by the Court to the AAIDD's definition is an appropriate means of discerning what personal characteristics are involved in assessing petitioner's "intellectual functioning and … conceptual, social, and practical adaptive skills" as defined in art. 905.5.1. The Court finds ample support for adopting the AAIDD's definition in the seminal cases of *Atkins* and *Corey Williams*, and therefore the AAIDD's definition as contained in its 10th Edition will provide the authoritative definition used by this Court in assessing Brumfield.[19] *Cf. Moore v. Quarterman*, 342 Fed.Appx. 65, 74 (5th Cir. 2009) (finding no abuse of discretion under Texas law in strictly applying the AAIDD 10th Edition's clinical definition).

Because the Court receives substantial guidance from the experts involved, a brief introduction to their qualifications and the basis for and summary of their testimony and conclusions is in order. Testifying for Brumfield were Stephen Greenspan, Ph.D., Ricardo Weinstein, Ph.D., Victoria Swanson, Ph.D., and James Merikangas, M.D.[20] Testifying for the State were Robert Blanche, M.D., Donald Hoppe, Psy.D., and John Bolter, Ph.D.

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[19] When ambiguities exist or where other sources might provide useful insight, the Court will look to those sources for guidance, but because the legislature implicitly endorsed the 10th Edition's definition, the Court will consider that source first.

[20] Merikangas submitted an expert report but did not testify at the hearing.

Dr. Greenspan is a licensed psychologist who obtained his Ph.D. in 1976. (Greenspan Curriculum Vitae, Ex. P-1). At the time of the hearing, he served as a visiting professor at the University of Colorado Medical School. (Greenspan Testimony, Doc. 101, p. 5). He is one of the foremost mental retardation experts in the country, and his work is cited in the 10th Edition numerous times. (*Id.*, pp. 10-11). He was accepted by the Court as an expert in mental retardation and adaptive behavior. (*Id.*, pp. 24-25). His testimony generally concerned proper use of the AAIDD's clinical standards in making diagnoses of mental retardation. (*See generally* Greenspan Testimony, Doc. 101, pp. 4-218).

Dr. Weinstein is a licensed psychologist who obtained his Ph.D. in 1981. (Weinstein Curriculum Vitae, Doc. 30-1, p. 20). At the time of the hearing, Dr. Weinstein had a forensic practice and also testified as an *Atkins* expert in various courts. (Weinstein Testimony, Doc. 101, pp. 219-230). He was accepted by the Court as an expert in mental retardation and forensic neuropsychology. (*Id.*, p. 234). He made a diagnostic evaluation of Brumfield after: personally meeting with Brumfield on two occasions for 5-6 hours; speaking with him for another 7 hours; reviewing Brumfield's social history; school records; medical records; institutional records; prison records; previous expert reports, evaluations, and depositions; Brumfield's prior statements to police; and interviews with at least 14 individuals. (Weinstein Testimony, Doc. 102, pp. 19-37). He also administered the ABAS-II adaptive behavior scales to several individuals. His testimony concerned his methodology and reasoning for reaching the conclusion that Brumfield is mentally

retarded. (*See generally* Weinstein Testimony, Docs. 101, pp. 219-284 *and* 102, pp. 3-176 *and* 103, pp. 3-127; *see also* Weinstein Report, Doc. 30-1, pp. 3-18).

Dr. Swanson is a Louisiana-licensed psychologist who received her Ph.D. from LSU in 1999. (Swanson Curriculum Vitae, Doc. 30-1, pp. 31-39; Swanson Testimony, Doc. 106, p. 19). Before receiving her Ph.D., Swanson worked in the mental retardation field for 26 years in various capacities, including work with school districts, teachers, and appraisal teams. (Swanson Testimony, Doc. 106, pp. 20-22). She served on the committee that drafted the Louisiana bill which eventually became law and created La. C.Cr.P. art. 905.5.1. (*Id.*, pp. 26-27). She was accepted by the Court as an expert in mental retardation and psychology. (*Id.*, p. 31). She created Brumfield's social history by reviewing school, medical, and institutional records. (*Id.*). She then met with Brumfield for 5 hours and reviewed additional evidence submitted by the State in this litigation, including much of the information Dr. Weinstein reviewed. (*Id.*, pp. 31-46). Her testimony sifted through Brumfield's past, emphasized his social history, and ultimately concluded that he is mentally retarded. (*See generally* Swanson Testimony, Doc. 106, pp. 19-237; *see also* Swanson Report, Doc. 30-1, pp. 25-30).

Dr. Merikangas is a physician who received his M.D. in 1969. (Merikangas Curriculum Vitae, Doc. 30-1, p. 45). He is board-certified in the field of neuropsychiatry. (*Id.*, p. 47). He submitted a report which stated that a neurological physical exam of Brumfield did not disclose any acquired brain damage

or ongoing disease. (Merikangas Report, Doc. 30-1, p. 42). He did not testify at the hearing.

Dr. Hoppe is a Louisiana-licensed clinical psychologist who received his Psy.D. in 1981. (Hoppe Curriculum Vitae, Ex. S-55). He has maintained a clinical practice for more than 27 years. (Hoppe Testimony, Doc. 103, p. 157). He was admitted by the Court as an expert in clinical and forensic psychology. (Doc. 103, p. 176). He administered an IQ test to Brumfield in addition to reviewing the available records in this case. (*Id.*, Doc. 104, pp. 7-11). He was unable to interview anyone other than Brumfield because counsel for the State did not provide him with contact information for those persons.[21] (Doc. 104, p. 98, 108). He concluded that Brumfield was not mentally retarded. (*Id.*, pp. 25-26).

Dr. Blanche is a forensic psychiatrist who received his M.D. from LSU Medical School in New Orleans in 1981. (Blanche Testimony, Doc. 104, p. 169). He works part-time as a psychiatrist in the East Baton Rouge Parish jail, where he identifies symptoms of mentally

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[21] Dr. Hoppe has previously testified in a state court sentencing, which later came before this Court on habeas review, regarding a defense expert's failure to assess collateral sources of information besides the person whose mental status is being evaluated. *See Koon v. Cain*, No. 01-cv-327-JJB (M.D. La. Feb. 1, 2007) Doc. 111 at **13, 26 (slip op.) (unreported), *aff'd*, 277 Fed.Appx. 381 (5th Cir. 2008) (criticizing defense expert Dr. Zimmerman for not obtaining corroborating data from collateral sources regarding defendant's mental health defense). The Court finds Dr. Hoppe's failure (or inability, if counsel for the State was to blame) to "obtain corroborating data from collateral sources" in this case renders his testimony here suspect.

ill persons for treatment. (Doc. 105, pp. 8-11). The Court accepted him as an expert in forensic psychiatry. (Doc. 104, p. 183). He interviewed Brumfield at Angola and reviewed the available records. (Doc. 104, pp.184-87). He did not interview anyone other than Brumfield, stating that he felt any information gleaned from outside sources would be unreliable.[22] (Doc. 105, p. 31). Until his deposition in this case in January 2010, Dr. Blanche had never heard of the AAMR/AAIDD and was thus unfamiliar with its diagnostic definitions. (Doc. 104, p. 182; Doc. 105, p. 11). In his work for the jail and in his general practice, he refers persons suspected of mental retardation to a psychologist. (Doc. 105, pp. 7-9). Dr. Blanche received no formal training in administering psychological testing. (Doc. 104, p. 181); *see also State v. Corey Williams*, 831 So.2d 835, 859 (La. 2002) (cautioning courts to not appoint physicians to assess mental retardation because they do not possess the "appropriate expertise"). He

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[22] Dr. Blanche's reticence to speak with members of Brumfield's family and others who knew him might have arisen because, as a State expert, he might be perceived as hostile to Brumfield's interests and thus might receive inaccurate information. Nonetheless, his failure to even make an attempt at corroborating his observations by cross-checking with collateral sources is of fundamental import. The AAIDD guidelines make clear that, especially in forensic diagnosis situations, a holistic review of petitioner's mental status must include these assessments. (*See* User's Guide to 10th Edition, Ex. P-13, pp. 18-22). Ratings by peers, teachers, family members, and others in the subject's community environment are considered crucial. (*Id.*). Dr. Blanche's failure to do so entitles his testimony to comparably less weight than Dr. Weinstein's and Dr. Swanson's, both of whom gave due consideration to the clinical guidelines in this regard.

concluded that Brumfield does not suffer from mental retardation. (Doc. 104, p. 218).

Dr. Bolter is a clinical neuropsychologist who received his Ph.D. from the University of Memphis. (Bolter Testimony, Doc. 107, pp. 3-5). Since 1988 he has worked at the Neuromedical Center in Baton Rouge. (Doc. 107, p. 3). During Brumfield's murder trial in state court in 1995, he submitted an expert report for the defense and testified at the sentencing phase of Brumfield's trial. (Transcript of Sentencing Phase, Vol. XVI, pp. 3902-10). Dr. Bolter's records were subsequently destroyed, and he remembered little about Brumfield. (Doc. 107, pp. 13-21). As a result, the Court admitted Bolter as an expert in neuropsychology but restricted questions to the scope of his 1995 report. (Doc. 107, pp. 19-20; *see also* Bolter Report, Exs. S-39 *and* P-33). Based on his 1995 report, Bolter found nothing in the report to suggest petitioner was mentally retarded. (Doc. 107, pp. 36-37).[23]

B. Prong 1: Significant Limitations in Intellectual Functioning

The AAIDD recognizes that because "intelligence is best conceptualized and captured by a general factor of intelligence," (10th Edition, Ex. P-11, p. 55), an assessment of intellectual functioning requires "reliance on a general functioning IQ score…." (*Id.*, p. 51). There is no federally-established, bright-line

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[23] This Court respects Dr. Bolter and found his testimony to be credible, but due to his limited records and memory, his testimony does not shed much light on the issues before the Court, especially beause his assessment was not an *Atkins*-tailored inquiry. *See infra*, Part II.D.

cutoff for persons to qualify as mentally retarded, even using an objective IQ test as the measure for the intellectual functioning prong. *See Atkins*, 536 U.S. at 308-09, n. 3 ("'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 *to approximately 70*.") (citing Diagnostic and Statistical Manual of Mental Disorders 42-43 (4th ed. 2000)) (emphasis added); *id.* at 309, n. 5 ("*[A]n IQ between 70 and 75 or lower … is typically considered the cutoff* IQ score for the intellectual function prong of the mental retardation definition." (citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds., 7th ed. 2000)) (emphasis added).

Nor does any codified portion of Louisiana law provide for a numerical cutoff. Louisiana cases have never explicitly found a bright-line cutoff and have consistently rejected imposition of one. *E.g., State v. Shedran Williams*, 22 So.3d 867, 888 (La. 2009) ("[N]either our legislature nor our jurisprudence has set forth a specific IQ score for determining intellectual functioning in the capital sentencing context… ."). The cases which have rejected *Atkins* claims based on IQ scores have done so, not simply because of the IQ score, but because other factors relevant to assessing intellectual functioning also pointed toward a finding of non-retardation. Moreover, those cases have arisen from direct review of a jury's rejection of a mental retardation claim. For instance, in *Shedran Williams*, 22 So.3d at 888, the defendant had a full scale score of 73 on the WAIS-R test. *Id.* at 888, n. 16. The defendant contested the jury's finding of non-retardation on direct review, alleging that the expert testimony of Dr. Hoppe (incidentally, the same expert used by the State in this case) that the ceiling IQ for mild mental retardation

was 70 was legal error. *Id.* at 887. The Court declined to find error in the jury's determination because the jury could also have reasonably found he flunked the adaptive skills prong. *Id.* at 888. The Court also noted that the defendant failed to present to the jury how the standard error of measurement might impact the full scale IQ score. *Id.* at 888, n. 16. In *Dunn III*, 41 So.3d 454, 470 (La. 2010), the court stated that "scores of 75 brush the threshold score for a mental retardation diagnosis" but ultimately did not disturb on direct review the jury's finding of non-retardation. *See also State v. Lee*, 976 So.2d 109, 146 (La. 2008) (holding that Dr. Hoppe's explanation of "an average IQ as a child of 75.5" as "well over the clinical definition of mild retardation" did not ultimately result in an irrational or unreasonable jury finding of non-retardation).

Mental health literature published by the AAIDD has admonished practitioners to avoid imposition of cutoff IQ scores as well, with the current edition noting that 70-75 is the upper range for mild mental retardation. (10th Edition, Ex. P-11, pp. 57-59). Because the Court has found the 10th Edition is the proper source to follow in construing Louisiana's definition of mental retardation, the Court therefore finds that, consistent with Louisiana statutory and case law, an IQ score of 75 or below does not preclude a finding of mild mental retardation for *Atkins* purposes.

In this case, Brumfield took four different IQ assessments and received the following unadjusted, full scale scores, as reported by petitioner's experts:

- In a 1995 WAIS-R test administered by then-defense expert Dr. Bolter, he scored a 75, with a 95% confidence interval of 70-80.
- In a 2007 Stanford-Binet V test administered by petitioner's expert, Dr. Weinstein, he scored a 72, with a 95% confidence interval of 69-77.
- In a 2007 C-TONI test administered by Dr. Weinstein, he scored a 70, with a 95% confidence interval of 65-75.
- In a 2009 WAIS-IV test administered by the State's expert, Dr. Hoppe, he scored a 70, with a 95% confidence interval of 67-75.[24]

(Summary of Brumfield's IQ Scores, Petitioner's Ex. 3).[25]

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[24] Suspecting that Brumfield may have not put forth his best effort, Dr. Hoppe gave him a Rey malingering test, which is designed to identify such a situation. Brumfield scored well within the normal range, though Dr. Hoppe still asserts Brumfield somehow outsmarted the malingering test. (Hoppe Testimony, Doc. 104, p. 16). Given the consistently close scores on the IQ tests and the testimony from Dr. Weinstein that such consistently low and close scores could only be accomplished through malingering by a genius—a label manifestly inappropriate for Brumfield—the Court cannot credit Dr. Hoppe's testimony on this issue. The Court therefore finds the 2009 score of 70 on the WAIS-IV test to be valid.

[25] The Court notes that one IQ score listed on the summary chart exhibit was found unreliable because the PPVT test only made an IQ estimate, and thus it cannot be taken into account in assessing Brumfield's intellectual functioning. (Weinstein Testimony, Doc. 102, pp. 117-18).

Standing alone, these scores appear to meet prong one of the mental retardation test. In Wechsler-scaled tests (such as WAIS-R and WAIS-IV), the standard deviation is 15 and the mean is 100, meaning that 70 represents the score best approximating the cutoff for qualifying under the clinical definition of significantly limited intellectual functioning. *Dunn III*, 41 So.3d at 461-62. The Stanford-Binet V test, unlike previous versions of that test, uses the same measuring guideposts as the Wechsler tests; thus, scoring a 70 on that test would best approximate intellectual functioning two standard deviations removed from the mean. *Id.* Brumfield's scores consistently show him scoring between 70 and 75 on various IQ tests, a range which falls squarely within the upper bounds of mild mental retardation according to the AAIDD's clinical definition.

Every expert that has testified in this matter has admitted that Brumfield meets the intellectual functioning prong of the mental retardation test as set forth in La. C.Cr.P. art. 905.5.1(H)(1). (Greenspan Testimony, Doc. 101, pp. 34, 60-66; Weinstein Testimony, Doc. 102, p. 50; Swanson Testimony, Doc. 106, pp. 49-50; Hoppe Testimony, Doc. 104, p. 71; Blanche Testimony, Doc. 105, pp. 19-20; *see also* Bolter Testimony, Doc. 107, p. 43 (admitting an IQ of 75 qualifies as the upper bound of mild mental retardation)). Nor does the State assert in its briefing that Brumfield fails to meet this part of the test.

Even though all of Brumfield's IQ scores, when assessing the standard error of measurement, show him to potentially be mentally retarded using even the stricter cutoff of 70, courts have sometimes been

hesitant to reach into the lower bounds of the standard error of measurement (sometimes referred to as the "margin of error") to make a finding of mental retardation. *See, e.g., Moore v. Quarterman*, 342 Fed.Appx. 65, 80, n. 23 (5th Cir. 2009) (Smith, J., dissenting) (asserting that a preponderance standard cannot be satisfied under Texas law's IQ cutoff of 70 when a petitioner shows an average IQ score above 70, regardless of the standard error of measurement). Crucially, though, Brumfield's full, scaled IQ scores cited above do not take into account the "Flynn Effect." Those unadjusted IQ scores already qualify him as, at a minimum, on the borderline of mild mental retardation, a showing which alone permits inquiry into the second prong under Louisiana's flexible-cutoff approach. *See Dunn III*, 41 So.3d at 470 (noting that persons with IQ scores above 70 can nonetheless be diagnosed as mentally retarded by heavily depending on a showing of substantial impairment of adaptive functioning). Applying the Flynn Effect to Brumfield's scores would indisputably place him within the range of mild mental retardation.

This phenomenon, named after political scientist James Flynn, found that, over time, the mean IQ scores of the American public on any given test increase by approximately 3 points per decade, or an average of approximately 0.30-0.33 points per year. Flynn measured this increase by simply giving an individual two tests, one of which was an older IQ test that had been normalized to the public at the time of its publishing and one of which was a newly-normalized, recently-published test. Test subjects consistently performed better on the older test than the newer test, leading to the theory that the public on average

becomes more intelligent—at least as reflected in mean IQ scores—as times passes. Thus, when an older test is used to measure a test subject, the subject's IQ score may be artificially inflated because that test was normalized using a past sample of Americans. Since the general public's IQ scores have since risen, measuring someone against an older set of norms means measuring someone against a norm set that does not currently reflect the average IQ today, requiring a downward adjustment of the subject's score to account for the subsequent IQ rise of the public which the older test itself does not capture. (*See, e.g.,* User's Guide to 10th Edition, Ex. P-13, p. 20, ¶ 4; *see also* Frank M. Gresham, *Interpretation of Intelligence Test Scores in* Atkins *Cases: Conceptual and Psychometric Issues*, 16 Applied Neuropsychology 91, 93-94 (2009), Ex. P-9; Gilbert S. Macvaugh, III & Mark D. Cunningham, Atkins v. Virginia*: Implications and recommendations for forensic practice*, 37 J. of Psychiatry & Law 131, 148-151 (2009), Ex. P-10).

The Flynn Effect has been widely accepted as a fact in the scientific community, though explaining the cause of this phenomenon has proven more difficult. (Kevin S. McGrew, *Is the Flynn Effect a Scientifically Accepted Fact?*, Institute for Applied Psychometrics (2010), Ex. P-4). Moreover, courts have struggled to determine whether the Flynn Effect should be applied to individual scores and/or whether it should be applied differently depending on the test administered. Neither the Fifth Circuit nor the Louisiana Supreme Court has determined whether to accept the Flynn Effect as a valid method. *See In re Mathis*, 483 F.3d 395, 398, n.1 (5th Cir. 2007) (mentioning that the Flynn Effect has not been accepted as scientifically valid within the

Fifth Circuit); *In re Salazar*, 443 F.3d 430, 433, n. 1 (5th Cir. 2006) (expressing no opinion on validity of Flynn Effect); *Dunn III*, 40 So.3d 454, 470, n. 16 (La. 2010) (noting that the Flynn Effect had not been specifically accepted as scientifically valid by the Louisiana Supreme Court); *see also Dunn III*, 40 So.3d at 478-79 (Knoll, J., concurring) (asserting that the Flynn Effect should not be applied to individual IQ scores but that use of outdated tests may be taken into account when making *Atkins* determination).

In the face of this legal uncertainty, the Court gives great weight to the AAIDD's clinical standards, which tip the balance in favor of at least considering the Flynn Effect, even if the Court does not fully embrace all of its contours. *See Wiley v. Epps*, 668 F.Supp.2d 848, 894-95 (N.D. Miss. 2009), *aff'd*, 625 F.3d 199 (5th Cir. 2010) (assessing Flynn Effect holistically as a factor to consider in analyzing IQ scores). The AAIDD's User Guide specifically instructs practitioners to apply the Flynn Effect, especially when presented with a retrospective diagnosis situation, as is the case here. (User's Guide to 10th Edition, Ex. P-13, pp. 17-21). Applying the Flynn Effect would lower Brumfield's 1995 WAIS-R score from 75 to 70, his 2007 Stanford-Binet V score from 72 to 70, and his 2007 C-TONI score from 70 to 65.[26] (Summary of IQ Scores, Ex. P-3). Thus, the Flynn Effect would place those scores solidly and indisputably into the mildly mentally retarded level.

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[26] No computation of the Flynn Effect on his 2009 WAIS-IV score of 70 was made, but that is unnecessary because that score already undoubtedly qualifies as showing mild mental retardation.

Given that (1) every single testifying expert—both petitioner's and the State's—agrees that Brumfield has satisfied the intellectual functioning prong, (2) the unadjusted IQ scores permit inquiry into the other parts of the test under Louisiana's flexible-cutoff approach, and (3) the Flynn Effect-adjusted scores place all of Brumfield's IQ scores at or more than two standard deviations below the mean, the Court finds Brumfield has met his burden and shown by a preponderance of the evidence that he has significant limitations in intellectual functioning. Prong One is met.

C. Prong Two: Significant Limitations in Adaptive Behavior as Expressed in Conceptual, Social, and Practical Adaptive Skills

Prong Two involves an assessment of Brumfield's adaptive skills in the areas of conceptual, social, and practical skills. He must show a significant limitation in at least one of those three domains to satisfy the adaptive skills prong. (*See* 10th Edition, Ex. P-11, Table 1.2, p. 14). The AAIDD's 9th Edition defined significant limitation in adaptive skills as someone who exhibited deficits in at least two of the following ten areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. (*Id.*, Table 2.1, p. 21). The 10th Edition moved away from that scheme of categorization, instead forming three clusters of related skills and requiring a significant limitation in one of those broader domains. (*Id.*, Table 5.2, p. 82).

Conceptual skills include language skills, reading and writing abilities, self-direction, and grasping

concepts of money. (*Id.*). These conceptual skills may be collectively labeled as functional academics. (*Id.*).

Social skills focus on interpersonal relationships, responsibility, self-esteem, gullibility/naivete, following rules/obeying laws, and avoidance of victimization. (*Id.*).

Practical skills focus on self care and daily living. (*Id.*). Such skills include preparing and eating meals, dressing, toileting, personal mobility and use of transportation, occupational skills, health care, and maintenance of safe environments. (*Id.*, Table 3.1, p. 42).

The AAIDD prefers that practitioners utilize standardized testing in these areas, and like the intellectual functioning prong, a showing of significant limitation requires a score two standard deviations below the mean. (*Id.*, p. 76). However, in retrospective diagnosis situations, it is often difficult to assess such limitations simply by giving a subject and his inner circle a questionnaire to fill out. (User's Guide to 10th Edition, Ex. P-13, p. 17). Rather, the guidelines in this situation call for additional inquiry into the subject's past, including interviews alongside questionnaires. (*Id.*, pp. 18-22).

In this case, Brumfield and several people who knew him well were given ABAS-II questionnaires by Dr. Weinstein in 2007 and 2009 in an effort to obtain relatively objective measures of Brumfield's adaptive skills. (ABAS-II Questionnaires and Results, Petitioner's Exs. 48-52). However, Weinstein explained that the scores on the ABAS tests could not be given preclusive effect in assessing Brumfield's adaptive

skills and cautioned that they might not be wholly reliable. (Weinstein Testimony, Doc. 102, p. 59). Depending on the person, these tests sought input as to Brumfield's past ability in his childhood to perform certain tasks. Brumfield was born on January 7, 1973, and these backward-looking questions rely principally upon the memories of the test-takers regarding Brumfield's abilities dating back 15-20 years. Some of them have emotional incentive to lie or exaggerate (such as Brumfield's mother, sister, and his child's mother) in order to spare him the penalty of execution. Others, such as Brumfield's former teacher, may or may not have a clear recall of events since he was only one of many hundreds of students she taught over her career. Brumfield does not rely on these scores in his briefs, the State does not either, and in any event the guidelines for retrospective diagnoses of mental retardation eschew total reliance on this type of information in favor of interviewing relevant persons with knowledge of petitioner and cross-checking that information with school records, social history, and other more objective indicia. (User's Guide to 10th Edition, Ex. P-13, pp. 18-22). The Court finds these tests to be of little or no value and therefore will not address the results of the ABAS-II exams.[27]

Without reliable standardized measures available, the Court must rely on the testimony of the expert witnesses and their reports, the Court's independent evaluation of Brumfield's social, educational, medical, and criminal histories, and a common sense appraisal of Brumfield's actions and abilities. In this regard,

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[27] For whatever they are worth, the scores showed Brumfield with very significant adaptive deficits.

several considerations stressed in the clinical literature bear repeating. As the AAIDD's operational assumptions make clear, "people with mental retardation are complex human beings" who may have "strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." (10th Edition, Ex. P-11, p. 8). Thus, diagnosis of mental retardation "is ruled in by areas of impairment but is not ruled out by areas of competence." (Greenspan Testimony, Doc. 101, p. 75). Mental retardation is essentially a disorder of thinking rather than learning. (*Id.*, pp. 40-41). Breakdowns in routine require higher-level problem-solving abilities and critical thinking skills that even mildly mentally retarded persons often lack. (*See id.*). Mentally retarded persons can read and write but usually only up to a fifth or sixth grade level. (*Id.*, p. 43). Mildly mentally retarded persons have mental abilities of seven to eleven year old children. (Summary of American Psychological Association's Characteristics of Mildly Mentally Retarded Individuals, Ex. P-60)

While "[a]daptive behavior is considered to be conceptually different from maladaptive or problem behavior," it is nonetheless important to recognize "that the function of inappropriate, or maladaptive, behavior may be to communicate an individual's needs, and in some cases, may even be considered 'adaptive.'" (10th Edition, Ex. P-11, p. 79). The Court must take into account the retrospective diagnostic guideline admonishing practitioners to "not use past criminal behavior or verbal behavior to infer level of adaptive behavior," (User's Guide to 10th Edition, Ex. P-13, p. 22), because "adaptive behavior and problem behavior are independent constructs and not opposite

poles of a continuum." (*Id.*, p. 20). The reasons for not using maladaptive criminal behavior to assess adaptive skills are several: (1) the defendant may have gullibly acted under the direction or training of a confederate during the crime; (2) there may not be available enough accurate details about the facts of the crime from which to draw adaptive conclusions; and (3) in any event, there is a lack of normative information about actions during and following crimes to be able to meaningfully assess whether and how much a defendant's actions deviated from the mean adaptive behavior during criminal acts. (*Id.*; Greenspan Testimony, Doc. 101, pp. 121-26; Swanson Testimony, Doc. 106, pp. 117-23).

On the other hand, the Court must also remain cognizant of the propensity of Louisiana courts to take such maladaptive criminal behavior into account when discussing the adaptive skills prong of the mental retardation test. The Louisiana Supreme Court has in several instances discussed the criminal actions of an *Atkins* petitioner when assessing that person's adaptive skills.

In *State v. Brown*, 907 So.2d 1, 45-47 (La. 2005), the Louisiana Supreme Court examined on direct review the defendant's actions immediately following the crime, including destruction of evidence, in light of defendant's contention that a gunshot incurred by him in a previous criminal episode damaged his brain's frontal and temporal lobes and deprived him of his ability to make reasonable choices. The *Brown* Court rejected defendant's contention in light of the fact that no expert testified that he was mentally retarded. *Id.* at 46-47. In *State v. Scott*, 921 So.2d 904, 959 (La. 2006), *overruled in part on other grounds by State v.*

Dunn II, 974 So.2d 658 (La. 2008), the Court on direct review succinctly noted that "the defendant's behavior during and following the commission of the crime can be relevant to the determination of mental retardation." In *State v. Lee*, 976 So.2d 109 (La. 2008) the Louisiana Supreme Court evaluated on direct review "[t]he complexity, scope, planning, and relative skill with which defendant committed" his crimes as evidence of strength in adaptive skills. 976 So.2d at 147. In *State v. Anderson*, 996 So.2d 973, 991 (La. 2008), the Louisiana Supreme Court, like in *Brown*, analyzed on direct review the evasive steps defendant took in the wake of committing the charged crime, noting that "[s]uch organized behavior to cover his tracks, suggests a level of intellectual awareness of right from wrong, and could have formed the basis for the jury to determine that defendant's adaptive skills were not retarded." In *State v. Shedran Williams*, 22 So.3d 867 (La. 2009), the Louisiana Supreme Court found that the jury could have discredited the defense's expert witness because he failed to interview eyewitnesses to the crime who might have had an opinion on the defendant's behavior prior to and during its commission. 22 So.3d at 885.

Notably, all five of these cases—*Brown*, *Scott*, *Lee*, *Anderson*, and *Shedran Williams*—affirmed on direct appeal a jury's assessment of death in the penalty phase of trial where the mental retardation issue was actually litigated. The difference in procedural posture between those cases and this case is not insignificant. When the Louisiana Supreme Court directly reviews a jury's death sentence verdict, it does so under the standard announced in *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires a court to assess whether

any rational factfinder, when viewing the evidence in the light most favorable to the prosecution, could conclude that the defendant failed to prove by a preponderance of the evidence that he was mentally retarded. *See Shedran Williams*, 22 So.3d at 881-82. Because the Louisiana Supreme Court was tasked in those cases with affirmatively searching for reasons to uphold a jury verdict if they existed—meaning that expert testimony was construed wholly in the State's favor and against the defendant—it was obviously entitled to make an adaptive skill assessment based on potential juror inferences from the facts of the crime itself.

State v. Dunn (III), 41 So.3d 454 (La. 2010), is the only Louisiana Supreme Court case on point with a procedural posture comparable to this one.[28] That Court found that it was "important to consider the defendant's behavior during the planning and commission of the instant crime," 41 So.3d at 471, when the plan showed "premeditative aspects" and that the defendant lacked "the impulsiveness and non-leadership interactions associated with mentally retarded persons," at least when the trial evidence showed those skills to be "firmly established facts…." *Id.* at 472. While the Court admitted that showing weaknesses "of some adaptive skills … would not necessarily preclude a finding of mild mental retardation," it ultimately affirmed the trial judge's determination that the defendant had not met his burden to show mental retardation. *Id.* at 472-73.

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[28] Dunn had been convicted of capital murder but, after *Atkins*, his retardation claim was decided by a state trial judge after several days of hearings. 41 So.2d at 457-58.

A fair-minded reading of *Dunn III* establishes that courts certainly should consider evidence of the criminal action in the overall assessment if "firmly established facts" show clear instances of premeditation and leadership which tend to preclude, for instance, the possibility that the petitioner gullibly followed the direction of another or relied on impulse rather than a plan. These directives are not inconsistent with the 10th Edition's recognition that maladaptive criminal actions can in some rare instances be considered adaptive behavior. However, as Dr. Greenspan noted, because there are few studies showing normative behavior during commission of a crime, courts must be wary of drawing conclusions from those actions alone. *Dunn III* was a rare case where those circumstances were met. However, far from establishing a categorical imperative that courts must give great weight to petitioner's actions during the crime, *Dunn III* simply supports giving a court discretion to consider those facts when and if they are relevant to a particular adaptive skill. *Dunn III*, 41 So.3d at 471 (stating that "the defendant's behavior during and following the commission of the crime *can* be relevant to the determination of mental retardation") (quoting *Scott*, 921 So.2d at 959) (emphasis added).

Ultimately, the State's position seems to be that the facts of the underlying crime compel a finding of non-retardation. That position does not comport with the clinical guidelines. While it is true that the Louisiana Supreme Court has at times taken the criminal facts into account (notably, only when the jury or, in one case, the judge found non-retardation), that Court has never repudiated the clinical guidelines; indeed, it has

consistently endorsed them. The main thrust of Louisiana jurisprudence on this issue does not cabin a court's discretion in derogation of the clinical guidelines. In assessing the weight to be given the criminal facts, this Court lends great credence to the clinical admonitions that using those facts to determine adaptive skills is at best a haphazard and risky business. As will be shown below, on the facts presented here, the criminal facts the State relies on are entitled to relatively little weight.

With these important precepts in mind, the Court must endeavor to navigate the murky waters of adaptive skills. While both Dr. Weinstein and Dr. Swanson testified regarding Brumfield's adaptive skills, only Dr. Blanche made determinations as to Brumfield's adaptive skills. (Hoppe Testimony, Doc. 106, p. 68 (asserting that Dr. Blanche was focusing on the adaptive skills prong while he focused on the intellectual functioning prong); Blanche Testimony, Doc. 105, p. 29 (asserting that his sole focus was on the adaptive skills prong)). As previously discussed, Dr. Blanche's failure to adhere to the AAIDD's clinical standards must be taken into account when assigning credit to the often-conflicting testimony.

1. Conceptual Skills

The first category of adaptive skills to be considered is the realm of conceptual skills, which includes language skills, reading and writing abilities, self-direction, and grasping concepts of money, which may be collectively labeled as functional academics. (*See* 10th Edition, Ex. P-11, p. 82). Functional academics

are concepts used in the real world rather than in the classroom. (Greenspan Testimony, Doc. 101, pp. 72-73).

Brumfield's writing abilities are severely limited. While this limitation is partially related to his lack of motor skills in this particular area, the Court heard testimony that he must use a piece of cardboard to write in a straight line, that he cannot write freehand, and that he takes an inordinate amount of time to write a simple, one-page letter. (Weinstein Testimony, Doc. 102, pp. 72-73). Brumfield requires assistance from other death row inmates to write his letters, (*id.* at 78-79), and thus the reliance by the States' experts on the quality of his expressions in his prison correspondence is misplaced. (*See also* Letter from Brumfield to Richard Donald dated March 16, 2010, Ex. P-24 (referencing "the guy that helps me with my letters"); Swanson Testimony, Doc. 106, p. 93-99 (referencing teacher who let Brumfield copy things during class with aid of cardboard piece and testifying generally to Brumfield's writing limitations)).

The State does not contend that Brumfield has adequate reading abilities. Dr. Swanson listened to Brumfield read some of the letters he wrote and found that his reading was on a fourth grade level. (Doc. 106, p. 104). The reading materials in his prison cell are targeted to middle school audiences and are consistent with someone who has mental retardation. (*Id.*, pp. 100-106).

Brumfield has a dismal record of academic accomplishments in the classroom. Although Brumfield was always behind in school due to his developmental delays (Weinstein Testimony, Doc. 102, p. 69), his progress stalled completely in middle school. He

reached a plateau somewhere between the fourth and sixth grade, which is where mildly mentally retarded individuals generally fall. (Swanson Testimony, Doc. 106, p. 86). Although Brumfield was never held back, his teachers were insistent that he not be promoted, but the principal gave him a "social promotion." (Swanson Testimony, Doc. 106, pp. 73-74). School testing records show lack of competence in virtually every area. In eighth grade, Brumfield tested two standard deviations below his age group in standardized testing—he read at the third grade level, did math at the third grade level, and wrote at the fourth grade level. (Swanson Testimony, Doc. 106, p. 85). His prior testing during the fifth grade revealed similar deficits. (*Id.*, pp. 68-71).

Because of Brumfield's severe academic challenges, his teachers and school officials attempted to identify the problem(s) with his learning. Unfortunately, he was constantly shuttled between different schools and remained periodically in-and-out of mental health centers and special education classes beginning in the fifth grade. (*See* East Baton Rouge Parish Schools Pupil Appraisal of Kevan Brumfield, Ex. P-27). A constant refrain of the teacher and specialist assessments was his need for a highly structured environment in order to provide the necessary supports for him to function. (*See* Brumfield School Records, Ex. P-27). In all, Brumfield attended 14-15 schools prior to eventually dropping out in 1989 at age 16. (LeGuin's Report on Brumfield's Social History, Ex. S-37, p. 21). During the period from January 1984 to May 1989 when Brumfield was in special education, he was placed in at least 10 different schools. (Swanson Report, Doc. 30-1, p. 26).

In response, the State essentially argues that Brumfield's lack of prior mental retardation diagnosis forecloses a retrospective diagnosis based on the level of attention his mental health received during his formative years. Brumfield concedes that Dr. Weinstein was the first person to diagnose him with mental retardation, despite prior testing to determine the genesis of his academic and behavioral problems. (Weinstein Testimony, Doc. 102, p. 108). The State argues that the diagnoses during Brumfield's school years—conduct disorders, under-socialization, and aggressiveness—show a conspicuous lack of mention of mental retardation, which should preclude a retrospective diagnosis at this point in time. But Dr. Swanson adequately rebutted this *expresio unius*-like argument. In the late 1970s and early 1980s, black male students were being disproportionately diagnosed as mentally retarded. This apparent over-diagnosis problem caused an overcorrection by school officials, who were cautioned not to over-represent that demographic by instead diagnosing them with a related disorder that would avoid the mental retardation label but still allow for the same level of educational services to be provided that individual student. (Swanson Testimony, Doc. 106, pp. 51-60). As the User's Guide makes clear, political correctness and worry about negative stigmatization has often played a role in preventing prior diagnosis of mental retardation. (Ex. P-13, p. 18). Because the school appraisal teams might have looked past factors pointing toward Brumfield's mental retardation in favor of diagnosing him with more politically palatable ailments, like conduct disorders and behavioral problems, the Court refuses to treat his lack of prior diagnosis as

preclusive.[29] Moreover, Brumfield never previously underwent testing aimed specifically at determining mental retardation. A lack of mental retardation diagnosis in the face of *general* aptitude and behavioral testing differs in kind from an affirmative non-diagnosis in light of *specifically tailored* testing for mental retardation, which Brumfield never received until this case commenced.

The State also points to several practical facts which it asserts show Brumfield's functional academic skills were not grossly deficient in the area of conceptual skills. Dr. Blanche notes that Brumfield must have had a basic grasp of economic and monetary concepts because he left his job as a restaurant cook to make more money selling drugs. (Doc. 104, pp. 210-212). Both Dr. Hoppe and Dr. Blanche talk about the multi-tasking skills needed to deal drugs, including an ability to avoid police detection, to count money, and to ascertain the correct amount of drugs to distribute in each deal. (Hoppe Testimony, Doc. 104, pp. 41-42; Blanche Testimony, Doc. 104, pp. 210-12). Common sense dictates that those are certainly traits that "successful" drug dealers should possess. But did Brumfield actually possess those traits? The record is

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[29] Article 905.5.1(H)(2) likewise does not preclude a finding of mental retardation even if the symptoms exist in tandem with other related disorders. Moreover, the clinical literature recognizes that mildly mentally retarded individuals often suffer from many of the same disorders listed in article 905.5.1(H)(2). (User's Guide to 10th Edition, Ex. P-13, pp. 15-16). Thus, contrary to the State's contention, prior diagnosis of other, related mental health disorders, like the undersocialized, aggressive conduct disorder diagnoses from this childhood (*see* Doc. 104, pp. 130-36), do not preclude and could be consistent with mental retardation.

barren of any testimony regarding his efficacy in drug transactions. Perhaps he guesstimated what amounts of drugs were sufficient for the price a customer was willing to pay. Perhaps he had others count the money for him or divide the drugs into set quantities for sale at a set price. Or perhaps Brumfield was actually a savvy drug merchant. The point is that we simply have no testimony establishing what Brumfield did or did not do well during his drug dealing days. Nothing in the record shows that Brumfield actually exhibited traits consistent with being a "successful" drug dealer, making the State expert's theorizing about Brumfield's success dealing drugs inadequate to show an adaptive strength in this regard.[30]

Blanche elaborated on other perceived adaptive skills, including Brumfield's "ownership" of a car, his cash transactions in renting motel rooms, and his contributions to his girlfriend. (Blanche Testimony, Doc. 104, pp. 213-15). These assertions have more solid factual foundation. There is no dispute that Brumfield acquired a car prior to and in connection with the crime, though the record shows that rather than owning the car, he simply used his access to drugs to barter for its use—a "street rental." (Doc. 103, p. 27). In any event, this testimony, even if accepted at face value, does not negate the possibility that Brumfield had significant deficits in the domain of conceptual skills. It is a truism of mental retardation analysis that strengths may coexist alongside weaknesses. Even if Brumfield was able to conduct a transaction for a motel

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[30] In fact, it appears that Brumfield operated as a street drug dealer selling nickel and dime bags provided to him. (Doc. 104, pp. 41-43).

room or operate a car, those skills are not inconsistent with mental retardation. Blanche himself conceded that, based upon his interview, Brumfield had skills and knowledge equivalent to a ten-year-old child. (Doc. 105, pp. 52-55). Mildly mentally retarded people generally have mental ages ranging from seven to eleven. (Summary of American Psychological Association's Characteristics of Mildly Mentally Retarded Individuals, Ex. P-60). It is not inconceivable for someone around the age of ten to have the mental capacity to conduct a relatively simply economic transaction like renting a room, especially if receiving help from another source like a girlfriend.

The ABAS-II scores, for what they are worth, consistently show that Brumfield's lowest assessed scores are in the area of functional academics. (*See* ABAS-II scores, Exs. P-48-52). Dr. Swanson unequivocally testified that Brumfield had significant deficits in the area of functional academics and that he was significantly impaired in the area of conceptual skills as defined by the AAIDD. (Doc. 106, pp. 129-30).

The State counters with two arguments: first, it points to Brumfield's videotaped confessions, which it asserts show a poised, manipulative person with at least average adaptive functioning; and second, that the facts of the murder for which Brumfield was convicted show that Brumfield had the ability to premeditate and lead a heinous crime.

Brumfield's confessions show composure and clear answers to direct questions. (*See* Brumfield Confession Tapes, Exs. S-15, S-17). But as Dr. Swanson correctly identified, during his first interrogation, Brumfield deliberately lied about his educational achievements

and therefore masked his deficits by stating he graduated from high school and made "As and Bs" throughout school; in reality, of course, he achieved neither. (Doc. 106, p. 106). Swanson testified that the first confession tape shows he acquiesced to answers that were cued and prompted by his questioner. (*Id.*, p. 107). In the second taped confession, because it appears Brumfield had been discussing the topic for a longer period of time, his responses were quicker in taking his questioner's cues and also longer because he had practiced speaking on the topic already. (*Id.*, p. 108). These traces of suggestibility are consistent with mental retardation, according to Dr. Swanson. (*Id.*, pp. 109-112). Even without wholly accepting Dr. Swanson's theory of his confessions—they are undoubtedly legally valid and non-coercive—her testimony is credible, and the Court therefore cannot find the taped confessions to be dispositive evidence on non-retardation, as the State would have it.

A recording of Brumfield's outgoing phone calls from prison (Ex. S-35) shows nothing extraordinary that a normal ten-year-old child could not do.[31] Talking about making purchases online, conversing about sports scores and stats, and the like are simply not sufficient to show adaptive strength in communication

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[31] For the same reasons, the Court finds Brumfield's conversation with Warrick Dunn, the victim's son, not particularly probative. The fact that Brumfield knew some of his football stats and what some of his siblings were doing shows only that Brumfield anticipated and prepared for the meeting, which occurred in the highly-structured prison environment. But it must be noted that Dunn's willingness to confront and, ultimately, forgive his mother's killer shows remarkable bravery.

abilities. Even so, because strengths can coexist alongside weaknesses, one or two instances of him exhibiting oral communication skills expected of adults could hardly be said to outweigh the other documented adaptive weaknesses in the conceptual domain. As the diagnostic guidelines state, "adaptive behavior refers to typical and actual functioning and not to capacity or maximum functioning." (User's Guide to 10th Edition, Ex. P-13, p. 20).

Finally, Brumfield's actions during and immediately following the underlying murder for which he was convicted must be discussed. In many cases, criminal actions will more readily be applicable to social and practical skills than conceptual skills. Capital murder is the only offense where *Atkins* becomes relevant, and in large part these acts of violence show competence in the criminal's ability to manipulate weaponry and other machinery, such as cars. While evading police and avoiding capture can exhibit raw physical skills, at other times those acts are just as consistent with primal survival instincts as they are with callous, cold-blooded calculation. Such an instance would not, of course, excuse the act itself or its aftermath in any way, but in a certain factual context it might place the evasion into a different category for purposes of evaluating adaptive skills. As noted above, it is only the rare case where there will be firmly established facts from a criminal episode that can establish strengths in adaptive skills. This is especially true when evaluating the language skills and reading and writing abilities that form part of the conceptual domain. In this case, those abilities were not readily implicated by the facts of the crime itself, and therefore the Court must look to the crime for evidence, if any, of

conceptual skills in the areas of self-direction and abstract reasoning.

As mentioned above, courts sometimes look to premeditation of and leadership during commission of the crime in affirming non-retardation conclusions based on strengths adaptive skills. In this case, Brumfield acted along with other confederates in executing their criminal scheme which ultimately left a police officer dead. To briefly recount the facts as contained in Brumfield's confession, Brumfield and his two confederates decided to conduct an armed robbery of a Piggly Wiggly grocery store manager while making a night deposit at a Baton Rouge bank. Brumfield and another lay in wait in some bushes adjacent to the bank. The grocery manager arrived at the bank in a police car with her off-duty escort, Corporal Betty Smothers. Brumfield and his confederate simultaneously emerged from the bushes, with each man firing shots into a side of the vehicle. Brumfield, approaching the driver's side, fired several shots which struck and killed Cpl. Smothers, the driver. His confederate approached the passenger side and fired shots into the vehicle from that direction, but the manager, from the passenger seat, succeeded in driving the car away from the bank. (Second Brumfield Confession Videotape, Ex. S-17). Brumfield was later arrested and gave a false confession minimizing his role, but about 14 hours later he ultimately confessed to his true role in the crime. (*Compare* First Brumfield Confession Videotape, Ex. S-15, *with* Second Brumfield Confession Videotape, Ex. S-17).

The State fails to bring forward firmly established facts showing demonstrable leaderships skills during

the crime. One of Brumfield's confederates is currently on death row and does not have a pending *Atkins* claim, suggesting the possibility that Brumfield was gullibly convinced to join in the crime instead of actively planning out its details. Moreover, nothing in Brumfield's confession makes clear that Brumfield, rather than another of one his confederates, "led" this terrible scheme, and the State in its briefing points to nothing else from his trial record showing a form of criminal leadership sufficient to "firmly establish" that point. Nevertheless, it is true that elements of premeditation and planning were involved. Brumfield admitted to having previously seen other night deposits at the bank occur while he drove around the streets of Baton Rouge looking for potential robbery victims. He also lay in wait in the bushes by the bank for approximately 15 minutes before the victims arrived, demonstrating that he did not rely wholly on impulse to commit the crime. (Second Brumfield Confession Videotape, Ex. S-17). But is this particular instance sufficient to overwhelm the other demonstrated showings of adaptive deficits in conceptual skills? It should not be. As the clinical guidelines admonish, isolated occurrences of adaptive strengths by definition do not show typical functioning levels. Brumfield's confession tapes occur in a highly structured environment at the police station in response to firm and specific questioning. Needless to say, up to that point Brumfield's typical environment selling drugs on the street offered much less structure. While the confession surely shows the underlying facts of the crime, alleviating one of the three primary concerns clinicians have had with using facts from a crime in assessing adaptive skills, those facts themselves fail to demonstrate premeditation or leadership qualities that

so surpass the functioning levels of a typical mildly mentally retarded person so as to conclusively establish non-retardation as a matter of law. Moreover, direct expert testimony from Dr. Swanson established to this Court's satisfaction that those tapes are not inconsistent with a person who has mild mental retardation.

It bears repeating that the posture of this case does not bring Brumfield before this Court on direct review of a jury's imposition of the death penalty following evidentiary presentation on the issue of retardation. Rather, this Court must view, more or less in isolation, whether Brumfield meets the clinical criteria. Dr. Blanche, the State's expert, lacked basic knowledge about the AAIDD's standards until he was deposed in this case shortly before the hearing. Additionally, as the Louisiana Supreme Court has observed, his status as a physician rather than a psychologist harms his credibility because he lacks some of the appropriate expertise to be able to comment on certain diagnostic matters, as his lack of knowledge about the AAIDD shows. *Corey Williams*, 831 So.2d at 859. Additionally, Dr. Blanche failed to conduct interviews with anyone other than Brumfield himself, which runs afoul of the basic guidelines for retrospective diagnoses. Compared with him, the Court simply found more credible the testimony of Drs. Weinstein and Swanson. While Brumfield's confession tapes may at times show evidence of certain adaptive strengths in the area of language skills, they do not obviate his obvious conceptual deficits. Brumfield's maladaptive behavior in committing felony murder makes him unsympathetic and deserving of the maximum punishment available under the law, but it does not

necessarily take away from the other manifested deficits in adaptive skills. Moreover, the Court cannot accord great weight to the facts of the crime, even though they must be taken into account, because the diagnostic guidelines for assessing maladaptive behavior as a part of adaptive skills have not been sufficiently shown to be present in this case. When courts have reason to doubt that facts from a crime are "firmly established" to show whether the defendant exhibited leadership during or detailed premeditation of a criminal enterprise, following the clinical guidelines (which explicitly forbid use of maladaptive criminal behavior in assessing adaptive skills) provides the surest means of accurate fact-finding. The Court duly takes into account the facts of the crime, but in this posture those facts alone cannot control.

Ultimately, the Court finds that, based on the credibility of petitioner's witnesses combined with the documented problems with the bases of testimony by the State's experts, Brumfield has shown by a preponderance of the evidence that he has significantly limited conceptual skills. When holistically assessing his strengths and weaknesses in the areas of language skills, reading and writing abilities, self-direction, and abstract reasoning, the Court finds that, on balance, the evidence shows he meets the AAIDD's definition of mental retardation with respect to the conceptual domain of adaptive behavior. Prong Two is therefore met since Brumfield has shown a significant deficit in one of the three domains of adaptive functioning.

2. Social Skills

Because Brumfield's deficit in conceptual skills satisfies Prong Two of the mental retardation test, the Court will conduct only a brief review of the other two domains.

Social skills include interpersonal relationships, responsibility, self-esteem, gullibility/naivete, following rules/obeying laws, and avoidance of victimization. Brumfield's interpersonal relationships received little discussion at the hearing. He clearly has skills adequate to attract partners, as he has several children by different women. No showing was made of significant deficits in this factor.

Responsibility was also a factor that did not receive much attention on its own, though this factor ties into the other factor regarding following rules and obeying laws. The Court heard testimony that Brumfield's brother had to do his chores for him as a child because he either forgot to do them or could not perform the tasks assigned. (Weinstein Testimony, Doc. 102, p. 67). The record is replete with instances of Brumfield not following the rules at school, as evidenced by his diagnosis as behaviorally disordered. Of course, the Court would not be making this analysis if Brumfield was able to obey the law. Significant testimony was received regarding his inability to follow even simple instructions and rules of games. (Weinstein Testimony, Doc. 102, p. 69). Even Dr. Blanche admits that this was a deficit. (Blanche Testimony, Doc. 105, p. 40).

Nothing in the record shows that Brumfield suffered a deficit in self-esteem. Indeed, he thought himself above the law, not just with his brazen criminal actions

throughout his late adolescence leading up to the murder, but also his statements that he would drive as fast as he wanted to. (Blanche Report, Ex. S-44, p. 9).

With regard to gullibility and naivete, Brumfield was apparently hoodwinked into attending Camelot College when representatives of that institution came into his neighborhood and said he could obtain a loan to go to school there, (Weinstein Testimony, Doc. 102, pp. 82-83), a fact which Dr. Hoppe essentially concedes. (Hoppe Testimony, Doc. 104, pp. 118-20).

Avoidance of victimization is another factor to which the experts did not devote much time. From the Court's review of the record, Brumfield does not appear to have been particularly susceptible to being victimized. In fact, his attendance at Camelot College notwithstanding, it appears Brumfield used his aggression to insulate himself from attempts to victimize him.

Based on these criteria, Brumfield appears to have strengths in interpersonal relationships, self-esteem, and avoidance of victimization. He has shown some evidence of deficit in the gullibility/naivete factor, and he has unquestionably shown strong evidence of significant deficits with regard to responsibility and following rules/obeying laws. On balance, this domain is a close call, but the Court does not find Brumfield meets the criteria for a significant overall deficit in the domain of social skills.

3. Practical Skills

Practical skills represent abilities in self care and daily living, such as preparing and eating meals, dressing, toileting, personal mobility and use of

transportation, occupational skills, health care, and maintenance of safe environments.

The record contains occasional references to Brumfield's poor hygiene in certain respects, but apart from that, no credible evidence suggests he is unable to care for himself in the course of daily living.[32] No showing has been made that he lack the ability to provide himself with meals, dress himself, use the toilet properly, or otherwise lacks modes of personal transportation. Indeed, he has shown his ability to make use of a car by obtaining a "street rental" and operating the car before, during, and after the murder for which he was convicted. Even if his activity during the crime may not have been "typical" as defined in the diagnostic guidelines, Brumfield has made no showing that he lacks these skills.

Occupationally, he was able to work as a cook on a couple of occasions, though his efficacy at that job is unclear. He obtained at least one of those jobs through his girlfriend and only stayed for a few months before moving on to drug-dealing. As previously discussed, he occupational skills at drug-dealing are far from clear, if such skills can even contribute to "gainful employment" as used in the literature.

Little evidence exists regarding Brumfield's health care, though on at least one episode he went to the hospital for treatment of a gunshot wound. (*See* Guin's Social History Report, Ex. S-37, p. 13). Brumfield

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[32] The parties' experts disagree on when Brumfield could first tie his shoes, but the Court finds that fact entitled to little weight when compared to his other demonstrated strengths in the same area.

consciously placed himself in harm's way by dealing drugs and knowingly involved himself with the dangerous and violent situations that lifestyle inherently entails. He thus cannot be said to have maintained a "safe environment."

The Court finds Brumfield has not met his burden of showing he has significant deficits in practical skills.

D. Prong Three: Onset Before Age Eighteen Based on Etiology

The third prong requires that the deficits in intellectual functioning and adaptive skills exhibit themselves before the petitioner reaches adulthood. Etiology is the study of causative factors that put persons at risk for diseases, including mental retardation. Because etiology ties in to the timing of the onset of mental retardation, some of its evaluative factors apply with equal force to the first and second prongs.

The State's experts spent little time discussing this part of the test. As Dr. Weinstein remarked in his unrebutted testimony, "I don't think there is any question by anybody that [Brumfield] was not able to function adequately and he had development problems. Some people may question or may have some disagreement on whether it's mental retardation, learning disability, something else. But there is no question that he had very serious problems from very early on in life." (Doc. 102, p. 87). Dr. Swanson likewise made that same conclusion in her expert report on Brumfield's social history. (Doc. 30-1, p. 30). Dr. James Merikangas conducted a neurological exam on Brumfield in 2007 which failed to disclose any acquired

brain damage or ongoing disease that might negate the existence of an organic reason for Brumfield's mental retardation. (Merikangas Report, Doc. 30-1, p. 41).

The State correctly points out that, prior to his *Atkins* claim, Brumfield had never been diagnosed as mentally retarded. In particular, Dr. Hoppe reviewed Brumfield's medical and school records and concluded that no less than six doctors performed psychological testing on Brumfield and none of them diagnosed him with mental retardation. (Hoppe Psychological Evaluation, Ex. S-42, pp. 7-9; Hoppe Testimony, Doc. 104, pp. 53, 63-64; Greenspan Testimony, Doc. 101, p. 208 (listing experts who previously evaluated Brumfield)). Dr. Blanche made a similar conclusion in that the school had a financial incentive to make all diagnoses they could in order to receive extra education funding. (Blanche Report, Ex. S-44, p. 6; Blanche Testimony, Doc. 105, pp. 12, 28, 36).

Courts justifiably view with suspicion made-for-litigation diagnoses. *See Dunn III*, 41 So.3d at 472. On the other hand, though, sometimes litigation serves as the impetus for narrowly focusing on a person's abilities based on specific diagnostic criteria rather than relying on wide-ranging evaluations which may overlook certain facts peculiar to a mental retardation inquiry. The AAIDD's clinical guidelines do not preclude a retrospective diagnosis of mental retardation, even if the subject received childhood psychological testing. (*See* User's Guide to 10th Edition, Ex. P-13, p. 17).

As already noted above in Part II.B, Dr. Swanson has given the Court a compelling reason to not draw a negative inference due to the lack of childhood

diagnosis. She points out that during Brumfield's school years in the late 1970s, African-Americans males were bring disproportionately diagnosed with mental retardation. (Doc. 106, p. 55). School officials, psychologists, and appraisal teams were accordingly cautious not to over-represent black males as being mentally retarded and were instead urged to consider other alternatives that would avoid placing the mental retardation label on them. (*Id.*). Swanson confirmed that East Baton Rouge Parish schools, which Brumfield attended, had received this admonition. (*Id.*). AAIDD standards confirm that lack of an earlier mental retardation diagnosis may indeed be attributable to that pressure. The User's Guide recognizes that "the school's concern about over-representation for data reporting purposes of specific diagnostic groups within their student population" might require a retrospective analysis. (Ex. P-13, p. 18). It also acknowledges that a person might be "given no diagnosis or a different diagnosis for 'political purposes' such as protection from stigma or teasing, avoidance of assertions of discrimination, or related to conclusions about the potential benefits or dangers of a particular diagnosis." (*Id.*). Because the school appraisal teams might have looked past factors pointing toward Brumfield's mental retardation in favor of diagnosing him with more politically palatable ailments, like conduct disorders and behavioral problems, the Court refuses to treat his lack of prior diagnosis as preclusive.

Etiological factors appear to bolster the conclusion that Brumfield was and is mentally retarded. Etiology divides up into four general categories: biomedical, social, behavioral, and educational. (10th Edition, Ex. P-11, p. 123). The State failed to present etiological

testimony as such, though its experts certainly did evaluate Brumfield's social, behavioral and educational issues as represented in his medical and school records. Biomedical factors relate to genetics and parental health during pregnancy (prenatal), premature birth and birth injury (perinatal), and nutrition, existence of traumatic brain injury, and degenerative disorders (postnatal). (*Id.*, Table 8.1, p. 127).

Dr. Weinstein testified regarding Brumfield's etiological risk factors. (*See* Weinstein Report, Doc. 30-1, p. 17). With regard to biomedical factors during the prenatal period, he found that Brumfield's mother had psychiatric problems and took psychotropic medication during her pregnancy. (Doc. 102, pp. 88-89). In the perinatal period, Brumfield was born prematurely at 36 weeks and his birth weight appears to have been low at between three and three and a half pounds. (*Id.*, p. 89). Brumfield also suffered fetal stress during birth. (*Id.*). Postnatally, Brumfield was shot and hit by a car prior to age 18 (*id.*, pp. 90-91), although neuroimaging of his brain did not reveal any lasting effect. (*See* Merikangas Report, Doc. 30-1, p. 41). Genetically, it appears several of Brumfield's family members also suffer from mental retardation, including a wheelchair-bound first cousin with moderate to severe retardation. (Weinstein Report, Doc. 30-1, p. 17; Weinstein Testimony, Doc. 102, pp. 33-35).

With regard to the social factors, Brumfield was institutionalized, neglected, and suffered severe physical abuse from domestic violence. (Weinstein Testimony, Doc. 102, p. 92). Brumfield's mother lacked prenatal care and did not even know she was pregnant

until six months into her term. (*Id.* p. 88). Poverty played a large role throughout Brumfield's life. (*Id.*).

With regard to educational factors, Weinstein testified that school officials' efforts to intervene in Brumfield's educational decline were inadequate, resulting in delayed diagnosis of Brumfield's deficiencies. He also found inadequate family support, including his mother's lack of preparation for parenthood. (*Id.*, pp. 90-92).

Behaviorally, Brumfield suffered from apparent parental drug use during pregnancy along with violence, abuse and neglect during his upbringing. (*Id.* pp. 88-89).

All of the shortcomings listed above are risk factors that play an important role in making a mental retardation diagnosis. (10th Edition, Ex. P-11, pp. 123-128). The Court's conclusions with respect to the first two prongs have been shown by a preponderance of the evidence to have existed before Brumfield turned 18. While he was not diagnosed as mentally retarded prior to adulthood, that fact alone in no way detracts from this Court's conclusion. The etiological risk factors, along with Brumfield's school and medical records, indicate that his mental health problems and developmental delays occurred prior to adulthood. The State has introduced no evidence suggesting that Brumfield's mental health problems were caused by brain trauma or through another causative factor manifesting itself after he became an adult. Nor could the State's experts even pretend to know many of his etiological risks because they failed to interview anyone other than Brumfield himself. While disagreement certainly exists over whether Brumfield's school

records and prior medical history preclude a diagnosis of mental retardation, show another related diagnosis, or simply fail to meet the *Atkins* standard, those disagreements center on differing interpretations of evidence, not on an absence of evidence prior to adulthood. Based on the showing of substantial intellectual functioning and adaptive behavior deficiencies detailed above, the Court credits the testimony of Brumfield's experts and finds Brumfield has met his burden to show by a preponderance of the evidence that those deficits occurred before he turned 18.

IV.

Judges are tasked with solemn and difficult obligations. At times, they must grapple with the subjective elements of our legal system and search in vain for the easy answer, the convenient out. Only by applying an equal amount of diligence and common sense to the unsavory cases that courts normally apply to the familiar ones can it be said that "equal justice under law," that confident phrase boldly inscribed above the entrance to the Supreme Court, is uniformly available to all.

In evaluating *Akins* claims of mental retardation, courts must disregard whatever pre-conceptions they might have about this intellectual disability. Mildly mentally retarded persons usually do not have obvious physical manifestations of their shortcomings, as may be the case with persons diagnosed with Down's Syndrome. Nor are their intellectual capabilities so severely impaired as to be immediately noticeable to most people in casual conversation, as is the case with profoundly mentally retarded individuals. Indeed, the

line between the upper range of mildly mentally retarded persons and the borderline cases where mild mental retardation is not shown can be exceedingly blurry and subjective. Yet if we as a society are to effectuate the evolving standard of decency contemplated by the Eighth Amendment's prohibition on cruel and unusual punishment, we must accept as a given that certain cases will present unfortunate facts which, when viewed under the law, result in an outcome at odds with majoritarian sentiment. This may be one of those cases in the eyes of some.

It bears repeating that the remedy granted here is a limited one. While ineligible for execution, Brumfield will remain incarcerated in Angola for the rest of his life. This ruling does not "let him off easy" on some convoluted procedural technicality. It merely seeks to fairly apply the law as written. Louisiana's statute vests significant discretion in making the mental retardation evaluation with the jury. But no jury is available now. In a post-verdict posture, the Louisiana Supreme Court charges judges with making this decision. Judges must weigh the credibility of witnesses and fair-mindedly view the evidence presented. Even a convicted murderer deserves no less. Had the State presented more persuasive expert testimony, the result here might have been different. But it is not the role of a judge to hypothesize what testimony or evidence might have been presented; we can only act with what we have before us. At bottom, this case is about dispassionately applying the clinical guidelines on mental retardation, which Louisiana law has adopted as its legal test, to the facts as presented. Tasked with this duty, the Court concludes, under the totality of the circumstances and based on a

preponderance of the evidence, Kevan Brumfield has demonstrated he is mentally retarded as defined by Louisiana law.

V. Conclusion; Order

Kevan Brumfield's petition for a writ of habeas corpus is hereby GRANTED insofar as he is ineligible for execution because he is mentally retarded.

Accordingly, it is ORDERED that the State is permanently enjoined from executing Brumfield.

Signed in Baton Rouge, Louisiana, on February 22, 2012.

/s/
JAMES J. BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA