17-12524

CAPITAL CASE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARK ALLEN JENKINS,

Petitioner – Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent – Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama

BRIEF OF *AMICI CURIAE* THE ARC OF THE UNITED STATES, THE ARC OF ALABAMA, AND THE ALABAMA DISABILITIES ADVOCACY PROGRAM IN SUPPORT OF PETITIONER-APPELLANT'S PETITION FOR *EN BANC* REVIEW

Elaine J. Goldenberg
Brendan B. Gants
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W., Seventh Floor
Washington, District of Columbia 20004
P: (202) 220-1100
F: (202) 220-2300
Elaine.Goldenberg@mto.com
Brendan.Gants@mto.com

Counsel for Amici Curiae

Jenkins v. Commissioner, No. 17-12524

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies that no parent corporation or publicly held corporation owns 10% or more of the stock of any of the *amici curiae*.

Pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3, undersigned counsel certifies that the following persons and entities may have an interest in the outcome of the case:

Alabama Disabilities Advocacy Program, *Amicus Curiae*;

ALLEN, Richard, former Commissioner, Alabama Department of Corrections;

ALPER, Ty, Counsel for Mr. Jenkins at Rule 32 proceedings;

BARNETT, IV, A. Vernon, Counsel for the State of Alabama at Rule 32 proceedings;

BILLINGSLEY, Michael, Counsel for the State of Alabama at Rule 32 proceedings;

BRASHER, Andrew L., Solicitor General of Alabama and Counsel for the State of Alabama at second Rule 32 petition before the United States Supreme Court;

CARNES, EDWARD E., Counsel for the State of Alabama on direct appeal;

CRENSHAW, James Clayton, Counsel for the State of Alabama at federal habeas proceedings;

DANIEL, Tracy M., Counsel for the State of Alabama at Rule 32 proceedings;

DAVIS, Van, Counsel for the State of Alabama at trial;

DOWNEY, Stan, Counsel for Mr. Jenkins at trial (deceased);

DUNN, Jefferson S., Commissioner, Alabama Department of Corrections;

EVANS, Hon. James H., former Alabama Attorney General;

FLOOD, Joseph Thomas, Counsel for Mr. Jenkins at Rule 32 proceedings and federal habeas proceedings;

GANTS, Brendan G., Counsel for *Amici Curiae*;

GOLDENBERG, Elaine J., Counsel for *Amici Curiae*;

GREENE, Hon. Paul W., former United States Magistrate Judge;

HEREFORD, The Honorable William E., Circuit Judge of St. Claire County;

HILL, The Honorable James E., Circuit Judge of St. Claire County;

HOGELAND, Tammy, victim;

HOGELAND, Wendy, victim's sister;

HOLLADAY, The Honorable Hugh E., Circuit Judge of St. Claire County;

HOPKINS, The Honorable Virginia Emerson, United States District Judge for the Northern District of Alabama;

HUGHES, Beth Jackson, Counsel for the State of Alabama at Rule 32 proceeding before the United States Supreme Court;

JENKINS, Mark Allen, Plaintiff/Petitioner-Appellant;

JOHNSON, Henry Mitchell, Counsel for the State of Alabama at federal habeas proceedings;

KING, Troy, former Attorney General for the State of Alabama;

LIVINGSTON, Kelly, Counsel for the State of Alabama at trial;

LUSK, Robert E., Counsel for the State of Alabama on direct appeal;

MARSHALL, Steve, Attorney General for the State of Alabama;

MILLER, Kasdin E., Counsel for the State of Alabama at second Rule 32 proceedings before the United States Supreme Court;

Munger, Tolles & Olson LLP, Counsel for *Amici Curiae*;

NEIMAN, John C., Counsel for the State of Alabama at Rule 32 proceedings;

NUNNELLEY, Michael Anthony, Counsel for the State of Alabama at federal habeas proceedings;

POOLE, Andy S., Counsel for the State of Alabama at Rule 32 proceedings;

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PRYOR, William H., former Alabama Attorney General;

SCOFIELD, Douglas H., Counsel for Mr. Jenkins at trial and on direct appeal;

SESSIONS, Jeff, former Alabama Attorney General;

STEWART, Sandra J., Counsel for the State of Alabama on direct appeal;

STRANGE, Luther, former Alabama Attorney General;

The Arc of Alabama, *Amicus Curiae*;

The Arc of the United States, *Amicus Curiae*;

TURNER, Vivian, victim's mother; and

WEISBURD, Katherine R., Counsel for Mr. Jenkins at Rule 32 proceedings.

Date: September 27, 2019

/s/ Brendan B. Gants

Elaine J. Goldenberg
Brendan B. Gants
Counsel for Amici Curiae
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W., Seventh Floor
Washington, District of Columbia 20004
T: (202) 220-1100
F: (202) 220-2300
Elaine.Goldenberg@mto.com
Brendan.Gants@mto.com

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STATEMENT OF COUNSEL FOR *AMICI CURIAE*

I express a belief, based on a reasoned and studied professional judgment, that the panel's decision regarding the issue addressed in this brief is contrary to the following decisions of the Supreme Court of the United States and the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Atkins v. Virginia*, 536 U.S. 304 (2002); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013).

/s/ Brendan B. Gants

Attorney of Record for *Amici Curiae*

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STATEMENT OF THE ISSUE ADDRESSED BY *AMICI CURIAE*

The majority opinion in this case disregarded substantial evidence of intellectual disability and relied on a record that predated *Atkins v. Virginia*, 536 U.S. 304 (2002), to conclude that Jenkins is not intellectually disabled. In doing so, the majority created a conflict with *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308 (11th Cir. 2013).

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations in the field of intellectual disability. They share a vital interest in ensuring that all individuals with intellectual disability receive the protections and supports to which they are entitled by law—including, where appropriate, a hearing and the opportunity to present evidence—and that courts employ scientific principles for the diagnosis of intellectual disability.

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities and consists of nearly 700 state and local chapters across the country. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes.

The Arc of Alabama is an affiliate of The Arc of the United States and serves Alabamians with intellectual and developmental disabilities through 26 local chapters throughout the state.

The Alabama Disabilities Advocacy Program ("ADAP") is part of the National Disability Rights Network, the nonprofit membership organization for the

[1] Counsel for *amici* authored this brief in its entirety. No party or its counsel, or any other person or entity other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. This proposed brief is accompanied by a motion for leave to file.

federally mandated protection and advocacy ("P&A") system. As Alabama's only statewide, cross-disability, comprehensive legal advocacy organization, ADAP protects and promotes the civil rights of Alabamians with physical, cognitive, and mental health disabilities.

SUMMARY OF ARGUMENT

A death row inmate who claims that he has intellectual disability and therefore is exempt from execution under the Eighth Amendment, pursuant to the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), should have the opportunity to develop an appropriate record in support of that claim when there is evidence of impairment that could be attributable to intellectual disability. That common-sense rule is grounded in principles of due process and fundamental fairness, taking into account the way *Atkins* fundamentally changed the legal context of intellectual disability evidence in capital cases. It also is grounded in clinical standards regarding the diagnosis of intellectual disability, which emphasize the importance of thorough evidence-gathering and clinical judgment.

Mark Allen Jenkins has never had such an opportunity. Even so, the available record in this case—developed in a pre-*Atkins* context—includes significant evidence that he may be a person with intellectual disability. The state courts unreasonably disregarded that evidence in a cursory analysis that relied on stereotypes to preclude the possibility of *Atkins* relief, an error the panel majority's

decision compounded. That decision, if allowed to stand, would severely undermine Supreme Court and Eleventh Circuit precedent regarding the need to develop an appropriate record to evaluate *Atkins* claims. Jenkins should have the opportunity to develop such a record.

ARGUMENT

I. APPLICABLE LEGAL AND SCIENTIFIC PRINCIPLES SUPPORT THE IMPORTANCE OF EVALUATING *ATKINS* CLAIMS ON A RECORD DEVELOPED FOR THAT PURPOSE

The Eighth Amendment prohibits the execution of any person with intellectual disability. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The basic definition of intellectual disability requires (1) intellectual-functioning deficits, generally indicated by an IQ score approximately two standard deviations below the mean, (2) adaptive deficits, and (3) onset of those deficits during the developmental period. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 33, 37 (5th ed. 2013) ("DSM-5"); AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1, 31 (11th ed. 2010) ("AAIDD Manual"). Clinical definitions of intellectual disability "were a fundamental premise of *Atkins*," which was informed by "the diagnostic criteria employed by psychiatric professionals." *Hall v. Florida*, 572 U.S. 701, 720-721 (2014) (citing *Atkins*, 536 U.S. at 309 nn.3, 5).

The Supreme Court has emphasized—as has this Court—the importance of adjudicating death row inmates' intellectual-disability claims based on a record developed after *Atkins* for that purpose. *See*, *e.g.*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) (petitioner's argument for an evidentiary hearing was supported by the fact that he "had not yet had the opportunity to develop the record for the purpose of proving an intellectual disability claim"); *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (recognizing that prior to *Atkins*, it often was in the interest of prosecutors rather than the defense to use evidence of intellectual disability); *Burgess v. Commissioner, Alabama Department of Corrections*, 723 F.3d 1308, 1316, 1318 (11th Cir. 2013) (holding state court unreasonably relied on pre-*Atkins* record, where evidence "was presented in an entirely different context and without the benefit of any explanation of how it would or would not be consistent with" an intellectual disability). This Court also has noted that proper analysis of any intellectual-disability claim "requires verifiable expert analysis and diagnosis" because, "[a]s the Supreme Court recognized in *Atkins*, [intellectual disability] is fundamentally a 'clinical' diagnosis." *Id.* at 1316 n.9 (citing *Atkins*, 536 U.S. at 308 n.3, 317 n.22). As a matter of due process and fundamental fairness, *Atkins* claimants should have an opportunity to develop an appropriate record. *See*, *e.g.*, *id.* at 1318 ("[I]t would be a gross inequity to hold [the petitioner] to an undeveloped, pre-*Atkins* record.").

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

This case illustrates the problems with relying on a pre-*Atkins* record. Both the panel majority's decision and the underlying state court decision relied on the testimony of Dr. Kirkland, the State's expert, at a pre-*Atkins* Rule 32 hearing. *See* Majority 17-20, 44, 46; *Jenkins v. State*, 972 So. 2d 111, 154-55 (Ala. Crim. App. 2004). But nothing in the record suggests that Dr. Kirkland or the defense expert who also testified had expertise in intellectual disability, or that they even attempted to make a diagnosis; in fact, Dr. Kirkland testified explicitly that he made no such attempt. *See* Vol.22, p.671. That is unsurprising, since Jenkins did not and could not have sought relief at the Rule 32 hearing based on intellectual disability—at the time, the execution of a person with intellectual disability was not barred by state or federal law. *See Atkins*, 536 U.S. at 316 & n.20. The experts' testimony at the hearing concerned "Jenkins's history of psychological trauma stemming from his childhood abuse." Majority 17.

Nevertheless, the majority found it "[m]ost fundamental[]" and "tremendously significant" that no clinical assessment in the record had found that Jenkins is a person with intellectual disability. *Id.* at 46. The majority also deemed significant the fact that "[n]o witness mentioned" that Jenkins had adaptive deficits in certain areas—including areas where the evidence *did* suggest deficits. *Id.* at 51. But of course one would not expect such testimony to be solicited years before *Atkins*. This Catch-22—denying the opportunity to develop evidence

supporting an intellectual-disability claim based on not having introduced such evidence before *Atkins* provided a reason to do so—would, if allowed to stand here, severely undermine Supreme Court and Eleventh Circuit precedent regarding the need to develop an appropriate record to evaluate *Atkins* claims.

II. JENKINS SHOULD HAVE THE OPPORTUNITY TO DEVELOP AN APPROPRIATE RECORD IN SUPPORT OF HIS *ATKINS* CLAIM

Even despite the absence of any appropriate evidentiary hearing in this case, the state court record contains significant evidence supporting the possibility that Jenkins has intellectual disability. The state court's decision nevertheless to deny him the opportunity to properly develop his *Atkins* claim was unreasonable, and the panel majority erred by denying Jenkins's claim on the present record.

In seeking an evidentiary hearing, Jenkins "was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much." *Brumfield*, 135 S. Ct. at 2281. Substantial evidence supports the possibility that Jenkins has intellectual disability and compels the conclusion that he should have an evidentiary hearing. The State's expert, Dr. Kirkland, testified that Jenkins's IQ score was "two standard deviations" below the mean, Vol.22, pp.670-71, which would satisfy the intellectual-functioning criterion of the diagnostic framework, *see* DSM-5 at 37. Jenkins also scored in the bottom percentile on a neuropsychological test measuring cognitive flexibility and problem solving. *See* Vol.22, pp.669-70. At nearly 30 years old, Jenkins still

operated at a third-grade level in reading, spelling, and arithmetic, results that were consistent with Jenkins's performance in school. *See id.* at 641, 669. Both in childhood and as an adult, Jenkins demonstrated gullibility that led to him being manipulated and taken advantage of by others. *See* Vol.19, Tab #R-48, pp.60-61; Vol.20, p.124; Vol.22, p.483; *see also* DSM-5 at 34, 38 (noting that "[g]ullibility is often a feature" of intellectual disability, and places the person "at risk of being manipulated by others"); *accord* AAIDD Manual at 44. As an adult, he has struggled to maintain employment even in unskilled jobs, to maintain adequate housing, and to manage basic self-care tasks like hygiene. *See, e.g.*, Vol.20, Tab #R-48, pp.151, 200-201; Vol.22, pp.485-486; Vol.29, p.1255.

Remarkably, the panel majority opinion acknowledges that the record "contains evidence of Jenkins's childhood academic and social deficits," but disregards this evidence based on an unsupported claim that "Jenkins's childhood is not directly relevant to our consideration of his present limitations." Majority 51. That claim is contrary to legal authority and clinical standards, which do not distinguish in any such way between childhood and adulthood when assessing adaptive deficits. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2279-80 (relying heavily on evidence from birth and childhood to conclude that the record "contained sufficient evidence to raise a question as to whether Brumfield met" the adaptive-deficits criteria, such that an evidentiary hearing should have been conducted); DSM-5 at

37; AAIDD Manual at 94-96. The panel majority's disregard of childhood adaptive-deficit evidence is especially significant here, both because Jenkins was only 21 years old at the time of his crime and because of the panel's acknowledgment that the disregarded evidence reveals deficits in at least two areas of adaptive functioning. *See* Majority 51.

The available evidence in this case also indicates the presence of many risk factors for intellectual disability. Those risk factors include, for example, child abuse, neglect, domestic violence, and social deprivation, all of which Jenkins experienced to a horrifying degree. *See* AAIDD Manual at 60; Majority 13-17. Other risk factors present here include maternal drug and alcohol abuse in the prenatal period, premature birth, parental rejection of caretaking, and malnutrition. *See* AAIDD Manual at 60; Majority 13-17. Jenkins also was at risk of a traumatic brain injury or other brain damage during the developmental period due to frequent beatings with various implements by his stepfather. *See* AAIDD Manual at 60; Majority 13-14. These risk factors provide additional support for Jenkins's *Atkins* claim.

This record calls out for—at the very least—an evidentiary hearing and opportunity for Jenkins to present evidence on his *Atkins* claim. The state court's contrary decision unreasonably ignored evidence supportive of intellectual disability and, in a cursory discussion, relied on harmful and inaccurate stereotypes

to reject Jenkins's *Atkins* claim. Most notably, the state court's analysis of Jenkins's adaptive functioning consisted of a single sentence indicating that he must not have significant deficits in adaptive behavior because he was able to "maintain[] relationships with other individuals" and sometimes had a job. *Jenkins*, 972 So. 2d at 155. But the idea that a person who can do those things must not be a person with intellectual disability is a harmful, offensive, and inaccurate stereotype with no basis in law or science. People with intellectual disability are capable of maintaining relationships with other individuals and being employed. *See, e.g.*, DSM-5 at 34 ("In adulthood, competitive employment is often seen in jobs that do not emphasize conceptual skills."); AAIDD Manual at 151 (rejecting the "incorrect stereotypes" that people with intellectual disability "never have friends, jobs, spouses, or children"). The fact that Jenkins had a string of low-skill, menial-labor jobs—jobs he held for only a few months each, during which time employers took advantage of him—in no way precludes a diagnosis of intellectual disability. The state court's analysis contravened the core holding of *Atkins* that the Eighth Amendment bars execution for the entire category of persons with intellectual disability. *See Atkins*, 536 U.S. at 321; *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005).

The decision of the panel majority, rather than correctly identifying those errors as unreasonable, compounded and reinforced them. The panel decision's

brief analysis of Jenkins's adaptive functioning assumes he has a substantial deficit in functional academics, but otherwise focuses on various perceived strengths as excluding a potential diagnosis of intellectual disability. *See* Majority 49-51. For example, the panel rejected Jenkins's claimed deficits "in the areas of communication, self-care, community use, and self-direction" based on "the facts of the crime," *id.* at 50, even though legal precedent and clinical literature repudiate that analysis. *See Brumfield*, 135 S. Ct. at 2280-81 (rejecting argument that purported adaptive strengths demonstrated in the facts of the crime negated the need for an evidentiary hearing); *Holladay v. Allen*, 555 F.3d 1346, 1363 (11th Cir. 2009) ("Individuals with mental retardation have strengths and weaknesses, like all individuals. . . . Dr. Ackerson's predominant focus on Holladay's actions surrounding the crime suggests that she did not recognize this."); AAIDD, *User's Guide to Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports* 20 (2012) ("The diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'").

In sum, the record here—such as it is—provides significant reason to believe that Jenkins may be a person with intellectual disability, and offers no justification for precluding such a diagnosis. Particularly in light of relevant legal and scientific

principles, Jenkins should have the opportunity to develop an appropriate record supporting his *Atkins* claim, including through an evidentiary hearing.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant rehearing *en banc*.

Respectfully submitted,

Date: September 27, 2019

/s/ Brendan B. Gants

Elaine J. Goldenberg
Brendan B. Gants
Counsel for Amici Curiae
MUNGER, TOLLES & OLSON LLP
1155 F Street N.W., Seventh Floor
Washington, District of Columbia 20004
T: (202) 220-1100
F: (202) 220-2300
Elaine.Goldenberg@mto.com
Brendan.Gants@mto.com

CERTIFICATE OF COMPLIANCE

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Dated: September 27, 2019

/s/ Brendan B. Gants
Brendan B. Gants

CERTIFICATE OF SERVICE

I certify that on September 27, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: September 27, 2019

/s/ Brendan B. Gants
Brendan B. Gants