No. 15-1164

IN THE
Supreme Court of the United States

BURL CAIN, Warden,
Petitioner,
v.
KEVAN BRUMFIELD,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. After weighing the evidence adduced over the course of a seven-day hearing—at which all experts agreed that Kevan Brumfield had substantial impairments in intellectual functioning, multiple psychologists detailed Kevan Brumfield's significant limitations in adaptive skills, and multiple psychologists opined that Kevan Brumfield is intellectually disabled—the district court found that Kevan Brumfield is, in fact, intellectually disabled. In a thorough opinion detailing the extensive evidence before the district court, the Fifth Circuit affirmed the district court's finding. Was the Fifth Circuit wrong to conclude that the district court's finding of intellectual disability was plausible in light of the record and thus not clearly erroneous?

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INTRODUCTION

The State asks this Court to grant review of an intensively fact-bound determination that presents no circuit split or important issue of federal law. The Court should not.

Following a seven-day hearing, at which multiple experts described Kevan Brumfield's substantial intellectual and adaptive impairments and specifically opined that he is intellectually disabled, the district court found that he is, in fact, intellectually disabled. In a 43-page opinion describing the extensive evidence before the district court, the Fifth Circuit unanimously held that the district court's finding was not clearly erroneous.

The Fifth Circuit's routine application of the clear error standard to the "intensively factual inquiry" of whether Brumfield is intellectually disabled under Louisiana law, *State v. Williams*, 22 So. 3d 867, 887 (La. 2009), does not present any "compelling reason[]" that would warrant this Court's review. Sup. Ct. R. 10. The State does not even attempt to argue that this case would resolve any important federal question or resolve any disagreement among the lower courts. Instead, the State uses its petition for certiorari as an opportunity to relitigate its evidentiary case, arguing that the Fifth Circuit's decision "should be overturned" because Brumfield failed to "prove by a preponderance of the evidence that he is mentally retarded." Pet. 39. Throughout its petition, the State asks this Court to review the thousands of pages of testimony and evidence presented at Brumfield's evidentiary hearing, re-evaluate the district court's credibility

determinations, and reweigh all of the evidence as it relates to the intensively factual determination of whether Brumfield is intellectually disabled. In doing so, the State demonstrates not only a fundamental misunderstanding of this Court's clear error standard—which considers only whether a district court's finding is "plausible in light of the record" and does not allow an appellate court to reverse even if "it would have weighed the evidence differently," *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)—but also how inappropriate it would be to grant certiorari in this case. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); Stephen M. Shapiro, et al., *Supreme Court Practice* 352, § 5.12(c)(3) (10th ed. 2013) (error correction is "not among the 'compelling reasons' . . . that govern the grant of certiorari").

In any case, if this Court were inclined to review the voluminous record below to determine whether the district court committed clear error, it would reach the same conclusion as the Fifth Circuit. The district court's finding was far from clearly erroneous. As this Court previously held, Brumfield's state trial record *alone*—which took place before *Atkins* was decided—contained an IQ score of 75, which placed him "squarely in the range of potential intellectual disability." *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015). Each of the experts at Brumfield's federal hearing—including the State's—reported IQ scores that were even lower: 70, 72, and 72. And every expert at Brumfield's federal

hearing—including the State's—agreed that these IQ scores demonstrate substantial limitations in intellectual functioning.

Furthermore, as this Court recognized, Brumfield's pre-*Atkins* trial record *alone* provided "substantial reason to believe that he suffers from adaptive impairments." *Id.* at 2281. The "extensive evidence" presented over the course of Brumfield's federal habeas proceeding, *id.* at 2275-76, was even more compelling. It demonstrated that Brumfield's writing abilities are severely limited and measure at a fourth grade level (Vol. II at 72-74; Vol. VI at 93, 96-99). He needs to use a piece of cardboard to write in a straight line, takes an inordinate amount of time to write a simple letter, and needs the assistance of others to put the words together (Vol. II at 72-74; Vol. VI at 96-99). Brumfield also reads at a fourth grade level (Vol. VI at 65, 124, 126-127; P-31 at 3) and his adult reading habits are consistent with someone who is intellectually disabled (Vol. VI at 100-06). He was always behind in school due to his developmental delays and reached a plateau somewhere between the fourth and sixth grade, where mildly intellectually disabled individuals generally fall (Vol. VI at 86; P-31 at 3).

Brumfield was unable to process and retain information in a comparable manner to other children (P-42 at 129; P-26 at 20, 26) and his teachers referred him for special education because he was "unable to follow directions and seemed confused." (P-31 at 2; P-27 at 10). In the ninth grade, Brumfield's ability to solve word problems measured at a first grade level—*i.e.* at age 14, Brumfield had the problem solving skills of a

five- to six-year-old. (Vol. VI at 84; P-31 at 3). He needed a highly structured environment in order to provide the necessary supports for him to function (Vol. II at 62, 74; Vol. III at 93, 99-100; Vol. VI at 94; P-17 at 1). Brumfield was constantly shuttled between different schools and placed in-and-out of special education and mental health centers beginning in the fifth grade (Vol. VI at 57-59; P-31 at 2-3; P-26 at 7-12).

Brumfield's deficiencies were confirmed by objective, neuropsychological testing, which placed him in the bottom 1% of the population (P-16 at 4-5; P-21). The testing indicated brain dysfunction in the frontal lobes, compromising his ability to control his impulses and be aware of his actions. (P-16 at 4-5).

The evidence of Brumfield's intellectual disability included a host of etiological factors, including that, during her pregnancy, Brumfield's mother lacked prenatal care, did not even know she was pregnant until six months into her term, and took psychotropic medication during her pregnancy (Vol. II at 89; P-16 at 15); that Brumfield suffered fetal stress during birth and was born prematurely with a low birth-weight around 3.5 pounds (Vol. II at 88-89; P-26 at 1; P-16 at 15; P-42 at 114); that Brumfield was born with slower responses than other babies (P-42 at 115). Moreover, Brumfield had several family members with intellectual disability, including an aunt, an uncle, and a wheelchair-bound first cousin with moderate to severe intellectual disability. (Vol. II at 34-35; Vol. III at 75-76; P-16 at 15).

The State did not contest virtually any of these facts before the district court or before the Fifth Circuit—and it does not do so now. As discussed

below, the State's petition is based on a series of misrepresentations about the record below and reliance upon evidence that was expressly discredited by the district court, which, even if true, would fail to establish that the district court clearly erred by relying upon the extensive evidence described above. *See 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 petition does not raise any question that warrants this Court's review and should be denied.

STATEMENT OF THE CASE

I. State Court Proceedings.

Brumfield was convicted and sentenced to death in 1995. Following this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), Brumfield sought relief from execution on the basis of his intellectual disability. The state court denied Brumfield's post-conviction petition without a hearing. *See Brumfield*, 135 S. Ct. at 2278-79.

II. Federal District Court Proceedings—The Seven-Day Hearing On Brumfield's Intellectual Disability.

Brumfield subsequently filed a petition for habeas relief in the Middle District of Louisiana. The district court held that the state court's denial of Brumfield's *Atkins* claim was unreasonable in light of the evidence

before the state court, and that Brumfield was thus entitled to a hearing under 28 U.S.C. § 2254(d)(2).[1]

After hearing evidence from both Brumfield and the State during a seven-day evidentiary hearing, the district court found that Brumfield is, in fact, intellectually disabled. *Brumfield v. Cain*, 854 F. Supp. 2d 366, 405-06 (M.D. La. 2012). The court heard testimony from six experts—three for Brumfield and three for the State.

A. Brumfield's Three Experts On Intellectual Disability.

Brumfield called three experts, all of whom the district court accepted as experts in the diagnosis of intellectual disability. First, Brumfield called Dr. Stephen Greenspan, a licensed psychologist with a Ph.D. in psychology and postdoctoral certificate in intellectual and developmental disabilities, who had received the highest honor in the field of intellectual disability.[2] (Testimony of Dr. Greenspan, Vol. I at 5-6, 9); 854 F. Supp. 2d at 386. The district court found that Dr. Greenspan was "one of the foremost [intellectual disability] experts in the country," whose work was relied upon "numerous times" by the applicable clinical

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[1] The district court also held that a hearing was warranted because the state court unreasonably denied Brumfield funding to prove his intellectual disability, under 28 U.S.C. § 2254(d)(1). *Brumfield v. Cain*, 854 F. Supp. 2d 366, 378-79 (M.D. La. 2012).

[2] The seven volumes of transcripts of from the district court's evidentiary hearing are available at Dist. Ct. ECF Nos. 101 to 107 and are referred to herein as Vol. I to Vol. VII, respectively.

guidelines. 854 F. Supp. 2d at 386. Dr. Greenspan was called to provide the court with background on the clinical definition of intellectual disability and "proper use of the AAIDD's clinical standards in making diagnoses of [intellectual disability]." *Id.* He was not asked to opine as to whether Brumfield himself was intellectually disabled.

Dr. Greenspan explained that intellectual disability is often a "hidden disorder," which requires special clinical training and experience to diagnose. (Vol. I at 79, 117-19.) He explained that it is important to recognize that there is no particular type of social behavior that a person who has an intellectual disability exhibits. (*Id.* at 38.) People with mild intellectual disability typically live in the community—they have the ability to learn, they marry and have children, they are able to obtain a driver's license, usually after several tries, and they can read and write, typically having the abilities of an 11-year old. (*Id.* at 40-44.) According to Dr. Greenspan, due to the complexity in diagnosing intellectual disability, even a licensed psychologist or psychiatrist is "basically a lay person when it comes to diagnosing" the disability unless he or she has special training and clinical experience in the diagnosis. (*Id.* at 118.)

Dr. Greenspan also explained that for the retrospective diagnosis of intellectual disability, it is "very important" to interview third parties who knew the individual being diagnosed during his developmental years, such as family members, school teachers, neighbors, and coaches. (*Id.* at 101-04.) According to Dr. Greenspan, the applicable clinical

manuals require that such interviews be conducted for a proper diagnosis. (*Id.* at 102-03.)

Second, Brumfield called Dr. Ricardo Weinstein, a licensed psychologist who was accepted by the district court as an expert in intellectual disability and forensic neuropsychology. 854 F. Supp. 2d at 386-87. Dr. Weinstein testified that he met with Brumfield on four separate occasions, and that he reviewed Brumfield's social history, school records, medical records, psychological records and reports, group home records, the testimony from his penalty phase, Brumfield's prison records, letters and calls, his statements to police, and the depositions and reports of the State's experts. Dr. Weinstein also interviewed Brumfield's mother, his stepmother, his father, his brother, his half-sister, three of his paternal aunts (two of whom are special education teachers), his maternal aunt (who runs a group home for persons with developmental disabilities and was a caretaker for Brumfield's uncle and aunt, both of whom had developmental disabilities), Brumfield's cousin, two of his teachers, and his childhood football coach. Based on an assessment of all of this information pursuant to his expertise and the clinical guidelines, Dr. Weinstein concluded that Brumfield is intellectually disabled. *Id.*

Third, Brumfield called Dr. Victoria Swanson, a licensed psychologist with a Ph.D. in psychology who had served on the committee that drafted the bill that eventually became the Louisiana statute defining intellectual disability, La. Code Crim. Proc. art. 905.5.1. Dr. Swanson had over 35 years of experience working in the field intellectual disability, including working

with school districts, teachers, and appraisal teams. 854 F. Supp. 2d at 387. She was accepted by the court as an expert in the diagnosis of intellectual disability and psychology. *Id.* Dr. Swanson testified that she created a social history of Brumfield based on his school, medical, and institutional records, interviewed Brumfield and multiple persons who knew him during his developmental years (including his teachers and childhood football coach), and reviewed the evidence relied upon by Dr. Weinstein and submitted by the State. *Id.*; (Vol. IV at 32). Based on an assessment of this information, Dr. Swanson, too, rendered the opinion that Brumfield is intellectually disabled. 854 F. Supp. 2d at 387.[3]

B. The State's Experts.

The State called two experts, Dr. Robert Blanche and Dr. Donald Hoppe—each of whom lacked credibility, according to the district court—to testify regarding whether Brumfield is intellectually disabled, and a third expert, Dr. John Bolter, to testify regarding the contents of a report he created at the time of Brumfield's 1995 trial.

Dr. Blanche was a medical doctor specializing in psychiatry. 854 F. Supp. 2d at 387-88. He testified that

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[3] Petitioner also introduced into evidence the report of a fourth expert, Dr. James Merikangas, who ruled out the possibility that Brumfield's limitations arose from acquired brain damage or other ongoing disease that would be inconsistent with the onset of intellectual disability prior to age 18. 854 F. Supp. 2d at 387. Dr. Merikangas also provided a medical opinion that Brumfield is intellectually disabled.

he had no "training or experience in administering IQ tests" and had "no training in administering adaptive behavior scales." (Vol. IV at 181-82); 854 F. Supp. 2d at 387-88. He was unaware of the AAIDD/AAMR and did not know of the existence of the AAIDD 10th ed. or AAIDD User's Guide until his deposition in this case. 854 F. Supp. 2d at 388. Dr. Blanche testified that in his occupation as a jail psychiatrist, he would refer patients to a psychologist when he believed they were intellectually disabled and did not know what the psychologist did to assess adaptive functioning. 854 F. Supp. 2d at 387-88; (Vol. V at 7-9). Throughout his testimony, Dr. Blanche stated that "as a psychiatrist, I don't know that I am really qualified to comment upon," and that he did not "fully understand," certain aspects related to the diagnosis of intellectual disability. (Vol. V at 14.)

Dr. Blanche met with Brumfield for just two hours and did not speak to anyone who knew Brumfield during his developmental years. 854 F. Supp. 2d at 388; (Vol. IV at 20). He testified that he could not know for sure if Brumfield had any developmental delays in adaptive functioning because he did not "have any reliable information." (Vol. V at 25.) He nonetheless "chose not to interview" anyone else who knew Brumfield, even though he did "not disput[e] the value of [such] information." (*Id.* at 28.) He expressed the view that Brumfield "possesses weaknesses, not just in one domain, but in several domains of adaptive functioning," but that overall he did not think Brumfield is intellectually disabled. (*Id.* at 41; Vol. IV at 218.)

The State's second witness, Dr. Donald Hoppe, was a clinical psychologist who was accepted by the court as an expert in clinical and forensic psychology. 854 F. Supp. 2d at 387. Dr. Hoppe testified that he was "unable to interview anyone other than Brumfield because counsel for the State did not provide him with contact information for those persons." *Id.* He testified that it would have been "very helpful" to interview collateral sources and that he told counsel for the State that such interviews were "important to [his] work," but that counsel still did not provide access to any collateral sources. (Vol. IV at 98-99.) Dr. Hoppe nonetheless testified that he did not think Brumfield was intellectually disabled. 854 F. Supp. 2d at 387.

The State's third expert, Dr. John Bolter, limited his testimony to the contents of a report he created during Brumfield's 1995 trial. *Id.* at 388. Dr. Bolter testified that he remembered little about Brumfield and that his records had been destroyed since the time of his report. *Id.* He testified, however, that nothing in his report suggested that Brumfield was intellectually disabled. *Id.*

C. The District Court's Findings.

The district court found that "under the totality of the circumstances and based on a preponderance of the evidence," Brumfield is intellectually disabled as defined by Louisiana law. 854 F. Supp. 2d at 406. The court recognized that both *Atkins* and Louisiana law adopted the clinical definition of intellectual disability, based on the guidelines and diagnostic manuals of the AAIDD, and the American Psychiatric Association ("APA"). *See id.* at 384-86 (citing AAIDD 10th ed.).

The factual inquiry of whether Brumfield is intellectually disabled thus turned on the presence of significant limitations in (1) intellectual functioning and (2) adaptive skills, which (3) manifested during his developmental years. *See id.* at 385 (quoting La. Code Crim. Proc. art. 905.5.1(H)).

The district court expressly credited Brumfield's experts and severely discounted the value of the State's experts. The court found that Dr. Greenspan was "one of the foremost [intellectual disability] experts in the country," *id.* at 386, and noted multiple times that it "simply found more credible the testimony of Drs. Weinstein and Swanson" in comparison to the State's experts, *id.* at 401; *see also id.* at 388 n.22, 406. According to the Court, Dr. Blanche's testimony could be given little credit for several reasons: He "lacked basic knowledge about the AAIDD's standards until he was deposed in this case shortly before the hearing," *id.* at 401; he "fail[ed] to even make an attempt at corroborating his observations by crosschecking with collateral sources," which was of "fundamental import" and "considered crucial" by the relevant clinical guidelines, *id.* at 388 n.22; and according to the Louisiana Supreme Court, "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," *id.* at 401.

The court found that Dr. Hoppe, the State's other main expert, also provided testimony that was "suspect." *Id.* at 387 n.21. In particular, notwithstanding the fact that Dr. Hoppe had himself criticized an expert in another proceeding for failing to

"obtain[] corroborating data from collateral sources" when diagnosing intellectual disability, here, Dr. Hoppe testified that he did not interview anyone other than Brumfield because the State prevented him from doing so. *Id.* The court found that Dr. Bolter, the State's only remaining expert, was credible, but that "due to his limited records and memory, his testimony does not shed much light on the issues before the Court." *Id.* at 388 n.23.

After "dispassionately applying the clinical guidelines on [intellectual disability] . . . to the facts as presented," the court found "under the totality of the circumstances" that Brumfield was intellectually disabled. *Id.* at 406. With respect to intellectual functioning, the court noted that "[e]very 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)." *Id.* at 390. The State's own expert testified that Brumfield had an IQ of 70, and Brumfield's experts obtained scores of 70 and 72. *Id.* at 389-90. Thus, the court found—whether adjusted for the Flynn effect (which would more accurately place Brumfield's scores between 65-70) or not—it was uncontroversial that Brumfield had significant impairments in intellectual functioning. *Id.* at 392.

The district court recognized that the adaptive functioning prong of intellectual disability is "the murkiest and most subjective part of the [intellectual disability] test," which "requires exhaustive factual specificity since so many factors can influence 'adaptive behavior as expressed in conceptual, social, and

practical adaptive skills.'" *Id.* at 381-82 (footnote omitted) (internal quotation marks omitted). The court observed that "'people with [intellectual disability] are complex human beings' who may have 'strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'" and thus intellectual disability "is ruled in by areas of impairment but is not ruled out by areas of competence." *Id.* at 393 (internal quotation marks omitted). Moreover, the court explained, "adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum." *Id.* at 394 (quotation marks omitted).

Applying these concepts to Brumfield, and "holistically assessing his strengths and weaknesses in the areas of language skills, reading and writing abilities, self-direction, and abstract reasoning," the court found that evidence presented demonstrated that Brumfield had significant limitations in the conceptual domain of adaptive behavior. *Id.* at 401. The court found, among several other deficiencies, that "Brumfield's writing abilities are severely limited," needing to "use a piece of cardboard to write in a straight line" and "tak[ing] an inordinate amount of time to write a simple, one-page letter." *Id.* at 396. Furthermore, the court found it uncontroverted that Brumfield had deficient reading skills—that he reads "on a fourth grade level" and that his adult reading habits "are consistent with someone who has [intellectual disability]." *Id.* The court found that Brumfield had "a dismal record of academic accomplishments . . . always behind in school due to his developmental delays." *Id.* "He reached a plateau

somewhere between the fourth and sixth grade, which is where mildly [intellectually disabled] individuals generally fall," and "show[ed] lack of competence in virtually every area." *Id.* Brumfield was "constantly shuttled between different schools and remained periodically in-and-out of mental health centers and special education beginning in the fifth grade" and needed "a highly structured environment in order to provide the necessary supports for him to function." *Id.* at 397. By the time he dropped out of school at the age of 16, Brumfield had been shuffled between 14-15 schools, including 10 different schools during the five-year period that he was in special education. *Id.*

The district court expressly acknowledged that Louisiana law allows courts to take "maladaptive criminal behavior into account when discussing the adaptive skills prong." *Id.* at 394. In particular, courts "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." *Id.* at 395. The district court found that the facts of Brumfield's crime did not show "demonstrable leaderships skills during the crime." *Id.* at 400. According to the court, "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." *Id.* More likely, the record indicated "that Brumfield was gullibly convinced to join

in the crime instead of actively planning out its details." *Id.* Moreover, to the extent that Brumfield's crime demonstrated incidents of premeditation or other "isolated occurrences of adaptive strengths," they did not outweigh Brumfield's "demonstrated showings of adaptive deficits." *Id.*

Finally, the court found that Brumfield's impairments manifested during his developmental stage. The court found several indications that Brumfield was at risk beginning at birth, including that "Brumfield's mother lacked prenatal care," "did not even know she was pregnant until six months into her term," and "had psychiatric problems and took psychotropic medication during her pregnancy"; that Brumfield "suffered fetal stress during birth"; and that Brumfield "was born prematurely" with a low birth-weight of 3.5 pounds. *Id.* at 404-05. Moreover, the court found that "several of Brumfield's family members also suffer from mental retardation, including a wheelchair-bound first cousin with moderate to severe retardation." *Id.* The court found that the State's experts could not "even pretend to know many of [Brumfield's] etiological risks because they failed to interview anyone other than Brumfield himself." *Id.* at 405.

The district court thus concluded, based on the totality of the evidence before it, that Brumfield is, in fact, intellectually disabled as defined by Louisiana. *Id.* at 406.

III. The Fifth Circuit's Reversal Based On Deference To The State Court's Determination Under AEDPA.

On appeal, the Fifth Circuit reversed the district court's relief on the basis that it "erred when it failed to give the proper AEDPA deference to the state court's decision." *Brumfield v. Cain*, 744 F.3d 918, 926 (5th Cir. 2014). The Fifth Circuit concluded that the state court's determination was reasonable, and "[b]ecause the state court's judgment was entitled to AEDPA deference, 'there was no reason for the district court to conduct an evidentiary hearing.'" *Id.* (citation omitted).

The Fifth Circuit did not resolve the independent question of whether the district court's finding that Brumfield is intellectually disabled was clearly erroneous. *Brumfield*, 135 S. Ct. at 2276.

IV. This Court's Holding That The Evidence In Brumfield's Trial Record Provided "Substantial Reason" To Believe That He Is Intellectually Disabled.

This Court granted certiorari and reversed the Fifth Circuit's holding that the state court was entitled to AEDPA deference with respect to its denial of Brumfield's *Atkins* claim. This Court held that no deference was warranted because the state court unreasonably determined that an IQ score of 75 "precluded any possibility that [Brumfield] possessed subaverage intelligence" and because the evidence in Brumfield's trial record provided "substantial reason to believe that Brumfield suffers from adaptive impairments." *Brumfield*, 135 S. Ct. at 2277, 2281.

In describing the case's procedural posture, this Court expressed the view that the district court's finding of intellectual disability was based on "extensive evidence it received during an evidentiary hearing." *Id.* at 2275. That evidence, according to the Court, addressed all three prongs of the test for intellectual disability, "includ[ing] [1] the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70— [2] testimony and expert reports regarding Brumfield's adaptive behavior and 'significantly limited conceptual skills,' and [3] proof that these deficits in intellectual functioning had exhibited themselves before Brumfield reached adulthood." *Id.* (internal citations omitted).

With respect to the state court's determination that Brumfield did not satisfy the intellectual functioning prong, this Court held that "Brumfield's reported IQ test result of 75 was squarely in the range of potential intellectual disability." *Id.* at 2278. "To conclude, as the state trial court did, 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.*

Moreover, according to this Court, Brumfield's state trial record alone provided "substantial reason to believe that he suffers from adaptive impairments." *Id.* at 2281. Applying the definition of intellectual disability announced in *State v. Williams*, 831 So. 2d 835 (La. 2002), *superseded by statute*, *State v. Turner*, 936 So. 2d 89 (La. 2006), which governed at the time of the state court's determination, this Court held that

even under the interpretation of *Williams* "most favorable to the State," it was unreasonable for the state court to conclude that Brumfield lacked any deficits in adaptive functioning. 135 S. Ct. at 2279-81.

This Court explained that "[t]he adaptive impairment prong of an intellectual disability diagnosis requires an evaluation of the individual's ability to function across a variety of dimensions." *Id.* at 2279. This Court then reviewed the evidence in the state court record, which consisted of the testimony and reports of two experts—Dr. Cecile Guin, a social worker, and Dr. Bolter—and the testimony of Brumfield's mother. That evidence indicated that Brumfield was born prematurely with a low birth weight; had "slower responses than normal babies"; had been placed "in special classes in school and in multiple mental health facilities," where he "had been prescribed antipsychotics and sedatives"; "probably had a learning disability related to some type of slowness in motor development"; "could not process information"; had a "borderline general level of intelligence"; had a fourth-grade reading level, which amounted to "simple word recognition"; and "clearly" had "learning characteristics that make it more difficult for him to acquire new information." *Id.* at 2279-80 (quotation marks omitted).

"All told," this Court explained, the state court record alone "provided substantial grounds to question Brumfield's adaptive functioning." *Id.* at 2280. "An 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.'" *Id.* (alterations in original). Moreover, "the evidence of his low birth weight, of his commitment to mental health facilities at a young age, and of officials' administration of antipsychotic and sedative drugs to him at that time, all indicate that Brumfield may well have had significant deficits" in other areas of adaptive skills. *Id.*

This Court summarized: "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.

The Court also rejected the State's argument that the evidence before the state court failed to satisfy the third prong of intellectual disability—"that Brumfield's intellectual deficiencies manifested while he was in the 'developmental stage.'" *Id.* at 2282. The Court observed that "the state-court record contained ample evidence creating a reasonable doubt as to whether Brumfield's disability manifested before adulthood" and that "there is little question that [Brumfield] established good reason to think that he had been [intellectually disabled] since he was a child." *Id.* at 2283.

V. The Fifth Circuit's Comprehensive Opinion Upholding The District Court's Finding.

Upon remand from this Court, "[t]he sole remaining issue" was "whether the district court clearly erred when it found Brumfield was intellectually disabled." *Brumfield v. Cain*, 808 F.3d 1041, 1056 (5th Cir. 2015). In a 43-page opinion providing a detailed review of the evidence before the district court, the Fifth Circuit held that there was no clear error.

The Fifth Circuit began by recognizing that whether a person is intellectually disabled "is inherently an intensively factual inquiry." *Id.* at 1057 (quotation marks omitted). Under Louisiana law, "trial courts are called on 'to make exceedingly fine distinctions' between those who are mildly intellectually disabled and those who are not." *Id.* at 1065 (quoting *State v. Dunn*, 41 So. 3d 454, 469 (La. 2010)). Consistent with this Court's standard for clear error review, the Fifth Circuit explained that "[a] finding is clearly erroneous only if it is implausible in light of the record as a whole," and that "'[i]f 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.'" *Brumfield*, 808 F.3d at 1057 (quoting *Anderson*, 470 U.S. at 573-74 (internal quotation marks omitted)).[4]

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[4] As the Fifth Circuit explained, the State "never mention[ed]" the standard of review in its brief and "refused to acknowledge the

The Fifth Circuit then reviewed the evidence supporting each of the three prongs of intellectual disability. With respect to the first prong, Brumfield's intellectual functioning, the Fifth Circuit observed that based on Brumfield's unadjusted IQ scores—70, 70, 72, 75—"every single expert agreed that Brumfield's scores satisfied the first prong of the intellectual disability test." *Id.* at 1060. "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 diagnosis is not implausible and therefore is not clearly erroneous." *Id.*

The court rejected the State's assertion that "assessments consistently demonstrated that Brumfield had an IQ in the 70-85 range," explaining that "the State does not point to specific IQ scores which demonstrate that Brumfield's IQ fell within this range" and that it was not clear error for the district court to credit Brumfield's actual IQ scores. *Id.* The Fifth Circuit also rejected the State's suggestion that Brumfield's low IQ scores could have been the result of malingering, pointing to expert testimony that "Brumfield's consistent scores across multiple tests over multiple years ruled out malingering" and stating that it would not "second guess the district court's decision to believe the multiple experts who stated that

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appropriate standard of review" at oral argument. *Brumfield*, 808 F.3d at 1057 n.24.

Brumfield's scores were not a product of malingering." *Id.*

With respect to the second prong, Brumfield's deficits in adaptive functioning, the Fifth Circuit observed that "the district court carefully explained its reasoning, identified the specific evidence it relied upon, and specifically credited the testimony of certain experts." *Id.* at 1061. Upon reviewing that evidence, the Fifth Circuit concluded that "nothing in the district court's reasoning suggests its conclusion" was clearly erroneous and—much to the contrary—the district court had "more evidentiary support than prior cases in which [the Fifth Circuit had] upheld a district court's intellectual disability determination." *Id.* at 1061, 1063.

The Fifth Circuit addressed each of the State's arguments regarding adaptive functioning and concluded that "nothing the State emphasizes establishes" clear error. *Id.* at 1063. First, the State's argument that Brumfield's years of special education and academic problems were caused by "behavior problems and conduct, not an intellectual disability," was directly rebutted by Dr. Swanson's testimony that "at the time Brumfield attended school, school systems were urged to substitute diagnoses of conduct disorder for intellectual disability essentially for political reasons." *Id.* at 1062. Moreover, as this Court and the relevant clinical guidelines establish, a person can be intellectually disabled "regardless of and in addition to the presence of another disorder." *Id.* (quoting *Brumfield*, 135 S. Ct. at 2280; DSM-IV-TR at 47).

Second, the Fifth Circuit rejected the State's arguments that Brumfield's past (such as his car

ownership and drug dealing) or his prison behavior (such as the materials in his prison cell or prison calls) established clear error. The Fifth Circuit explained that the district court addressed each of these purported strengths and relied upon expert testimony that Brumfield's capabilities were consistent with intellectual disability and did not outweigh his "documented adaptive weaknesses." *Id.* at 1063.

Third, the Fifth Circuit rejected the State's argument that the district court failed to consider the facts of Brumfield's crime under *Dunn*, 41 So. 3d at 455-56. The Fifth Circuit explained that "[t]he district court carefully considered this case" and "[i]n 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 . . . and that nothing in the record suggested Brumfield led this terrible scheme." 808 F.3d at 1064 (internal quotation marks omitted). The Fifth Circuit concluded: "Overall, the district court considered the facts surrounding [the] murder as well as Brumfield's other criminal activities. . . . [W]e decline to disturb the 'exceedingly fine distinctions' the district court made in this 'intensively factual inquiry.'" *Id.* at 1065 (quoting *Williams*, 22 So. 3d at 887).

With respect to the third prong of intellectual disability, whether Brumfield's deficits manifested during his developmental stage, the Fifth Circuit observed that the deficits found by the district court, which included Brumfield's "poor academic record while in school[,] necessarily involved finding that the disability manifested before age 18." *Id.* at 1065.

Furthermore, the evidence of etiological factors in the record "such as, *inter alia*, Brumfield's low birth weight, fetal distress at birth, and family history of intellectual disability . . . certainly bolster the court's conclusion that Brumfield's intellectual disability manifested during his developmental years." *Id.*

The Fifth Circuit rejected the State's argument that the lack of a childhood diagnosis of intellectual disability established clear error. Rather, the district court relied upon Dr. Swanson's "coherent and facially plausible" account that one could not "draw a negative inference due to the lack of childhood diagnosis" in light of "the political incentives in place at the time Brumfield was in school." *Id.* at 1066 (internal quotation marks omitted).

Finally, the Fifth Circuit rejected the State's suggestion that the district court committed clear error by refusing to introduce certain evidence from Brumfield's state trial record. The Fifth Circuit explained that "in fact, the district court allowed the State to introduce the vast majority of the state court record into evidence." *Id.* at 1057 n.24.

In summation, the Fifth Circuit explained that the record did not support "a firm and definite conviction that the district court made a mistake." *Id.* at 1066. Much to the contrary, the record demonstrated that "Brumfield's witnesses were somewhat stronger" and offered the "slightly more compelling view." *Id.* In any case, "[e]ven 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.'" *Id.* at 1065 (quoting *Anderson*, 470 U.S. at 573).

REASONS FOR DENYING THE PETITION

The State provides no reason for this Court to review the Fifth Circuit's careful and correct application of clear error review to the district court's well-supported finding of intellectual disability.

I. The State Fails To Identify Any Compelling Reason To Review The Fifth Circuit's Thorough Decision.

Under this Court's rules, certiorari is "granted only for compelling reasons," such as resolving a conflict between the federal courts of appeals, reviewing a decision by a federal court of appeals that had significantly "departed from the accepted and usual course of judicial proceedings," or for reviewing an important federal question decided by a state court of last resort. *See* Sup. Ct. R. 10. The State's petition satisfies none of these criteria.

The only issue of federal law presented by the petition is whether the Fifth Circuit was correct in concluding that the district court's finding of intellectual disability was not clearly erroneous. The State does not explain why the Fifth Circuit's routine application of this standard of review to a fact-intensive question warrants this Court's attention. The State does not claim that the circuits are split on any issue presented by this case—in fact, the State does not cite any circuit court opinions outside of the Fifth Circuit.

Moreover, the State does not explain its assertion that the Fifth Circuit's application of the clear error standard was contrary to this Court's precedent. Rather, just as it did before the Fifth Circuit—which chided the State for failing to acknowledge the clear error standard, *see Brumfield*, 808 F.3d 1057 n.24—the State uses its certiorari briefing as another attempt to relitigate its evidentiary case, adding the occasional conclusory assertion that the evidence it introduced (virtually all of which comes from experts who were discredited by the district court) demonstrates "clear error." As the Fifth Circuit recognized, the clear error standard does not permit reweighing of the evidence or relitigation of the district court's credibility findings, and an appellate court cannot overturn a trial court's finding simply because "there are two permissible views of the evidence." *Id.* at 1057 (quoting *Anderson*, 470 U.S. at 574).

Because the State fails to give any reason—let alone a "compelling" reason—to grant review, the petition should be denied.

II. The State's Questions Presented Are Based On A Mischaracterization Of The Record And A Misunderstanding Of The Clear Error Standard.

In addition to failing to present an issue that warrants this Court's review, the State's questions presented are misleading as to the record below and conflict with the clear error standard.

1. The State's first question presented asks the Court to answer whether the district court committed

clear error based on assertions that the district court (1) refused to allow the State to present or admit certain evidence; (2) failed to consider the facts of Brumfield's crime, as required under Louisiana law; (3) failed to consider historical records that did not diagnose Brumfield with intellectual disability; or (4) incorrectly assessed the credibility of witnesses. Each of these assertions is meritless.

First, the State repeatedly claims throughout its petition that the district court committed clear error because it "refused to allow the state to introduce the trial court record in the federal proceedings" and "curtail[ed]" certain evidence from being admitted or presented. Pet. 33. This argument is seriously misleading. The Fifth Circuit explained as much: "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." *Brumfield*, 808 F.3d at 1057 n.24.

Before the district court, the State sought to admit "the entirety of the transcript of [Brumfield's] trial proceedings," Vol. VII at 94—*i.e.*, it wanted to admit the transcript *en masse*, without having to demonstrate or explain the relevance of the various testimony. The district court denied that request and explained that the State may put forward "portions that may be relevant to this matter, [and the court] will consider admitting that." Vol. VII at 95. Virtually all of the portions of trial evidence that the State identified and sought to admit were admitted—including the entirety

of Brumfield's taped confession (which was played in open court); the trial testimony of John Lewis, Anthony Miller, Edna Perry, Vella Brumfield, Thurman Ellis, Karen Cross, Teodis Brumfield, and Dr. Guin; the reports of Dr. Bolter and Dr. Jordan; and the social history prepared by Dr. Guin. (*See* Dist. Ct. ECF No. 110 (exhibit and witness list); Vol. I at 209 (admitting Dr. Bolter's report, Dr. Jordan's report, and social history); Vol. III at 127-28 (admitting transcripts of Dr. Guin, Thurman Ellis, Vella Brumfield, Karen Cross, and Teodis Brumfield); Vol. III at 137-38 (admitting transcripts of Anthony Miller and Edna Perry).)[5]

The district court excluded only three transcripts that the State sought to admit: the testimony of the victim's coroner (who discussed the victim's cause of death); the testimony of a firearms expert (who discussed the bullets and casings used in the crime); and the testimony of Sue Bernard (who testified that she saw Brumfield's co-defendant at the store where the victim worked prior to the murder). As the district court correctly found, testimony about the victim's cause of death, about the bullets and casings used in the crime, and about Brumfield's co-defendant's whereabouts prior to the crime, had nothing to do with

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[5] The State is thus wrong to suggest that the district court was not aware that "Brumfield is the person who procured the guns and car used in this crime"; of the facts of the crime; of Brumfield's prior alleged crimes; and of Brumfield's initial attempt to minimize his involvement in the murder. Pet. 33. All of these facts were included within the evidence that was admitted by the district court.

whether Brumfield is or is not intellectually disabled. Dist. Ct. ECF No. 85 at 4-5; Vol. III at 124.

Moreover, the evidence would have been wholly cumulative. For instance, according to the State, the coroner's and firearms expert's testimony was relevant to "show Brumfield's skill and ability to use firearms." See Dist Ct. ECF No. 85 at 4-5. But, in addition to Brumfield's confession itself, the district court heard ample evidence that Brumfield was capable of firing a gun, including Dr. Greenspan's testimony that any 9 or 10 year old could load and fire a gun (Vol. I at 124; *see also, e.g.*, Vol. III at 144-45 (testimony that Brumfield admitted to firing a gun); Vol. IV at 207 (testimony that Brumfield fired one of the guns that killed the victim).)

In any case, the State conflates the inquiry of whether the district court committed clear error in making a factual finding based on the evidence in the record with a challenge to the district court's evidentiary rulings. A district court's determinations of whether to admit or exclude evidence are reviewed for abuse of discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997). Before the Fifth Circuit, the State never challenged the district court's evidentiary rulings as an abuse of discretion and has thus waived any argument to that effect.

Second, Petitioner asserts that the district court "fail[ed] to consider the facts of the crime as provided for in *State v. Dunn III*." 41 So. 3d 454 (La. 2010). Pet. i. That argument is demonstrably false. As described above, and as the Fifth Circuit explained, the district court "carefully considered [*Dunn III*]" and "consider[ed] the evidence of Brumfield's criminal

activity," but "concluded that it was not sufficient to demonstrate an absence of deficits" in adaptive skills. *Brumfield*, 808 F.3d at 1064. The district court specifically acknowledged that "Brumfield's actions during and immediately following the underlying murder for which he was convicted must be discussed" in the analysis of adaptive skills, and that "the Court must look to the crime for evidence, if any, of conceptual skills." *Brumfield*, 854 F. Supp. 2d at 399-400. The district court then found that nothing in the record "makes clear that Brumfield, rather than another of one his confederates, 'led' this terrible scheme" and, to the contrary, the record suggests that "Brumfield was gullibly convinced to join in the crime instead of actively planning out its details." *Id.* at 400. Moreover, none of the facts identified by the State outweighed Brumfield's "other demonstrated showings of deficits in conceptual skills." *Id.*

Third, the State represents that the district court "fail[ed] to consider historical school records" and that there were "six prior mental health assessments that found Brumfield not to be mentally retarded." Pet. i, 14. Both representations are false. First, *none* of the tests that the State identifies, *see* Pet. 36-38, "found Brumfield not to be mentally retarded." Not a single one of those tests involved an evaluation for intellectual disability. Second, the district court discussed Brumfield's school records in detail, finding that they showed "lack of competence in virtually every area," "he was constantly shuttled between different schools and remained periodically in-and-out of mental health centers," and "his need for a highly structured

environment in order to provide the necessary supports for him to function." *Brumfield*, 854 F. Supp. 2d at 396, 397.

Fourth, Petitioner suggests that the district court erred "in assessing credibility of witnesses." Pet. i. That view misappreciates the role of appellate courts. As this Court has explained and the Fifth Circuit acknowledged, "[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 consistent, can virtually never be clear error." *Brumfield*, 808 F.3d at 1057 (quoting *Anderson*, 470 U.S. at 575). As the Fifth Circuit explained, the district court "explicitly weighed the credibility of different witnesses" and was "in a better position to judge the credibility of the witnesses" when it decided to credit the witnesses for the Brumfield. *Id.* at 1065, 1064 (internal quotation marks omitted).[6]

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[6] Although not tied to its questions presented, the State suggests that the district court shifted the burden of proof to the State. Pet. 29. That assertion contradicts the district court's repeated, express acknowledgement that it was Brumfield who "bears the burden of proving by a preponderance of the evidence that he meets the statutory definition" of intellectual disability, *Brumfield*, 854 F. Supp. 2d at 385, and findings that "Brumfield has met his burden" on each prong of the intellectual disability test. *Id.* at 392 (intellectual functioning); *id.* at 401 (adaptive functioning); *id.* at 405 (manifestation prior to age 18).

In sum, the bases upon which the State argues clear error are all either false or inconsistent with the very nature of clear error review.

2. Petitioner includes a second question presented suggesting that the Fifth Circuit erred by "failing to conduct an independent review as to whether Brumfield proved [his intellectual disability] by a preponderance of the evidence." Pet. i. This question also demonstrates a misunderstanding of the clear error standard.

The State does not contest, nor did it contest below, that whether a person is intellectually disabled under Louisiana law is a question of fact. *State v. Turner*, 936 So. 2d 89, 102 (La. 2006) (whether a person is intellectually disabled under La. Code Crim. Proc. art 905.5.1 is a "factual issue"); *State v. Williams*, 22 So. 3d 867, 887 (La. 2009) (intellectual disability is "inherently an intensively factual inquiry"); *Moore v. Quarterman*, 342 F. App'x 65, 67 (5th Cir. 2009) ("The question of whether a defendant suffers from mental retardation is a question of fact[.]"). Moreover, the State does not appear to contest that a district court's findings of fact are reviewed for clear error. *See* Pet. 14 ("the question is . . . whether the district court's finding was clearly erroneous); *see also* Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous[.]").

This is fatal to the State's suggestion that the Fifth Circuit should have "conduct[ed] an independent review as to whether Brumfield proved [his intellectual disability] by a preponderance of the evidence." Pet. i. 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. "'In applying the clearly erroneous standard . . . appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Id.* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).

Because each of the State's questions presented is premised on false assumptions or a misunderstanding of the clear error standard, the Court should not grant review.

III. The District Court's Finding Of Intellectual Disability Was Not Clearly Erroneous.

Even if this Court were inclined to review the voluminous record in this case, it would reach the same conclusion as the Fifth Circuit: The district court did not clearly err in finding that Brumfield is intellectually disabled under Louisiana law.

"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.

As described above and this Court previously observed, the district court's finding that Brumfield is intellectually disabled was based on "extensive

evidence." *Brumfield*, 135 S. Ct. at 2275. That evidence, this Court observed, encompassed all three aspects of the diagnosis of intellectual disability: it "included [1] the results of various IQ tests—which, when adjusted to account for measurement errors, indicated that Brumfield had an IQ score between 65 and 70—[2] testimony and expert reports regarding Brumfield's adaptive behavior and 'significantly limited conceptual skills,' and [3] proof that these deficits in intellectual functioning had exhibited themselves before Brumfield reached adulthood." *Id.* at 2276 (internal citations omitted).

Every expert who testified at Brumfield's federal hearing—including the State's—agreed that Brumfield's IQ scores demonstrated a substantial limitation in intellectual functioning. *See supra* pp. 2-3, 13, 22-23. Multiple experts described Brumfield's severe limitations in reading, writing, and processing information. *See supra* pp. 3-4*; Brumfield*, 135 S. Ct. at 2280 ("An 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.'" (citation omitted)). And multiple experts testified regarding his pre-natal, peri-natal, and post-natal risk factors. *See supra* p. 4; *Brumfield*, 135 S. Ct. at 2280 ("the evidence of his low birth weight, of his commitment to mental health facilities at a young age, and of officials' administration of antipsychotic and sedative drugs to him at that time, all indicate that

Brumfield may well have had significant deficits" in adaptive skills).

In light of the substantial evidence supporting the district court's conclusion, the Fifth Circuit was plainly correct in holding that the district court did not commit clear error.

* * *

This case does not present any circuit split or important legal issue. The Fifth Circuit's thorough opinion correctly applied the clear error standard to affirm the district court's fact-intensive finding that Brumfield is intellectually disabled under Louisiana law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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