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Brumfield v. Cain: Developing a Matter of Disability and Death

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BRUMFIELD v. CAIN: DEVELOPING A MATTER OF DISABILITY AND DEATH

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I. INTRODUCTION

While the virtues of the death penalty have long been in dispute,[1] few would disagree that this punishment should be reserved for the most morally culpable offenders and that there should be procedural safeguards in place to ensure that only those people are executed.[2] Usually, when a crime is punishable by death, the prosecutor decides whether to seek the death penalty, and the jury determines whether such punishment is appropriate after hearing both evidence of the defendant's culpability and evidence that the defendant's culpability is mitigated in some way.[3] The Constitution limits the application of this procedure. Under the Eighth Amendment's prohibition on cruel and unusual punishment, the Supreme Court has deemed certain categories of individuals

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1. *See generally* Gregg v. Georgia, 428 U.S. 153, 179–84 (1976) (describing jury verdicts and death penalty legislation as indicia of public opinion in favor of the death penalty, and leaving attempts to evaluate the death penalty's effectiveness in achieving penological goals to the legislature).

2. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 5 (1997) ("Most would agree at least . . . in the abstract with the importance of process: a proceeding conducted in accordance with established rules, presided over by an impartial judge, in which the accused is capably represented by a competent lawyer . . . . The legal system supposedly strives to provide this sort of process."); *see Gregg*, 428 U.S. at 187 ("There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to [ensure] that every safeguard is observed . . . . It is an extreme sanction, suitable to the most extreme of crimes." (citations omitted) (quoting another source)).

3. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 2015); LA. CODE CRIM. PROC. ANN. arts. 905.2–.4 (2012); *see* CAL. PENAL CODE § 190.9(a)(2).

ineligible for execution,[4] primarily because execution of such individuals would not serve the penological goals of capital punishment: deterrence and retribution.

In *Atkins v. Virginia*,[5] the Supreme Court held the intellectually disabled[6] to be among those constitutionally ineligible for the death penalty.[7] The Court left to the states the critical responsibility of defining intellectual disability and establishing procedures to implement the exemption embodied in *Atkins*.[8]

The lack of Supreme Court holdings on the procedures required to effectuate *Atkins* has caused those petitioners claiming to be intellectually disabled to face disparate requirements—and therefore inconsistent treatment—across the states.[9] This inequality increases the need for federal habeas review of the denial of *Atkins* relief to ensure petitioners' constitutional rights are protected. Yet without Supreme Court precedent, federal courts are poorly equipped to remedy state court constitutional shortcomings on habeas review.[10] This quagmire results from the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Supreme Court's

4. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding capital punishment unconstitutional for juvenile offenders); Ford v. Wainwright, 477 U.S. 399, 409 (1986) (holding capital punishment unconstitutional for insane offenders).

5. 536 U.S. 304 (2002).

6. The condition now known as intellectual disability was formerly called "mental retardation." *See id.* While the medical community, legislatures, and the majority of the Court have changed their terminology accordingly, others have not. *Compare* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (explaining the change in terminology), *and* Brumfield v. Cain, 135 S. Ct. 2269, 2274 n.1 (2015) (same), *and Frequently Asked Questions on Intellectual Disability*, AAIDD, http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited Feb. 15, 2016) (same), *and* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (enacting the same terminology change in many areas of federal law), *with Brumfield*, 135 S. Ct. at 2288 (Thomas, J., dissenting) (referring to the same condition as "mental retardation").

7. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

8. *Id.* at 317.

9. *See* Natalie Cheung, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317, 319 (2013); *see generally* Kathryn Raffensperger, Comment, Atkins v. Virginia*: The Need for Consistent Substantive and Procedural Application of the Ban on Executing the Intellectually Disabled*, 90 DENV. U. L. REV. 739, 743–54 (2012) (discussing requirements in individual states).

10. This is of particular concern in jurisdictions where judges are elected. *See* Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law But an Essential Right*, 64 ME. L. REV. 380, 386–88 (2012) (discussing the impact of popular law-and-order sentiment on elected state judges); Bright, *supra* note 2, at 10–18 ("The greatest threat to the rule of law comes from those judges who remain on courts, but refuse to enforce the law in instances when an unpopular outcome could jeopardize their careers."); Maura Dolan, *Clashing Courts: Law Restricts Federal Judges' Ability to Intervene in State Criminal Cases*, L.A. TIMES (Sept. 5, 2015), http://www.latimes.com /local/crime/la-me-courts-clash-20150906-story.html (observing that in close habeas cases, California courts tend to affirm convictions).

interpretations of it, which have severely limited state petitioners' opportunity for federal review. Particularly concerning for *Atkins* petitioners is the inability of federal courts to review most state court decisions related to federal law, including constitutional violations, unless the Supreme Court has directly held on the issue.[11] Despite these restrictions, the Court's recent decision in *Brumfield v. Cain*[12] may harken a new era, in which a federal court sitting in habeas may consider the adequacy of a state court's fact-finding procedures.

Kevan Brumfield was convicted of first-degree murder and sentenced to death in 1995, seven years before the Supreme Court decided *Atkins*.[13] Following *Atkins*, Brumfield petitioned the state court for habeas review, seeking a hearing to demonstrate that his sentence was unconstitutional because he was intellectually disabled.[14] The court denied Brumfield's requests for funding or time to obtain a pro bono expert to develop his argument, so Brumfield based his petition on evidence presented during the mitigation phase of his criminal trial, before intellectual disability was at issue.[15] The state habeas court denied him an *Atkins* hearing[16] and relief, finding that Brumfield did not present sufficient evidence to raise the issue of intellectual disability.[17]

Brumfield then sought federal habeas review.[18] He claimed that he was eligible for relief for two reasons: (1) the state habeas court had unreasonably applied federal due process law by denying him opportunity for fact-development in the form of funding or time to obtain an expert, and (2) the state habeas court had made unreasonable findings of fact based on the record before it.[19] The district court agreed on both counts and, after holding an evidentiary hearing on intellectual disability, found Brumfield to be intellectually disabled and thus ineligible for the death penalty.[20] The Fifth Circuit

11. *See* discussion *infra* Part II.A.
12. 135 S. Ct. 2269 (2015).
13. *See id.* at 2273–74.
14. *Id.* at 2273.
15. *Id.* at 2274–75.
16. An *Atkins* hearing is a hearing to determine whether a capital defendant suffers from intellectual disability and is thus ineligible for capital punishment. *See id.* at 2274.
17. *Id.* at 2275. Intellectual disability is defined under Louisiana law 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. ANN. art. 905.5.1(H)(1) (2012).
18. *Brumfield*, 135 S. Ct. at 2272.
19. *Id.* at 2275.
20. *Id.*

reversed, and the Supreme Court granted Brumfield's petition for a writ of certiorari.[21] The Court held that the state habeas court's findings were unreasonable and that those findings were the basis of the court's denial of Brumfield's petition for an *Atkins* hearing.[22] Though the Court declined to address whether the state court had unreasonably applied federal due process law, it considered Brumfield's lack of opportunity for fact development in concluding that the state court's findings were unreasonable.[23]

This Comment suggests that petitioners with intellectual disabilities are uniquely at risk of cruel and unusual punishment due to the narrowness of the Court's reading of AEDPA and due to limited Supreme Court precedent effectuating *Atkins*. *Brumfield* contains no new general pronouncement of law, and its holding is fact-specific, relating primarily to Louisiana law and the specific evidence that Brumfield presented. Yet the decision permits argument that courts should consider the fact-development opportunities of petitioners, particularly those sentenced to death before *Atkins*. *Brumfield* will not likely create significant procedural protections for petitioners. It may, however, mark the beginning of a broader reading of a previously underdeveloped section of AEDPA: 28 U.S.C. § 2254(d)(2).

Part II of this Comment provides a brief history of federal habeas review and Supreme Court interpretations of AEDPA. Part III discusses the constitutional exemption of the intellectually disabled from capital punishment. Part IV sets forth the factual background of *Brumfield* and the rationale underlying the Court's opinion. Part V discusses Justice Thomas's dissent and analyzes the propriety of the Court's holding. Part VI concludes, focusing on the potential impact of *Brumfield* on future petitions for federal habeas review, particularly those following the denial of *Atkins* hearings.

II. THE FEDERAL WRIT OF HABEAS CORPUS AND AEDPA

The writ of habeas corpus was created to protect individuals from unjust or unconstitutional incarceration or execution.[24] It is

21. *Id.* at 2276.

22. *Id.*

23. *Id.* at 2281–82.

24. *See* Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., Preface at xli (2015) ("Prior to AEDPA taking effect in 1996, the federal courts provided a final safeguard for the relatively rare but compelling cases where the state courts had allowed a miscarriage of justice to occur."); Adelman, *supra* note 10, at 382.

known as the "Great Writ" and traces its history back to the Magna Carta.[25] The Framers considered habeas review to be so important that they included in the Constitution the Suspension Clause, which prevents the suspension of the writ except in narrow circumstances.[26] The ability of federal petitioners to challenge federal detention was codified shortly thereafter.[27]

With the Habeas Corpus Act of 1867, Congress extended to state prisoners the ability to petition for federal habeas review.[28] While the writ has an illustrious history, federal habeas review of state detention has been met with antipathy as a result of its perceived conflict with states' fundamental police power.[29] Since federal review of state detention became available, those concerned with the principles of federalism, state sovereignty, and finality of judgments have sought to limit the doctrine.[30] In response to this sentiment and the attacks on the World Trade Center and Oklahoma City, Congress passed and President Clinton signed AEDPA into law in 1996.[31]

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25. Adelman, *supra* note 10, at 380.

26. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or invasion the public Safety may require it."); *see generally* Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 992–99 (2012) (explaining that the scope of the Suspension Clause remains ambiguous).

27. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 446–47 (2007) (citing Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82).

28. *Id.* (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385). It was not until well into the 20th century that the Supreme Court interpreted the act to allow a state court conviction to be collaterally attacked. Felker v. Turpin, 518 U.S. 651, 663 (1996).

29. Adelman, *supra* note 10, at 382; *see* Harrington v. Richter, 562 U.S. 86, 103 (2011) ("Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.") (citations omitted) (quoting another source); John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 263 (2006) (citing Rose v. Mitchell, 443 U.S. 545, 585 (1979) (Powell, J., concurring in the judgment)); Timothy J. Foley, *The New Arbitrariness: Procedural Default of Federal Habeas Corpus Claims in Capital Cases*, 23 LOY. L.A. L. REV. 193, 193–94 (1989) ("The review of state detentions through a federal habeas proceeding is alternatively embraced as a vindication of essential liberties, sweeping aside procedural impediments and curing injustice, or criticized as an encroachment on state court integrity preventing finality and clogging federal dockets.").

30. Kovarsky, *supra* note 27, at 459 (discussing the history of Congress's sentiment toward the writ of habeas corpus); *see* Blume, *supra* note 29, at 263–64 (discussing the intense debate surrounding habeas review of state decisions review).

31. Charles Doyle, *Antiterrorism and Effective Death Penalty Act of 1996: A Summary*, CRS REPORT FOR CONGRESS (June 3, 1996), http://www.4uth.gov.ua/usa/english/laws/majorlaw/96-499.htm; *see* Williams v. Taylor (*Michael Williams*), 529 U.S. 420, 436 (2000). *But see* Kovarsky, *supra* note 27, at 447, 457–58, 471 (arguing that "AEDPA's legislative history lacks evidence sufficient to extract a generalized purpose to promote comity, finality, and federalism;"

Under AEDPA, a federal court may entertain the petition of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[32] Furthermore, § 2254(d) bars litigation of any claim already adjudicated on the merits in state court, subject to the exceptions of §§ 2254(d)(1) and (2).[33] Therefore, relitigation is permitted only if the state proceeding:

> (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.[34]

The Supreme Court has interpreted AEDPA to permit relief in limited circumstances.[35] According to the Court, "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."[36] Some argue that the Court's interpretation of the statute has been more restrictive than the statutory language requires and than Congress intended.[37] Supreme Court decisions have clarified and narrowed the opportunity for relief under § 2254(d)(1), while leaving § 2254(d)(2) relatively unaddressed.[38] A brief survey of this case law

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that these principles are conflicting; and that the habeas corpus clauses were opportunistically added to a statute on terrorism that "few legislators dared oppose").

32. 28 U.S.C. § 2254(a) (2012).

33. 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 98.

34. 28 U.S.C. § 2254(d).

35. *See* Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (explaining that § 2254(d) sets forth a "highly deferential standard for evaluating state court rulings, which demands that state-court decisions be given the benefit of the doubt") (quoting another source).

36. Burt v. Titlow, 134 S. Ct. 10, 13, 15 (2013) (holding that federal courts must apply a doubly deferential standard of review on habeas review of ineffective assistance of counsel claims (*i.e.*, deference to the attorney and deference to the state court)); Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011) (quoting another source) ("[Section] 2254(d)(1) . . . carries out AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance.").

37. *See* Wiseman, *supra* note 26, at 960; Kovarsky, *supra* note 27, at 446–47;; *see also* Krista A. Dolan, *The § 2254 Trinity: How the Supreme Court's Decisions in* Richter, Pinholster, *and* Greene *Have Interpreted Federal Review into Near Nonexistence*, 8 CRIM. L. BRIEF 49, 52 (2013) ("[T]he Supreme Court has interpreted Section 2254 so narrowly that it has nearly eliminated federal review."); Blume, *supra* note 29, at 260. *But see* Bright, *supra* note 2, at 8–9 (discussing the Court's restrictions on federal habeas relief even before AEDPA).

38. Christy H. DeSanctis, Brumfield v. Cain, GEO. WASH. L. REV. DOCKET (OCT. TERM 2014) (2015), http://www.gwlr.org/brumfield-v-cain/ (citing Nancy J. King et al., *Habeas Corpus*

highlights the restrictions on petitions and demonstrates why *Brumfield*, though its holding is factually specific, has the potential to impact future habeas litigation and may allow for more federal review than previously existed for petitioners claiming to be exempt from execution under *Atkins*.

In *Harrington v. Richter*,[39] the Supreme Court held that a state court's summary denial of a habeas petition is a decision on the merits, and is therefore subject to § 2254(d).[40] When a state petition has been summarily denied, the petitioner bears the burden of demonstrating that "there was no reasonable basis" for the state court's decision.[41] This puts a significant burden on the petitioner to discredit each possible explanation for the denial in order to obtain federal review.[42] With such a burden on petitioners, state courts that summarily deny petitions are likely to receive greater deference under § 2254(d) than those that explain their denial.[43]

In *Williams v. Taylor*,[44] the Supreme Court clarified its interpretation of the first exception to § 2254(d)'s bar on relitigation: Section 2254(d)(1). This section states that "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" can be reviewed by a federal court.[45] *Williams* held that "clearly established Federal law" includes only holdings, not dicta, from previous Supreme Court cases.[46] Thus, unless the Supreme Court has explicitly held on the issue that is before the state court, a federal court cannot review the state court decision under (d)(1).

Williams further held that the "contrary to" and "unreasonable application of" clauses of subsection (d)(1) are independent of one

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Litigation in United States District Courts: An Empirical Study, 2000–2006 (2006), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/21200).

39. 562 U.S. 86 (2011).

40. Harrington v. Richter, 562 U.S. 86, 91 (2011); *see also* Johnson v. Williams, 133 S. Ct. 1088, 1091–92 (2013) (extending this ruling to decisions in which the state court addresses some but not all of the petitioner's claims, including those under § 2254(d)(2)).

41. *Richter*, 562 U.S. at 98.

42. Dolan, *supra* note 37, at 53.

43. *See* Dolan, *supra* note 37, at 53 (citing *Richter*, 562 U.S. at 102–03 ("Without knowing how a state court applied the law, it seems impossible to determine whether that application is 'unreasonable.' Unless a federal court finds it *impossible* for a state court's application to be reasonable, *Richter* has made state court decisions per se reasonable.") (emphasis in original).

44. Williams v. Taylor (*Terry Williams*), 529 U.S. 362 (2000) (O'Connor, J., opinion of the Court as to Part II).

45. 28 U.S.C. § 2254(d) (2012).

46. *Terry Williams*, 529 U.S. at 412.

another.[47] Though a petitioner will often argue that both clauses permit federal review in his case, each clause has its own elements that the petitioner must satisfy.[48]

The Court explained that a state court decision is "contrary to" federal law, thereby permitting federal habeas review under the first clause of subsection (d)(1), in one of two scenarios: (1) "if the state court applies a rule that contradicts the governing law set forth in [a Supreme Court case]," or (2) "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [that] precedent."[49] The first scenario will only arise when the applied law is "substantially different from the relevant precedent of [the] Court."[50] Because case facts are almost always distinguishable and AEDPA requires significant deference to state court decisions, a petition based on the second scenario will rarely succeed.[51]

The "unreasonable application" clause of subsection (d)(1) applies when "a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced."[52] The Court has clarified that the state court's application of a Supreme Court holding must be erroneous, incorrect, and objectively unreasonable to permit relief under the unreasonable application clause.[53] Application that is merely erroneous and incorrect is insufficient to obtain review.[54] Additionally, the degree of specificity of the rule can impact whether its application was "unreasonable."[55] The Court observed that "[t]he

47. *Id.* at 405.

48. *See, e.g.*, *id.* at 367; Carey v. Musladin, 549 U.S. 70, 72 (2006).

49. *Terry Williams*, 529 U.S. at 405–06.

50. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)) (accepting "'diametrically different,' 'opposite in character or nature,' or 'mutually opposed'" as the appropriate definition of "contrary" for purposes of § 2254(d)(1)).

51. Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 754 (2010) ("If a habeas petitioner must demonstrate that the Supreme Court has 'clearly established' the law applicable to his particular factual circumstance, relief pursuant to AEDPA will not only be severely curtailed, but applied in an arbitrary way simply by the happenstance of the small number of cases granted direct review in the Supreme Court.").

52. Wiggins v. Smith, 539 U.S. 510, 520–21 (2003) (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)).

53. *Terry Williams*, 529 U.S. at 411.

54. *Id.*

55. Harrington v. Richter, 562 U.S. 86, 101 (2011).

more general the rule, the more leeway [state] courts have in reaching outcomes in case-by-case determinations."[56]

Overarching the § 2254(d)(1) analysis rests *Cullen v. Pinholster*,[57] in which the Supreme Court held that federal habeas "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[58] The Court focused on the "backward-looking language" of the statute and the great deference owed to state habeas decisions.[59] The Court concluded that "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court."[60] *Pinholster* therefore increases the importance of fact development in state court for sustaining a petitioner's federal claim.[61]

Having considered the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1), a petitioner is left with a third and final path past § 2254(d)'s bar on relitigation: § 2254(d)(2). This section permits federal review when the state court's decision was based on unreasonable findings of fact.[62] A claim seeking relief under § 2254(d)(2) involves an inquiry dependent on the evidence presented at the state habeas court.[63] The Court has held that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."[64] To be subject to federal review under (d)(2), the state court finding must be objectively unreasonable, such that reasonable minds could not disagree on the matter.[65] Subsection (d)(2) has remained poorly developed, as few Supreme Court cases

56. *Id.* (quoting another source).
57. 131 S. Ct. 1388 (2011).
58. *Id.* at 1398.
59. *Id.*
60. *Id.* at 1399. *But see id.* at 1413 (Sotomayor, J., dissenting) ("Under the Court's novel interpretation of § 2254(d)(1), however, federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1)'s threshold obstacle to federal habeas relief—even when it is clear that the petitioner would be entitled to relief in light of that evidence.").
61. Wiseman, *supra* note 26, at 958, 972–77.
62. 28 U.S.C. § 2254(d)(2) (2012).
63. *See id.*
64. Wood v. Allen, 558 U.S. 290, 301 (2010).
65. *Id.* (quoting Rice v. Collins, 546 U.S. 333, 341–42 (2006)) (quoting another source).

have been decided on subsection (d)(2) grounds and each decision is inherently fact-specific.[66]

No one denies the importance of the life and liberty rights at issue in habeas petitions. Yet AEDPA's strong deference to state court decisions has left federal judges sitting in habeas with little ability to overturn unconstitutional decisions and convictions they believe to be wrongful.[67] Judge Kozinski has called attention to the impact of AEDPA:

> Hidden in [AEDPA's] interstices was a provision that has pretty much shut out the federal courts from granting habeas relief in most cases, even when they believe that an egregious miscarriage of justice has occurred. We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal.[68]

Because of the Supreme Court's restrictive interpretation of subsection (d)(1), federal courts are vastly limited in their ability to rule on a constitutional issue on habeas review of a state decision if the Court has not already ruled on the same issue on direct review.[69] *Brumfield*'s potential impact on subsection (d)(2) will be addressed after a discussion on intellectual disability and capital punishment.

III. INTELLECTUAL DISABILITY AND THE DEATH PENALTY

The Court has long observed that the death penalty should be reserved for the most serious offenses and the most culpable individuals.[70] Initially, this policy protected "lunatics and idiots,"[71]

66. *See* DeSanctis, *supra* note 38; *see, e.g.*, Cash v. Maxwell, 132 S. Ct. 611, 611 (2012) (Sotomayor, J., concurring) (agreeing with the majority's denial of the acting warden's petition for writ of certiorari because the Ninth Circuit had set forth "an avalanche of evidence demonstrating that the state court's factual finding was unreasonable"); Miller-El v. Dretke, 545 U.S. 231 (2005); Wiggins v. Smith, 539 U.S. 510 (2003).

67. *See* Kozinski, *supra* note 24, Preface at xli.

68. *Id.*

69. *See* Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) ("In all events, it seems to me the case as presented to us here does call for a new rule, perhaps justified as much as a preventative measure as by the urgent needs of the situation. That rule should be explored in the court system, and then established in this Court before it can be grounds for relief in the procedural posture of this case.").

70. *See* Godfrey v. Georgia, 446 U.S. 420, 432–33 (1980) (concluding that the petitioner was ineligible for the death penalty because it "cannot be said [that his crimes] reflected a consciousness materially more 'depraved' than that of any person guilty of murder"); Lockett v.

while those with milder intellectual disabilities remained eligible for the death penalty.[72] *Atkins v. Virginia*[73] changed this. The Court considered "evolving standards of decency" in determining whether execution of those with intellectual disabilities constituted cruel and unusual punishment under the Eighth Amendment.[74] The Court reasoned that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," the intellectually disabled cannot act with the degree of moral culpability requisite to justify the ultimate retribution of capital punishment.[75] Furthermore, the diminished cognitive capacity of such individuals renders them less likely to be deterred by the threat of capital punishment.[76] The Court also reasoned that a defendant with intellectual disabilities faces a special danger of a harsher-than-warranted penalty because he is less likely to be capable of assisting in his own defense and is more likely to give a false confession.[77] Therefore, the Court held the death penalty to be an unconstitutional punishment for those with intellectual disabilities.[78]

The Court observed that "[t]o the extent there is a serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."[79] The Court did not define "intellectual disability" or establish procedures to evaluate capital defendants who claimed to be intellectually disabled.[80] Instead, the Court left these critical determinations to the states, with the recommendation that they consider the guidelines of the American Association of Intellectual and Developmental Disabilities

Ohio, 438 U.S. 586, 606 (1978) (holding Ohio death penalty statute unconstitutional for not permitting individualized determinations of culpability). *Compare* Coker v. Georgia, 433 U.S. 584, 598 (1977) (holding capital punishment to be "an excessive penalty for the rapist who, as such, does not take human life"), *with Coker*, 433 U.S. at 603 (Powell, J., dissenting) (reflecting that some rapists may be more deliberate and vicious than murderers).

71. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES **24–25).

72. *See id.* at 340.

73. 536 U.S. 304 (2002).

74. *Id.* at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

75. *Id.* at 306, 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.").

76. *Id.* at 320.

77. *Id.*

78. *Id.* at 321.

79. *Id.* at 317.

80. *Id.*

(AAIDD)[81] and the American Psychiatric Association (APA).[82] Accordingly, most states followed the Court's suggestion and now define intellectual disability with the following three elements: (1) intellectual functioning, (2) adaptive functioning, and (3) age of onset.[83] States, however, vary in terms of the criteria used to define each element of intellectual disability and the procedures to identify whether an individual meets those criteria.[84] This difference in definitions "creates disparity amongst the states whereby a defendant executed in one state could have been considered intellectually disabled and thus ineligible for execution in another."[85]

In *State v. Williams*,[86] the Louisiana Supreme Court set forth the state's definition of intellectual disability as well as its procedures for determining whether a defendant is intellectually disabled.[87] *Williams* applied the three elements identified in the AAIDD and APA guidelines to define intellectual disability as requiring (1) sub-average intellectual functioning, (2) significant impairment in adaptive functioning, and (3) manifestations of this disorder in the developmental stage.[88] *Williams* further directed lower courts to look to the procedures for pre-trial competency hearings for guidance.[89] Those procedures indicated that the petitioner must "raise a reasonable doubt" as to intellectual disability to be granted an *Atkins* hearing.[90]

Under *Williams*, an individual sentenced to death will not automatically be entitled to an *Atkins* hearing; such a hearing will be granted only if the individual defendant bears his burden of providing "objective factors that will put at issue the fact of mental

81. The AAIDD was previously known as the American Association of Mental Retardation. *About Us*, AAIDD, http://aaidd.org/about-aaidd (last visited Feb. 15, 2016).

82. *Atkins*, 536 U.S. at 308 n.3, 317 n.22.

83. Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215, 226–27 (2008); *see Atkins*, 536 U.S. at 308 n.3; JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 108 (2009).

84. Raffensperger, *supra* note 9, at 743–47; *see, e.g.*, LA. CODE CRIM. PROC. ANN. art. 905.5.1(C) (2012); CAL. PENAL CODE § 1376(b) (West 2013).

85. Cheung, *supra* note 9, at 319.

86. 2001-1650 (La. 11/1/02); 831 So. 2d 835.

87. *Id.* at 858–59; LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2012). Louisiana codified the criteria set forth in *State v. Williams*, though the *Brumfield* parties agree that *Williams* continues to provide the procedure for determining intellectual disability in Louisiana. Brumfield v. Cain, 135 S. Ct. 2269, 2284 n.2 (2015).

88. *Williams*, 831 So. 2d at 852–54.

89. *Id.* at 858 n.33.

90. *Id.*

retardation."[91] While the court set forth the State's evidence that Williams was "street smart" and that the defendant's own expert witness said that Williams was not intellectually disabled, the court did not consider this evidence in reaching its decision regarding whether Williams was entitled to a hearing.[92] It only considered whether Williams' evidence met his burden.[93]

Though the U.S. Supreme Court did not explicitly indicate the retroactive nature of *Atkins*, the Louisiana Supreme Court observed that this bar on execution must provide individuals already sentenced an opportunity to seek habeas relief on the ground that they are intellectually disabled.[94] Yet courts and scholars have expressed concern for those convicted prior to *Atkins*, given that those with intellectual disabilities may have previously sought to hide such a condition.[95] In *Atkins*, the Court contemplated the "two-edged sword" faced by defendants who presented evidence of intellectual disability for mitigation purposes: such evidence could cause the jury to view the defendant as less culpable, though it could also cause the jury to find the aggravating circumstance of future dangerousness.[96] With this risk, there was no guarantee that an intellectually disabled petitioner would have introduced such evidence into the record prior to *Atkins*.[97]

In addition, the federal Supreme Court has been slow to identify safeguards necessary to effectuate *Atkins*' bar on execution of the intellectually disabled. The Court has rendered only one decision since *Atkins* that clarifies the definition of intellectual disability. In *Hall v. Florida*,[98] the Court held that a state law that precluded capital defendants with IQ scores exceeding 70 from being defined as intellectual disabled was unconstitutional.[99] The Court reasoned

91. *Id.* at 857. In California, by comparison, a defendant needs a sworn affidavit from an expert identifying the defendant as suffering from an intellectual disability in order to obtain a hearing on the matter. CAL. PENAL CODE § 1376(b)(1) (West 2013).

92. *Williams*, 831 So. 2d at 855, 857.

93. *Id.* at 857.

94. *Id.* at 851–52 n.21 (citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

95. *Id.* at 856 n.31.

96. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002); Michael L. Perlin, *"Life in Mirrors, Death Disappears": Giving Life to* Atkins, 33 N.M. L. REV. 315, 338–39 (2003).

97. *See Williams*, 831 So. 2d at 856–57 ("*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.").

98. 134 S. Ct. 1986 (2014).

99. *Id.* at 1990.

that the law created "an unacceptable risk that persons with intellectual disability will be executed."[100] The Court reiterated: "No legitimate penological purpose is served by executing a person with intellectual disability;" the deterrent and retributive purposes of the death penalty are ill-served by executing those with diminished logic, impulse control, and moral culpability.[101] But the Court remained silent regarding the procedures required to identify a person as intellectually disabled.[102]

AEDPA poses a special challenge to fully implementing *Atkins*. Since the Court left to the states the tasks of defining intellectual disability and developing procedures for determining it, *Atkins* provides a hollow holding for federal courts to entertain an *Atkins* petition under the strictures of § 2254(d)(1) precedent. Because the Court proscribed neither a definition of "intellectual disability" nor the procedures for courts to follow, there is no "clearly established Federal law" to permit federal habeas review under (d)(1).[103] When sitting in habeas, federal courts thus have little ability to review the constitutionality of state implementation of *Atkins*.[104] This procedural limitation poses significant problems for those sentenced before *Atkins* in states with more stringent and potentially unconstitutional statutes.[105] Given this barrier to relief under (d)(1), petitioners claiming intellectual disability may then look to (d)(2) for procedural safeguards and, after *Brumfield*, may find more relief.

IV. *BRUMFIELD V. CAIN*

Brumfield v. Cain brought a new challenge to the Court: whether a state habeas court's denial of a death row inmate's petition for habeas review—after the court had denied the petitioner the opportunity to develop the claim and denied him an *Atkins* hearing—

100. *Id.*

101. *Id.* at 1992–93 (citing *Atkins*, 536 U.S. at 317, 320).

102. *See* Perlin, *supra* note 96, at 315 ("*Atkins* gives us a blueprint with which to work, but we must remain vigilant to make sure that it does not become merely a 'paper victory.'").

103. Nathaniel Koslof, *Insurmountable Hill: How Undue AEDPA Deference Has Undermined the* Atkins *Ban on Executing the Intellectually Disabled*, 54 B.C. L. REV. E-SUPPLEMENT 189, 193 (2013); *see* discussion *supra* Part II.A.

104. *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 230 (2008) ("As long as the state courts do not stray far from Supreme Court precedent, AEDPA prevents the federal courts from interfering.").

105. Koslof, *supra* note 103, at 194; *see, e.g.*, Hill v. Humphrey, 662 F.3d 1335, 1360 (11th Cir. 2011) (upholding Georgia's intellectual disability standard, which exempts from the death penalty only those who prove intellectual disability beyond a reasonable doubt).

was subject to federal review as the result of an unreasonable factual determination under § 2254(d)(2) or whether this decision was contrary to or involved an unreasonable application of clearly established law under (d)(1).[106] The Court concluded that the state habeas court's decision was the result of unreasonable factual determinations, so federal habeas review was proper under (d)(2).[107] It therefore vacated the Fifth Circuit's decision and remanded the case for further proceedings.[108]

A. Factual and Procedural History

This case arose from the murder of Baton Rouge police officer Corporal Betty Smothers.[109] In 1993, Smothers had a second job as a security officer at a grocery store.[110] At the end of each day, Smothers escorted the store's assistant manager Kimen Lee to a local bank to make the grocery store's deposit.[111] On one such occasion, Kevan Brumfield and an accomplice attacked Smothers and Lee.[112] Brumfield shot Smothers five times in the forearm, chest, and head.[113] Lee took control of the police cruiser and drove to a nearby convenience store, where she called for help.[114] Corporal Smothers died from her injuries.[115]

A jury convicted Brumfield of first-degree murder and sentenced him to death.[116] Brumfield's sentence was affirmed on direct appeal, and in 2000 he filed a petition for state habeas review.[117] Following Louisiana's implementation of *Atkins* in *State v. Williams*,[118] Brumfield amended his petition to include a request for an evidentiary hearing to demonstrate intellectual disability, setting forth all relevant mitigation evidence gathered in his sentencing hearing.[119] Brumfield also requested "all the resources necessary to the proper presentation of his case," contending that it would be

106. Brumfield v. Cain, 135 S. Ct. 2269, 2276 (2015).
107. *Id.* at 2273.
108. *Id.* at 2283.
109. *Id.* at 2273.
110. *Id.* at 2284 (Thomas, J., dissenting).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 2288.
118. 2001-1650 (La. 11/1/02); 831 So. 2d 835; *see* discussion *supra* Part III.
119. *Brumfield*, 135 S. Ct. at 2274 (majority opinion).

premature for the court to deny his petition before he had the opportunity to retain an expert.[120]

The state habeas court denied Brumfield's funding requests, denied his requests for time to obtain a pro bono expert, and denied him a hearing.[121] Brumfield had no choice but to rest his *Atkins* claim on mitigation evidence presented at his criminal trial, before intellectual disability was at issue.[122] The court considered the petition and the mitigation evidence: transcripts of testimony of Dr. Bolter, a clinical neuropsychologist who had performed tests on Brumfield, and testimony of a social worker who had gathered Brumfield's history by consulting records and interviewing family members and teachers.[123] In dismissing Brumfield's petition, the court concluded:

> Dr. Bolter in particular found [Brumfield] had an IQ of over—or 75. Dr. Jordan[124] 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 [sic], 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 that hearing based on all those things that I just set out.[125]

The Louisiana Supreme Court summarily denied Brumfield's application for a supervisory writ, and in November 2004 Brumfield filed with the U.S. District Court for the Middle District of Louisiana a petition for federal habeas review, grounded in part on his request for an *Atkins* hearing.[126]

Once in federal court, Brumfield received funds to develop his *Atkins* claim for the first time.[127] The district court held that the state

120. *Id.* at 2275.
121. *Id.*
122. *Id.*
123. *Id.*
124. Dr. Jordan did not testify at Brumfield's trial, and it is disputed whether his statements were made part of the record. *See id.* at 2278; *id.* at 2289 (Thomas, J. dissenting).
125. *Id.* at 2275 (majority opinion).
126. *Id.*
127. Brumfield v. Cain, 854 F. Supp. 2d 366, 372 (M.D. La. 2012). On the recommendation of the magistrate, the district court held an evidentiary hearing, the propriety of which the State challenged. *Id.* Upon reviewing the issue, the district court found that the hearing was proper. *Id.* at 384.

habeas court's denial of the opportunity to obtain an expert was an unreasonable application of clearly established federal due process law.[128] The court lamented that "the state court denied Brumfield even an *opportunity* to develop his *prima facie* case."[129] This satisfied the court that 28 U.S.C. § 2254(d)(1) should allow federal review of the merits of Brumfield's claim.[130] The court further held that the state habeas court's decision was based on findings that were unreasonable because, among other reasons, Brumfield was forced to rely on information gathered before intellectual disability was at issue.[131] The court held that this satisfied § 2254(d)(2).[132]

The State appealed, arguing that the district court had not appropriately deferred to the state habeas court.[133] The Fifth Circuit agreed, reversing the district court's ruling and holding that Brumfield's federal habeas petition was barred because it failed to satisfy either § 2254(d)(1) or § 2254(d)(2).[134] The circuit court rejected the district court's § 2254(d)(1) holding because no Supreme Court precedent required a state court to grant an *Atkins* petitioner funds to make a threshold showing of intellectual disability.[135] The circuit court also rejected the district court's § 2254(d)(2) holding, explaining that the state habeas court had considered and rejected the evidence of intellectual and adaptive impairment.[136] The Fifth Circuit, therefore, found that Brumfield did not successfully clear § 2254(d)'s bar on relitigation and must be denied habeas relief.[137]

The Supreme Court granted Brumfield's petition for a writ of certiorari as to both §§ 2254(d)(1) and (d)(2).[138]

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128. *Id.* at 376–77.

129. *Id.* at 377 (emphasis in original).

130. *Id.* at 378.

131. *Id.* at 380. The district court also considered the following in concluding that the state court's findings were unreasonable: (1) the state court had notice of the inadequacy of Brumfield's opportunity for fact-development; (2) the decision improperly rested on the subjective adaptive skills prong; (3) rendering findings of adaptive skill was unreasonable, given that the pre-*Atkins* evidence did not dovetail with the Louisiana's factors for intellectual disability; and (4) it was improper to collapse a competency inquiry into an intellectual disability inquiry. *Id.* at 380–83.

132. *Id.* at 383.

133. Brumfield v. Cain, 744 F.3d 918, 922 (5th Cir. 2014).

134. *Id.* at 927.

135. *Id.* at 925–26 (describing the district court's holding as "an unwarranted extension of Supreme Court jurisprudence").

136. *Id.* at 926.

137. *Id.*

138. Brumfield v. Cain, 135 S. Ct. 752 (2014) (granting writ of certiorari).

B. The Supreme Court Opinion

The Supreme Court held that the state habeas court's denial of Brumfield's *Atkins* claim without affording him an evidentiary hearing or granting him opportunity to secure expert evidence "was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[139] Because the Court held for Brumfield on his § 2254(d)(2) claim, it declined to address whether the state habeas court's refusal to grant him the opportunity to develop his threshold showing was "contrary to, or an unreasonable application of, clearly established law" under § 2254(d)(1).[140]

The Court focused its analysis on the two factual determinations underlying the state habeas court's decision to deny Brumfield an *Atkins* hearing: (1) "that Brumfield's IQ score was inconsistent with a diagnosis of intellectual disability," and (2) "that he had presented no evidence of adaptive impairment."[141] The Court did "not question the propriety of the legal standard the [state] court applied, and presume[d] that a rule according an evidentiary hearing only to those capital defendants who raise a 'reasonable doubt' as to their intellectual disability [was] consistent with [its] decision in *Atkins*."[142] The Court concluded that, given the record before the state habeas court, both of these material factual determinations were unreasonable.[143]

As the Court observed, Brumfield had presented to the state court evidence suggesting, among other things, that he had registered an IQ score of 75, had a fourth-grade reading level, had been prescribed numerous medications and treated at psychiatric hospitals as a child, had been identified as having some form of learning disability, and had been placed in special education classes.[144]

First, the Court considered the state habeas court's finding that Brumfield's IQ score of approximately 75, "necessarily precluded any possibility that he possessed subaverage intelligence . . . ."[145] The Court looked to Louisiana state precedent to inform its

139. Brumfield v. Cain, 135 S. Ct. 2269, 2273 (2015) (quoting 28 U.S.C. § 2254(d)(2) (2012)).

140. *Id.* at 2288–89 (quoting 28 U.S.C. § 2254(d)(1)) (quoting another source).

141. *Id.* at 2276–77.

142. *Id.* at 2276.

143. *Id.* at 2277.

144. *Id.* at 2275.

145. *Id.* at 2277.

determination that an IQ of 75 "was entirely consistent with intellectual disability," and that the state habeas court's conclusion to the contrary was unreasonable.[146] Furthermore, the Court disagreed with the suggestion that evidence that psychologist Dr. Brian Jordan, who did not test Brumfield's IQ, thought Brumfield's IQ may be "a little higher" than 75, was sufficient "to preclude the possibility that Brumfield possesses subaverage intelligence."[147]

Next, the Court considered the state habeas court's conclusion that "the record failed to raise any question as to Brumfield's 'impairment . . . in adaptive skills.'"[148] Louisiana statutory law explains that adaptive impairment exists if a person suffers "substantial functional limitations in three or more of the following areas of major life activity:"[149]

i. Self-care,
ii. Understanding and use of language,
iii. Learning,
iv. Mobility,
v. Self-direction, and
vi. Capacity for independent living.[150]

The Court considered the evidence of Brumfield's weak reading skills, placement in special education classes, and suspicion that he had a learning disability as indicative of deficiency in "understanding and use of language" and "learning," two of the six areas of life activity that Louisiana law considers.[151] For the third required impairment, the majority relied on evidence of Brumfield's low birth weight,[152] commitment to mental health facilities at a young age, and administration of antipsychotic and sedative drugs.[153] The Court concluded that this evidence "indicate[d] that Brumfield may well

146. *Id.*
147. *Id.* at 2272.
148. *Id.* (citations omitted).
149. *Id.* at 2279 (citing State v. Williams, 2001-1650 (La. 11/1/02); 831 So. 2d 835, which set forth three sets of criteria to determine adaptive functioning, and applying the set of criteria "most favorable to the State").
150. *Id.*
151. *Id.* (quoting another source).
152. There was expert testimony that low birth weight can place a child at risk of "some form of potential neurological trauma . . . ." *Id.* at 2280.
153. *Id.*

have had significant deficits in at least one of the remaining four areas."[154]

The Court further observed that Brumfield did not bear the burden of proving that he was intellectually disabled or that he was likely to prevail on his claim of intellectual disability to be entitled to a hearing.[155] "Rather, [under Louisiana law,] Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing."[156] The Court observed that "none of the countervailing evidence could be said to foreclose all reasonable doubt."[157] Considering the disincentives for petitioners to introduce evidence of intellectual disability prior to *Atkins*,[158] the Court concluded: "[T]he state trial court should have taken into account that the evidence before it was sought and introduced at a time when Brumfield's intellectual disability was not at issue. The court's failure to do so resulted in an unreasonable determination of the facts."[159]

C. The Dissent and the (d)(1), (d)(2) Debate

Justice Thomas wrote the primary dissent, in which he contended that the majority misrepresented its decision as being under subsection (d)(2) when the majority actually took issue with the legal conclusions of the state court; thus, according to the dissent, the majority's decision should have been resolved under (d)(1).[160] The dissent reasoned that rather than disagreeing with the state court's factual determinations, "the majority disagrees with the state court's *conclusion* that Brumfield had not made a sufficient threshold showing of mental retardation to be entitled to an evidentiary hearing

154. *See id.* (referencing the four remaining areas considered in determining impairment in adaptive skills: self-care, mobility, self-direction, and capacity for independent living).

155. *Id.* at 2281.

156. *Id.* (quoting State v. Williams, 2001-1650 (La. 11/1/02); 831 So. 2d 835, 858).

157. The Court identified two specific pieces of evidence that indicated that Brumfield lacked disability. First, "Dr. Bolter stated that Brumfield 'appears to be normal from a neurocognitive perspective,' with a 'normal capacity to learn and acquire information when given the opportunity for repetition,' and 'problem solving and reasoning skills' that were 'adequate.'" *Id.* at 2280–81 (citations omitted). Second, "the underlying facts of Brumfield's crime might arguably provide reason to think that Brumfield possessed certain adaptive skills, as the murder for which he was convicted required a degree of advanced planning and involved the acquisition of a car and guns." *Id.* at 2281.

158. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

159. *Brumfield*, 135 S. Ct. at 2281–82 (discussing the two-edged nature of intellectual disability evidence prior to *Atkins*).

160. *Id.* at 2290 (Thomas, J., dissenting).

on his claim."[161] The dissent pointed to the majority's references to state law as evidence of the majority's improper approach.[162]

But the dissent conceded that intellectual disability is a factual issue,[163] and "that Brumfield's IQ score [and] adaptive skills . . . are facts."[164] In contrast, the dissent argued, the question of whether Brumfield should have been granted an *Atkins* hearing "requires the application of law to those facts" because *Atkins* protects only a subset of those with intellectual disabilities, as defined by the states, as "legally beyond a State's power to execute."[165]

Contrary to the assertions of the dissent, the majority correctly cast its decision under subsection (d)(2) for three reasons: (1) state law had to be considered to determine whether the state habeas court's findings were reasonable; (2) by considering improper evidence, the state habeas court's findings were unreasonable; and (3) by ignoring the fact that Brumfield's evidence was developed before *Atkins*, the state court's findings were also unreasonable.

First, a court may look to state law for more reasons than just to determine whether the state court misapplied the law.[166] Because *Atkins* left the definition of intellectual disability and the procedures by which to identify it to the states, state law must be consulted to analyze a petition under (d)(2), *i.e.*, to determine (a) whether the findings were reasonable based on the state's criteria and procedures and (b) whether the state court's unreasonable findings were the basis of its decision.[167]

Thus, contrary to the dissent's assertions, the Court must look to state law to analyze the undisputedly factual inquiries of adaptive functioning, intelligence, and age of onset because the criteria for

161. *Id.* at 2291 (emphasis in original) (arguing that the majority actually agreed that the state habeas court's factual findings were supported).

162. *Id.* at 2290–91.

163. *Id.* at 2291 n.7.

164. *Id.* at 2291.

165. *Id.* at 2291 & n.7.

166. *See id.* at 2277 n.3 (majority opinion) ("[W]e subject these determinations to review under § 2254(d)(2) instead of § 2254(d)(1) because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting Brumfield's *Atkins* claim, but with the underlying factual conclusions the court reached when it determined that the record evidence was inconsistent with intellectual disability.").

167. *See id.* (looking "to Louisiana case law only because it provides the framework in which these factual determinations were made, and makes clear that the state court's decision rejecting Brumfield's *Atkins* claim was premised on those determinations"); Transcript of Oral Argument at 25:19–21, 30:12–16, Brumfield v. Cain, 135 S. Ct. 752 (2014) (No. 13-1433); *cf.* Hall v. Florida, 134 S. Ct. 1986, 1993 (2014) (questioning whether Florida's IQ "cutoff rule" defined intellectual disability in such a way that implemented *Atkins*, and holding that it did not).

finding each fact is based in state law.[168] For example, it was necessary for the Court to look to the various criteria under adaptive functioning to determine whether the state court's finding that Brumfield had not presented evidence of low adaptive functioning was unreasonable. Even the Fifth Circuit, which ruled against Brumfield and was reversed by the Court, noted that "we examine Louisiana law to determine whether Brumfield established the prerequisites of an *Atkins* claim," *i.e.*, whether he had raised the issue of intellectual disability.[169]

Moreover, the dissent's argument ignored the statutory language that § 2254(d)(2) barred relief "unless the adjudication of the claim . . . *resulted* in a decision that was *based on* an unreasonable determination of the facts."[170] Without looking to Louisiana state law, the Court would be unable to discern whether the findings were unreasonable, let alone whether they were the basis of the state court's decision to deny Brumfield's petition, as required to satisfy subsection (d)(2).

Next, the dissent argued that in considering whether (d)(2) bars relief, the majority failed to consider the evidence supporting the state habeas court's findings.[171] The dissent identified the following evidence from the record indicating a possibility that Brumfield did not have an intellectual disability: one expert described Brumfield's speech and writing as "intelligible" and "normal;" Brumfield lived independently, had a pregnant girlfriend, and chose a life of crime after maintaining a job for three months because "his earnings were better."[172] Based on this evidence, the dissent concluded that the state court was reasonable in finding that Brumfield's showing did not warrant a hearing and that he lacked intellectual disability.[173]

A superficial consideration may lead one to conclude that the dissent's reasoning is correct in light of the deference federal courts should give state court decisions under AEDPA; the standard under § 2254(d)(2) is not whether the state court's findings are incorrect but whether they are objectively unreasonable.[174] Because evidence existed indicating that Brumfield lacked adaptive impairment, and

168. *See Brumfield*, 135 S. Ct. at 2291 n.7.
169. Brumfield v. Cain, 744 F.3d 918, 924 (5th Cir. 2014).
170. 28 U.S.C. § 2254(d)(2) (2012) (emphasis added).
171. *Brumfield*, 135 S. Ct. at 2290 (Thomas, J., dissenting).
172. *Id.*
173. *Id.*
174. Wood v. Allen, 558 U.S. 290, 301 (2010).

that his intellectual functioning was borderline, AEDPA deference would seem to require the Court to deny Brumfield's request for review.

Yet, under Louisiana law, if a petitioner provides "objective factors that will put at issue the fact of mental retardation," he must be granted an *Atkins* hearing.[175] To put "at issue" means to create dispute.[176] Because Brumfield was required to raise only a factual dispute to be entitled to a hearing, the state court was unreasonable to consider the State's evidence and render findings of inconsistency with intellectual disability while disregarding the petitioner's evidence. The majority correctly considered all of Brumfield's evidence that supported a finding of intellectual disability.[177]

This follows from the Louisiana Supreme Court's decision in *Williams*. In that case, the court concluded that Williams had presented sufficient evidence to be entitled to an *Atkins* hearing.[178] In rendering its decision, the court did not consider the State's evidence that Williams was "street smart" or that Williams's own expert testified that Williams did not have an intellectual disability.[179] Rather, to determine whether Williams was entitled to a hearing, the court considered only the evidence supporting a finding of intellectual and adaptive functioning, and thus supported a finding of intellectual disability.[180]

Contrary to the Louisiana Supreme Court's analysis in *Williams*, the state habeas court failed to make findings based on the evidence Brumfield put forward and instead focused almost exclusively on evidence put forward by the State that weakened Brumfield's position. The evidence that Brumfield presented put the facts of intellectual and adaptive functioning at issue, and the state court's finding of inconsistency with intellectual disability was unreasonable without a hearing.

Finally, the state court's finding that Brumfield failed to set forth sufficient facts for a hearing was unreasonable because Brumfield's evidence was gathered before *Atkins*, and he was denied the opportunity to develop those facts after intellectual disability was

175. State v. Williams, 2001-1650 (La. 11/1/02); 831 So. 2d 835, 857.

176. *See* BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "at issue" as "[t]aking opposite sides; under dispute; in question . . . .").

177. *Brumfield*, 135 S. Ct. at 2279–80 (majority opinion).

178. *Williams*, 831 So. 2d at 857.

179. *Id.* at 855.

180. *Id.* at 857.

an issue.[181] The court was on notice of Brumfield's multiple requests for funding or time to hire an expert to help develop his evidence, and his lack of opportunity to develop those facts after *Atkins*' new rule forbidding execution of the intellectually disabled.[182] While this is certainly a due process issue, and thus could have been addressed under (d)(1),[183] this consideration goes to the reasonableness of the court's findings as well.[184] A lack of basis for factual findings, and a denial of the petitioner's request for opportunity to develop such a basis, arguably makes any finding derived from such inadequate evidence unreasonable.[185] The Court did not hold on this issue though it is certainly contemplated in conjunction with the holding.[186]

In sum, the basis of the state habeas court's findings was flawed, which properly prompted a holding under § 2254(d)(2), rather than (d)(1). Based on the evidence that Brumfield presented, the state habeas court was unreasonable to find that Brumfield's IQ score was too high for intellectual impairment and that his activities demonstrated that he lacked adaptive impairment. Rendering such a finding ignored the petitioner's evidence and his lack of opportunity to develop his case while giving weight to State evidence, despite the fact that State evidence should not have even been considered. Because the Court considered only the issues that implicate the reasonableness of the state court's findings and whether those unreasonable findings were the basis of the court's denial, rather than whether the state court's decision was contrary to or an unreasonable application of federal law, *Brumfield* was appropriately decided under subsection (d)(2).

181. *See* Brumfield v. Cain, 854 F. Supp. 2d 366, 372 (M.D. La. 2012).

182. *See id.* at 378 ("[T]his 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, 477 U.S. 399 (1986)] (and later confirmed by [Panetti v. Quarterman, 551 U.S. 930 (2007)]) at the time the state habeas court rendered its decision, in violation of § 2254(d)(1).").

183. Such a claim would likely have been barred by (d)(1), given the lack of Supreme Court decisions holding that denying an *Atkins* petitioner a hearing—let alone funding or opportunity to obtain funding—violates his due process rights. *See* Brumfield v. Cain, 135 S. Ct. 2269, 2294–96 (2015) (Thomas, J., dissenting); *supra* discussion Part II.A.

184. Wiseman, *supra* note 26, at 984–85.

185. *See Brumfield*, 854 F. Supp. 2d at 380.

186. *See Brumfield*, 135 S. Ct. at 2273 (majority opinion).

V. *BRUMFIELD*'S IMPACT

By reaching its decision under subsection (d)(2), the Court opens the door to new argument under this subsection, while leaving (d)(1) constrained by prior holdings. During oral argument, the Justices repeatedly tried to ascertain the impact that ruling on the (d)(2) issue would have.[187] As the petitioner argued, "[T]his Court need do nothing more than rule that what this [state] judge did in this proceeding on this pre-*Atkins* record was unreasonable."[188] While the Court's holding was based on an application of Louisiana law and the finding that Brumfield had presented sufficient evidence to warrant a hearing, it has the potential to impact future *Atkins* petitioners in two ways: *Brumfield* requires (1) some consideration of the petitioner's opportunity to develop his claim and (2) some consideration of the weight of the State's evidence.

By concluding that Brumfield had set forth sufficient evidence to be granted a hearing under Louisiana law, the Court limited its holding. After all, *Brumfield* is unique because the petitioner already had expert testimony regarding his intellectual and adaptive functioning from his sentencing hearing that supported his petition and was sufficient to require an *Atkins* hearing. As discussed in *Williams*, defense counsel would have presented this evidence at trial or sentencing only if he thought it would operate in mitigation of the defendant's culpability. It will not always be the case that an intellectually disabled habeas petitioner sentenced prior to *Atkins* would have presented any evidence of intellectual disability.[189]

The Court did not end its discussion there. In holding that Brumfield set forth sufficient evidence for a hearing, the Court considered that Brumfield had not had the opportunity to develop the

187. Transcript of Oral Argument at 20:23–21:2, 30:12–16, Brumfield v. Cain, 135 S. Ct. 752 (2014) (No. 13-1433) (Chief Justice Roberts: "I just need to know whether it is simply whether the facts in your particular case lead to a particular result, or if there is some more general legal rule that you're arguing for"); *id.* at 28:4–5 (Justice Alito asking whether there is a "cross-cutting legal issue" under the petitioner's (d)(2) claim); *id.* at 19:20–21, 20:3–5 (the Chief Justice twice more asking what the "broader significance of the question" is); *see also* Robert Barnes, *In Death Row Case, Supreme Court Looks for Narrow Ruling*, WASH. POST (Mar. 30, 2015), http://www.washingtonpost.com/politics/courts_law/in-death-row-case-supreme-court-looks-for-narrow-ruling/2015/03/30/9c17715e-d705-11e4-ba28-f2a685dc7f89_story.html.

188. Transcript of Oral Argument at 21:4–7, Brumfield v. Cain, 135 S. Ct. 752 (2014) (No. 13-1433); *cf. id.* at 8:1–2 (the petitioner's counsel stating that he is "not asking for a bright-line rule" of when a hearing would be proper under (d)(2)).

189. *Brumfield*, 135 S. Ct. at 2281–82.

evidence supporting his claim before *Atkins*.[190] The Court treated this as a factor in determining whether the state court's finding was reasonable under (d)(2).[191] Therefore, *Brumfield* strengthens the argument that a state habeas court must consider the fact-development opportunities of the petitioner prior to denying him a hearing; if it does not, a federal court may grant review under (d)(2).[192] While the Supreme Court did not suggest the requirements for such fact-finding opportunity,[193] and it is unclear how the Court would have held if Brumfield had not presented sufficient evidence to meet his burden, this new factor in determining whether findings of fact are unreasonable could prove to help more *Atkins* petitioners obtain resources to develop their claims.

On the other hand, the Court's consideration that the State did not present sufficient "countervailing evidence . . . to foreclose all reasonable doubt" of intellectual disability[194] implies a restriction on access to hearings beyond what is required by Louisiana law. It leaves room for argument that petitioners may be denied hearings even if they put forward evidence of intellectual disability if the State puts forward sufficient countervailing evidence to foreclose all possibility of intellectual disability.[195] While this is contrary to Louisiana law, which requires consideration of only the petitioner's evidence,[196] it appears to be the antecedent to the low burden on the petitioner to raise a mere reasonable doubt of intellectual disability to warrant an *Atkins* hearing. For example, here, if State evidence had foreclosed all *possible* doubt, Brumfield could not have raised a

190. *Id.*

191. DeSanctis, *supra* note 38 ("[The Court] folded the [funding] issue into its (d)(2) analysis, thus treating it as another factor in determining unreasonableness of the state court's factual determination, as opposed to analyzing it as an alleged violation of clearly established federal law under (d)(1).").

192. *See id.*; Wiseman, *supra* note 26, at 984–85 (citing Taylor v. Maddox, 366 F.3d 992, 1000–01 (9th Cir. 2004)) (explaining that (d)(2) may provide further procedural safeguards due to the threat of four procedural flaws described by Judge Kozinski: (1) when state courts fail to make a finding of fact, (2) when courts mistakenly make factual findings under the wrong legal standard, (3) when "the fact-finding process itself is defective," and (4) when courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim").

193. *See* Hall v. Florida, 134 S. Ct. 1986, 2001 (2013) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.").

194. *See Brumfield*, 135 S. Ct. at 2281.

195. *See id.* ("[I]n light of the evidence of Brumfield's deficiencies, none of the countervailing evidence could be said to foreclose all reasonable doubt.").

196. State v. Williams, 2001-1650 (La. 11/1/02); 831 So. 2d 835, 857.

reasonable doubt, and thus a hearing would not have been warranted under Louisiana law. Thus, such consideration of countervailing evidence should not impact petitioners' access to federal courts.

While the full scope of *Brumfield*'s impact remains unclear, *Brumfield* seems to require, to a certain extent, state courts to consider the circumstances of a petitioner in conjunction with the evidence he puts forth supporting his petition prior to denying habeas review. On balance, *Brumfield* will likely improve the success of petitions under subsection (d)(2) when the petitioner had no opportunity to develop facts at the state court prior to the federal habeas case. This decision will be particularly important for those petitioners sentenced to death before *Atkins*. If a petitioner now claims to have an intellectual disability, a state habeas court should be wary of denying the petitioner an opportunity to develop his facts, and a federal court should consider the fact-finding opportunities of the petitioner.

VI. CONCLUSION

Consistent with this Comment's thesis, as of February 2016, petitioners remain optimistic that *Brumfield* stands for greater procedural and even substantive protections,[197] while federal courts have generally constrained their interpretations of *Brumfield* to the facts of the case.[198] Some courts have rejected petitioners' attempts to invoke *Brumfield*, on the grounds that the petitioner was afforded an evidentiary hearing and *Brumfield* is only relevant when the

197. *See, e.g.*, Commonwealth v. Vandivner, 130 A.3d 676, 683 n.9 (Pa. 2015) (rejecting as inaccurate the petitioner's contention that *Brumfield* "discussed the requirements of a successful claim of intellectual disability under *Atkins* . . . , and, in particular, the age of onset"); Petitioner's Informal Reply in Support of *Atkins* Petition Execution at 9–10, *In re* Alfredo Prieto, No. S227039 (Cal. Sept. 16, 2015) (arguing that the Supreme Court's decision in *Brumfield v. Cain* constitutes a change of law, and that "*Brumfield* shows that [the California Supreme Court's] failure to grant [the petitioner] an evidentiary hearing due to a technicality of failing to cite California law was unreasonable"); Petitioner's Reply Brief on the Merits of His Remaining Claims at 3:12–14, Kipp v. Woodford, No. 2:99-cv-04973-AB (C.D. Cal. July 17, 2015) (arguing that after *Brumfield* a state court "cannot reasonably deny claims without giving the petitioner 'the opportunity to develop the record for purpose of proving' his claims").

198. *See, e.g.*, Gray v. Zook, 806 F.3d 783, 797 (4th Cir. 2015) (rejecting the petitioner's contention that, for purposes of his ineffective assistance of counsel claim, *Brumfield* precluded the court from discounting of his evidence when contradicted by the State's evidence); Butler v. Stephens, 625 F. App'x 641, 653 (5th Cir. 2015) (rejecting the petitioner's interpretation of *Brumfield* as disapproving of the state's substantive standards for defining intellectual disability).

petitioner was denied such a hearing.[199] In *Prieto v. Zook*,[200] the Fourth Circuit set forth its narrow interpretation of *Brumfield*:

> The Supreme Court limited its holding in *Brumfield* to an application of Louisiana law to the evidence presented in that case. The Court did not purport to alter its prior teachings about intellectual disability, procedural default, or the actual innocence exception. Rather, the Court simply held that the state habeas court's refusal to grant Brumfield an evidentiary hearing on his intellectual disability claim, as permitted by Louisiana law, was based on 'an unreasonable determination of the facts' within the meaning of 28 U.S.C. § 2254(d)(2).[201]

Meanwhile, other courts have interpreted *Brumfield* to support greater opportunity to establish intellectual disability, including for petitioners outside of Louisiana. For example, in *Smith v. Campbell*[202] the Eleventh Circuit looked to *Brumfield* as "instructive" when remanding for an evidentiary hearing a case in which the petitioner had presented some evidence supporting intellectual disability.[203] In another case, the Eleventh Circuit framed the *Brumfield* state court's denial of time and funding as material to the Court's holding,[204] lending credence to the argument that *Brumfield* stands for greater procedural protections when a petitioner

199. *See, e.g.*, Henderson v. Stephens, 791 F.3d 567, 586 (5th Cir. 2015) ("Unlike petitioner in *Brumfield*, Henderson had an evidentiary hearing at which he presented expert testimony and other evidence in support of his *Atkins* claim."); *Butler*, 625 F. App'x at 653 (same); Marks v. Davis, No. CV 11–2458 LHK, 2015 WL 3920073, at *42 n.27 (N.D. Cal. June 25, 2015) (distinguishing *Brumfield* from *Marks* because "the trial court held a ten-day evidentiary hearing on [the petitioner's] *Atkins* claim, reviewed thousands of pages of documentary evidence, listened to the live testimony of six witnesses (five of whom were defense experts), and issued a twenty-six-page order detailing the bases for its finding that [the petitioner] is not intellectually disabled"). *But see* Oats v. State, 181 So. 3d 457, 459 (Fla. 2015) (citing *Brumfield* as "further authority that all three [intellectual disability] prongs generally must be considered in tandem," despite the fact that the petitioner was already afforded an evidentiary hearing).

200. 791 F.3d 465 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 28 (2015).

201. *Id.* at 472 n.6, *quoted in* Guevara v. Stephens, No. H-08-1604, 2016 WL 305220, at *6 (S.D. Tex. Jan. 26, 2016); *see Guevara*, 2016 WL 305220, at *7 ("In sum, *Brumfield* did not announce new law or create a new legal standard. Instead, the Supreme Court held that Louisiana had failed to apply its own standards for *Atkins* claims.").

202. 620 F. App'x 734 (11th Cir. 2015).

203. *Id.* at 748–49 & n.21 (holding "the Alabama appellate court's factual determination—that the 'only grounds' Smith pled were conclusory allegations that he met each of the three requirements—is unsupported by the record and therefore unreasonable" under § 2254(d)(2)).

204. Kilgore v. Sec., Fla. Dept. of Corrs., 805 F.3d 1301, 1309 n.5 (11th Cir. 2015) (finding *Brumfield* inapplicable because the petitioner did not challenge any factual findings, nor did he raise a § 2254(d)(2) argument).

is denied the opportunity to develop his facts prior to an *Atkins* hearing.

Procedural safeguards are necessary to ensure that only the most culpable are sentenced to the ultimate punishment of death. *Brumfield* may indicate that § 2254(d)(2) permits federal review of some procedural shortcomings in state habeas court fact-finding, but another case must reach the Supreme Court to settle the full extent of such requisite procedures. And another case must reach the Supreme Court on direct review to settle the substantive and procedural safeguards constitutionally required to effectuate *Atkins*.