No. _____

Supreme Court of the United States

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JOSEPH CLIFTON SMITH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Attorney General

STATE OF ALABAMA
Office of the Att'y Gen.
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Robert M. Overing
Deputy Solicitor General

Dylan Mauldin
Ass't Solicitor General

Counsel for Petitioner

February 2025

CAPITAL CASE
QUESTIONS PRESENTED

Like most States, Alabama requires that offenders prove an IQ of 70 or less to satisfy the intellectual-functioning prong of *Atkins v. Virginia*. This case was not close: Smith scored 75, 74, 72, 78, and 74 on five full-scale IQ tests. There is no way to conclude from these five numbers that Smith's true IQ is *likely* to be 70 or below. So the courts below required Smith to prove only that his IQ "*could be*" 70 and required the State to bring evidence "strong enough" to "foreclose" and "rule out the possibility" of intellectual disability. The first question presented is:

1. Whether, under a proper application of *Atkins*, a State can require a claimant to prove an IQ of 70 or less by a preponderance of the evidence.

Evaluating multiple IQ scores is "complicated," and "this Court has not specified how" to do it. In the State's view, five scores are more accurate than one, and there are ways to account for that fact. The courts below disagree. The district court relied on Smith's 72 ± 3 to find that his IQ "could be" 69. On remand, the Eleventh Circuit's "holistic approach" asked whether Smith had scores of "about" 75 or less. Counting four out of five scores between 72 and 75, the court found "consistent evidence" that Smith "may" qualify as mildly disabled. Thus, the court "followed the law's requirement," in its view, to "move on" to Smith's adaptive deficits. The second question presented is:

2. Whether courts evaluating multiple IQ scores must find that every valid score of "about" 75 or less supports an *Atkins* claim.

PARTIES

Petitioner (appellant below) is the Commissioner of the Alabama Department of Corrections (ADOC). Respondent (appellee below) is Joseph Clifton Smith.

LIST OF PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit (11th Cir.), No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered Nov. 14, 2024 (affirming on return from remand).

Supreme Court of the United States (U.S.), No. 23-167, *Commissioner, Alabama Department of Corrections v. Smith*, judgment entered Nov. 4, 2024 (granting, vacating, and remanding).

U.S., No. 22A1111, *Commissioner, Alabama Department of Corrections v. Smith*, judgment entered June 23, 2023 (denying stay).

11th Cir., No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered June 9, 2023 (denying stay).

11th Cir., No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered May 19, 2023 (affirming grant of petition for writ of habeas corpus).

United States District Court for the Southern District of Alabama (S.D. Ala.), No. 1:05-cv-00474-CG-M, *Smith v. Dunn*, judgment entered Nov. 30, 2021 (denying Rule 59(e) motion to alter or amend the judgment; granting motion for reconsideration to the extent the order clarifies).

S.D. Ala., No. 1:05-cv-00474-CG-M, *Smith v. Dunn*, judgment entered Aug. 17, 2021 (granting petition for writ of habeas corpus).

11th Cir., No. 14-10721, *Smith v. Campbell*, judgment entered Aug. 3, 2015 (reversing denial of petition for writ of habeas corpus).

S.D. Ala., No. 05-0474-CG-M, *Smith v. Thomas*, judgment entered Sept. 30, 2013 (denying petition for writ of habeas corpus).

Supreme Court of Alabama (Ala.), No. 1080589, *Smith v. State*, judgment entered Apr. 15, 2011 (quashing petition for writ of certiorari).

Ala., No. 1080589, *Smith v. State*, judgment entered Jan. 20, 2010 (granting petition for writ of certiorari as to one claim).

Court of Criminal Appeals of Alabama (Ala. Crim. App.), No. CR-05-0561, *Smith v. State*, judgment entered Sept. 26, 2008 (affirming dismissal in out-of-time appeal from denial of petition for writ of habeas corpus), rehearing denied Feb. 13, 2009.

Circuit Court of Mobile (Mobile Cir. Ct.), No. CC-98-2064.60, *Smith v. State*, judgment entered Nov. 21, 2005 (granting out-of-time appeal of dismissal of second amended petition for writ of habeas corpus).

Ala., No. 1041432, *Ex parte Smith*, judgment entered Aug. 12, 2005 (denying petition for writ of certiorari).

Ala. Crim. App., No. CR-04-1491, *Smith v. State*, judgment entered June 29, 2005 (dismissing appeal as untimely).

Mobile Cir. Ct., No. CC-98-2064.60, *Smith v. State*, judgment entered Mar. 18, 2005 (dismissing amended petition for post-conviction relief).

Ala. Crim. App., No. CR-02-0319, *Smith v. State*, judgment entered May 28, 2004 (reversing dismissal).

Ala., No. 1030608, *Ex parte Smith*, judgment entered Mar. 5, 2004 (reversing dismissal of petition for post-conviction relief as untimely).

Ala. Crim. App., No. CR-02-0319, *Smith v. State*, judgment entered Dec. 19, 2003 (affirming dismissal of petition for post-conviction relief as untimely), rehearing denied Jan. 16, 2004.

Mobile Cir. Ct., No. CC-98-2064.60, *Smith v. State*, judgment entered Oct. 9, 2002 (dismissing petition for post-conviction relief as untimely).

U.S., No. 00-10675, *Smith v. Alabama*, judgment entered Oct. 1, 2001 (denying petition for writ of certiorari).

Ala., No. 1992220, *Ex parte Smith*, judgment entered Mar. 16, 2001 (denying petition for writ of certiorari).

Ala. Crim. App., CR-98-0206, *Smith v. State*, judgment entered Aug. 25, 2000 (denying rehearing).

Ala. Crim. App., CR-98-0206, *Smith v. State*, judgment entered May 26, 2000 (affirming conviction and death sentence).

Mobile Cir. Ct., No. CC-98-2064.60, *State v. Smith*, judgment entered Oct. 16, 1998 (entering conviction and death sentence).

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PETITION FOR WRIT OF CERTIORARI

Joseph Smith is not intellectually disabled. Under Alabama law, *Atkins* claimants must prove an IQ of 70 or below. With five IQ scores *above* 70, Smith did not carry his burden by a preponderance of the evidence. Even adjusting for error, there is no way to combine his scores—not the average, median, mode, nor any composite metric—to find an IQ of 70 or less.

So the Eleventh Circuit did not combine Smith's scores at all. It did not attempt the "complicated" work of "jointly" analyzing "multiple IQ scores." App.12a. Instead, the panel asked whether *each* score "fell within the range of about 65 to 75." App.7a. As four of Smith's five scores were *individually* "consistent" with mild disability, the panel concluded that Smith "may" satisfy the first prong of *Atkins*. *Id.* And that was enough: Whenever IQ scores do not "rule out the possibility" of disability, the court held, it is proper "move on" to adaptive skills. App.6a, 8a.

Given the rare chance to fix its errors on remand, the Eleventh Circuit multiplied them. *First*, the panel discharged Smith's burden to prove an IQ of 70 or less and gave the State a new burden to "foreclose" or "rule out" disability. App.5a-6a. But under Alabama law, the claimant must prove each prong by a preponderance of the evidence. When *Hall* and *Moore* told courts to consider a test's error range, the Court did not hold that a mere "possibility" of 70 IQ would suffice. *Contra* App.6a; *see also* App.36a-40a, 60a-61a.

Yet the lower courts are deeply confused about what a State can require. According to the Fifth, Sixth, Seventh, and Tenth Circuits, a claimant can be asked to prove an IQ of 70 or less by a preponderance

of the evidence. But courts in the Eighth, Ninth, and now Eleventh Circuits will "move on" from IQ scores if there is *any risk* of a low enough IQ. Adopting the latter view, the panel below watered down the most objective prong of the test, overrode Alabama's definition of intellectual disability, and shattered *Atkins*'s promise to leave meaningful discretion to the States.

Second, the Eleventh Circuit's answer to this Court's open question—how to assess scores "jointly"—was plainly wrong. The panel held that scores of 75 or less count for the claimant, period. Smith could take hundreds of IQ tests, score 75 on *all* of them, yet his IQ still "could be" 70, according to the panel, because every test could have erred by 5 points.

The panel failed to appreciate that multiple tests *together* can provide a more accurate estimate than each test alone. Indeed, as the State's expert testified, five scores yield a dramatically more accurate estimate; courts dealing with multiple scores should not mechanically assume an error range of ± 5. While one could compute a composite score across IQ tests to produce a much smaller error range, Smith's claim should have failed without resort to complex methods. His average score is 74.3, his modal score is 74, and his median score is 74. Neither Smith nor the courts below offered a method of "jointly" analyzing scores that suggests his IQ is likely to be 70 or below.

Combining these missteps, the panel doubled down on its facially errant conclusion that Smith satisfied prong one despite scoring 75, 74, 72, 78, and 74. Neither the Eighth Amendment nor precedent exempts Smith from capital punishment. The Court should grant certiorari and reverse.

PRIOR OPINIONS

The Eleventh Circuit's 2024 opinion is available at 2024 WL 4793028 and reproduced at App.1a-9a.

This Court's 2024 opinion is reported at 604 U.S. 1 and reproduced at App.10a-13a.

The Eleventh Circuit's 2023 opinion is reported at 67 F.4th 1335 and reproduced at App.18a-57a. The court's 2023 order on motion to stay is reproduced at App.14a-17a.

The district court's opinion is available at 2021 WL 3666808 and reproduced at App.63a-97a. The court's order on motion to alter or amend the judgment is reproduced at App.58a-62a.

JURISDICTION

The Eleventh Circuit entered judgment on November 14, 2024. Petitioner timely invokes the Court's jurisdiction under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Rule 32.3 of the Alabama Rules of Criminal Procedure provides, in pertinent part, that a petitioner for post-conviction relief "shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."

STATEMENT

A. Constitutional Background

1. The Eighth Amendment originally prohibited rare and "barbaric" punishments that "superadded" "terror, pain, or disgrace," like "disemboweling, quartering, public dissection, and burning alive." *Bucklew v. Precythe*, 587 U.S. 119, 130, 137 (2019). Today, it still bars those "punishments[s] … considered cruel and unusual" at the Founding. *Ford v. Wainwright*, 477 U.S. 399, 405 (1986). But over the past few decades, the doctrine has developed beyond "historical conceptions." *Graham v. Florida*, 560 U.S. 48, 58 (2010); *see also Kennedy v. Louisiana*, 554 U.S. 407, 419-21 (2008). The Court has held that the Amendment's "meaning" is now "draw[n] … from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

The evolving-standards lens requires the Court to make "policy" judgments, *Gregg v. Georgia*, 428 U.S. 153, 175 (1976), about the "acceptability of the death penalty," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), and who "deserves" it, *Graham*, 560 U.S. at 101 (Thomas, J., dissenting). The Court issues its "own" "independent evaluation," *Atkins*, 536 U.S. at 312, 321, trying to avoid the "appear[ance]" of relying on "the subjective views of individual Justices," *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). In theory, the Court still considers "the Eighth Amendment's text, history, meaning, and purpose." *Kennedy*, 554 U.S. at 421. The Court also looks to "objective evidence of how our society views a particular punishment." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). State law is paramount when discerning societal views, for States

"respond to the will and consequently the moral values of the people," *Gregg*, 428 U.S. at 175-176.

2. The Court has twice considered the constitutionality of capital punishment when the offender is intellectually disabled.[1] In both cases, the Court confronted the "unavoidably moral question," *Miller v. Alabama*, 567 U.S. 460, 504 (2012) (Thomas, J., dissenting), of whether the sentence was "grossly out of proportion" or failed to fulfill "social purposes." *Kennedy*, 554 U.S. at 441; *see Penry*, 492 U.S. at 335-36 (opinion of O'Connor, J.); *Atkins*, 536 U.S. at 311-13.

In *Penry v. Lynaugh*, the Court rejected a categorical exemption for the intellectually disabled. At common law, the Court explained, "idiots" with an "IQ of 25 or below" were immune from punishment because they lacked the "capacity to form criminal intent" and distinguish "good and evil." 492 U.S. at 331-33. But many offenders with IQs from 25 to 70 can appreciate the wrongfulness of their crimes and can follow the law. *Id.* at 308 n.1, 333. If they are fit to stand trial, their disability can be a mitigating factor at sentencing; its effect on sentencing is an "individualized determination … in each particular case." *Id.* at 328, 340. Further, there was no "national consensus" on the issue in 1989. *Id.* at 334.

But by 2002, the Court's "own judgment" had changed. *Atkins*, 536 U.S. at 313, 321; *cf. Graham*, 560 U.S. at 85 (Stevens, J., concurring) ("Standards of decency have evolved since 1980. They will never stop doing so."). While intellectually disabled criminals

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[1] For consistency with the Court's recent terminology, this petition uses the term *intellectual disability*, rather than the DSM-5-TR's term *intellectual developmental disorder*.

"should be tried and punished," their "diminished capacities … diminish their personal culpability." 536 U.S. at 306, 318. Because a disabled murderer is less culpable than "the average murderer" and "the average murderer" does not deserve death, the Court reasoned, no intellectually disabled murder deserves death. *Id.* at 319. The Court was "not persuaded" that such sentences would "measurably advance" deterrence or "the retributive purpose." *Id.* at 321.

And a "national consensus" of eighteen States was identified. *Id.* at 314-16; *but see Roper v. Simmons*, 543 U.S. 551, 597 (2005) (O'Connor, J., dissenting) (discussing *Atkins*); *Atkins*, 536 U.S. at 342-48 (Scalia, J., dissenting). The Court found "powerful" both the "direction of change" since *Penry* and the absence of any State prohibiting and then "reinstating" the death penalty for disabled offenders. *Id.* at 315-16.

Exempting all offenders with intellectual disability from capital punishment, "*Atkins* gave no comprehensive definition" of the trait. *Shoop v. Hill*, 586 U.S. 45, 49 (2019). The Court observed that States "generally conform" to "clinical definitions," 536 U.S. at 317 n.22, but offered no "definitive procedural or substantive guides," *Bobby v. Bies*, 556 U.S. 825, 831 (2009). It was "left to the State[s]" to "develop[] appropriate ways to enforce" *Atkins*. 536 U.S. at 317.

3. The Court has since provided further guidance. In *Hall v. Florida*, the Court considered Florida's "strict IQ test score cutoff." 572 U.S. 701, 712 (2014). Under Florida law, an offender needed a test score below 70, or his *Atkins* claim failed. This Court faulted that approach for failing to account for the standard error of measurement (SEM). That a "significant majority of States … t[ook] the SEM into account," *id.* at

714, was "strong evidence" that "society" thought a strict cutoff was not "proper or humane," *id.* at 718.

Florida's rule also "disregard[ed] established medical practice," which treats an IQ score "as a range." *Id.* at 712-13. A test is imprecise, and a score can be influenced by factors like the test-taker's "health" or "demeanor." *Id.* at 713. Expert opinion "informed" but did not "dictate the Court's decision." *Id.* at 721.

Finally, the Court also applied its "own judgment." *Id.* In its view, States could not ignore the "imprecision" of tests; else, they "risk[]" executing a person with a disability. *Id.* at 723. Thus, an offender "with an IQ test score … [of] 75 or lower," "must be able to present additional evidence …, including testimony regarding adaptive deficits." *Id.* at 722-23.

In *Moore v. Texas*, the Court reviewed an *Atkins* claim for an inmate with two valid IQ scores, a 78 and a 74. *See* 581 U.S. 1, 10 (2017). It was uncontested that the score of 74 reflected an error range of 69 to 79, but the court below had "disregard[ed] the lower end" of the range. *Id.* at 14; *see Ex parte Moore*, 470 S.W.3d 481, 519 (Tex. Crim. App. 2015). And in its adaptive-functioning analysis, the lower court had "deviated from … clinical standards" in favor of "lay perceptions of intellectual disability." 581 U.S. at 15, 18. While the Eighth Amendment does not "demand adherence to everything stated in the latest medical guide," *id.* at 13, those guides "constrain[]" the States, *id.* at 20. *Moore II* reversed again because the lower court repeated its errors with respect to adaptive functioning, 586 U.S. 133, 139 (2019), but, like *Moore I*, its "articulation of how courts should enforce" *Atkins* "lacked clarity," *id.* at 143 (Roberts, C.J., concurring).

B. Procedural History

1. Smith's Crime and Sentence

In 1997, Joseph Clifton Smith brutally beat Durk Van Dam to death with a hammer and saw so that he could steal $140, the man's boots, and his tools. Smith was convicted of capital murder during a robbery.

At sentencing, Smith raised the mitigating factor of extreme mental or emotional disturbance. To that end, a psychologist testified that Smith's IQ "could be as high as 75 or as low as 69." *Smith v. State*, 71 So. 3d 12, 19 (Ala. Crim. App. 2008). In response, the State pointed to Smith's scores of 74 and 75 on two prior IQ tests. *Id.* at 18–20. The jury recommended a death sentence, which the court entered. *Id.* at 14. On direct appeal, the Alabama Court of Criminal Appeals ("ACCA") affirmed. *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000). The Alabama Supreme Court ("ASC") denied Smith's petition for a writ of certiorari, *Ex parte Smith*, 795 So. 2d 842 (Ala. 2001) (mem.), and so did this Court, *Smith v. Alabama*, 534 U.S. 872 (2001).

2. Smith's *Atkins* Claim

Under Alabama law, an *Atkins* claimant must show "[1] significantly subaverage intellectual functioning (an IQ of 70 or below), [2] significant or substantial deficits in adaptive behavior[,] [and] [3] [that] these problems … manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002). And he must prove each prong by a preponderance of the evidence. *See, e.g.*, *Morrow v. State*, 928 So. 2d 315, 322-23 (Ala. Crim. App. 2004).

a. Because Smith could not show an intellectual disability by a preponderance of the evidence, the state circuit court denied his petition, the ACCA affirmed, *Smith*, 71 So. 3d 12, and the ASC declined to hear the case. Smith then filed an amended habeas petition, including an *Atkins* claim, in federal district court. The court denied his petition, *Smith v. Thomas*, No. 05-0474-CG-M, 2013 WL 5446032, at *29 (S.D. Ala. 2013), and Smith appealed.

In a halfhearted application of AEDPA, ignoring 28 U.S.C. §2254(e)(1), the Eleventh Circuit found unreasonable determinations of fact and reversed. *Smith v. Campbell*, 620 F. App'x 734 (11th Cir. 2015). The panel hardly discussed Smith's IQ scores. It cited one expert opinion that Smith's 72 ± 3 meant his IQ "could be as low as 69," and it noted the state court's "refus[al] to downwardly modify" that score. *Id.* at 745, 750-51. Smith's higher scores, 74 and 75, played *no role* in the analysis. *See id.* at 750-51.

On remand, Smith took two more tests and scored 74 and 78. In all, he has obtained five valid IQ scores in his lifetime: 75, 74, 72, 78, and 74. App.5a. Because his scores were all above 70, Smith tried to persuade the district court to adjust his scores to account for the "controversial" Flynn effect. *Dunn v. Reeves*, 594 U.S. 731, 736 (2021). Relying on both the Flynn effect and a downward adjustment for error, Smith's expert testified that Smith's IQ was "around 70." DE120:200.[2]

Alabama urged the court to consider that Smith had *five* IQ test scores above 70. As the State's expert testified, "multiple sources of IQ … contributes to the

[2] Citations to the District Court record cite the District Court docket number and page number, abbreviated as "DE __:__."

construct of validity indicating what a true IQ score is for an individual." App.70a. The "five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions … are all in the borderline range." *Id.*[3]

On remand, the district court did not dispute the "evidence" that Smith's "IQ is above 70." App.60a. Still, the scores were not "strong enough to conclude that Smith is not intellectually disabled." App.70a. Smith had "scores as low as 72," which "could mean his IQ is actually as low as 69." App.68a. Calling it "a close case," the court "could not determine solely by [Smith's] scores" whether he satisfied the first prong, so the fate of Smith's claim would "fall largely" on the other prongs. App.60a, 74a. In light of Smith's adaptive deficits, the court deemed his "actual functioning [to be] comparable" to that of someone who is intellectually disabled. App.61a. The court granted relief.

b. The Eleventh Circuit affirmed. Although the first prong "turns on whether [Smith] has an IQ equal to or less than 70," the panel held that it was proper to "move on" without proof of an IQ of 70 or less. App.35a, 36a; *accord* App.16a-17a. Because Smith had a score "as low as 72," his IQ "*could be*" 69, the panel held, so the district court "had to move on." App.17a, 44a-45a (citing *Hall* and *Moore*).

Addressing the State's argument that Smith failed to prove his claim by "a preponderance of the evidence," the panel "disagree[d], though, because Smith carried his burden" with testimony about his 72 ± 3.

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[3] The term "borderline range" means the category between one standard deviation below the mean (85 IQ) and two standard deviations below the mean (70 IQ).

App.43a-44a. "Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70," *id.*, which occurs "if even one valid IQ test score generates [such] a range," App.42a. As to whether error is a "one-way ratchet," the panel found it improper to "consider anything other than the lower end of an offender's standard-error range." *Id.*

c. The State sought review from this Court, which granted the petition, vacated the judgment below, and remanded for the panel below to clarify ambiguity in its 2023 opinion. The Court noted that the district court *was* clear in its finding "that Smith's IQ could be as low as 69 given the [SEM] for his *lowest score* of 72." App.12a (emphasis added). The Court explained that the Eleventh Circuit's opinion *could* be "read to afford conclusive weight" to that fact, creating "a *per se* rule that the lower end of the standard-error range for an offender's lowest score is dispositive." *Id.* "On the other hand," the panel stated that "Smith's lowest score is not an outlier," suggesting "a more holistic approach." App.12a-13a. Taking a "holistic approach" would raise a question this Court has not answered—how to analyze "multiple IQ scores jointly." *Id.*

Ten days later, the Eleventh Circuit issued a new opinion "reject[ing] any suggestion" that the first prong is satisfied whenever "the lower end of the standard-error range for [the] lowest of multiple IQ scores is 69." App.2a. Instead, the panel explained that a court must consider adaptive skills if it cannot "rule out the possibility" of disability based on "the body of evidence that [the] IQ scores represent." App.6a. Test scores fail to rule out disability when "the lower end of [the offender's] score range falls at or below 70." App.4a (quoting *Moore*, 581 U.S. at 14).

Here, Alabama's expert testified "that Smith's multiple IQ scores … taken over a long period of time place him in the borderline range." App.5a. (He had also testified that "multiple sources of IQ" provide a better estimate of the subject's "true IQ score." App.70a.) According to the panel, however, Smith's scores were not "so high" that a court could "disregard[]" what some of the tests "*individually* suggest." App.6a (emphasis added). Scores "within the range of about 65 to 75" "individually suggest Smith's true IQ may be 70 or lower." App.6a-7a. Counting four out of five scores in that range, the panel found "consistent evidence" that Smith *may* satisfy the first prong. App.7a. For that reason, the Eleventh Circuit held, the district court had conducted "a 'holistic' review" and correctly moved on to adaptive deficits after finding that Smith's scores did not "foreclose the conclusion that he has significantly subaverage intellectual functioning." App.4a-5a.

REASONS TO GRANT THE WRIT

I. The Eleventh Circuit has now held repeatedly that a man with a true IQ above 70 nonetheless is immune from capital punishment. In doing so, the panel eviscerated the most important prong of *Atkins*. The panel relaxed Smith's burden such that he needed only a "possibility" of a 70 IQ; it shifted the burden to the State to "foreclose" Smith's claim; and then it injected evidence of adaptive deficits into the first prong. Each step in this maneuver departed from precedent, deepened a circuit split, and demoted the most objective and reliable evidence of intellectual functioning. Each step also trampled on the discretion that *Atkins* left to the States.

II. Even under its new burden-shifting framework, the Eleventh Circuit erred. Its method of "analyzing multiple IQ scores jointly" (App.12a) was no method at all. The panel simply counted how many of Smith's scores were 75 or less. That's wrong for many reasons. For one, moving the line from 70 to 75 to "account[] for the margin of error," App.3a, ignores half the range, *i.e.*, the equal chance that a test score underestimates the taker's true IQ. For another, fixating on 75 when the burden is 70 wrongly assumes that the relevant confidence interval is ± 5 points for every test. It's not. Finally, the panel failed to appreciate the effect of multiple scores to restrict the error range. The panel did not try to combine the five scores, let alone try to discern the proper error range. Consequently, the panel had no basis for thinking that "additional evidence" beyond IQ was "required." App.5a. Because the panel dodged the "complicated endeavor" (App.21a) needed to rule for Smith, its opinion cannot stand.

I. Under *Atkins*, States May Require Claimants To Show They Have An IQ Of 70 Or Less By A Preponderance Of The Evidence.

As the Court recognized, Smith's *Atkins* claim "depended in part on whether his IQ is 70 or below." App.11a. An "IQ of 70 or below" has been the first prong of the test for intellectual disability in Alabama since *Atkins* was decided. *Perkins*, 851 So. 2d at 456 (on remand for reconsideration in light of *Atkins*). And "an IQ of 70 or below" remains the test today. *See, e.g.*, *Spencer v. State*, No. CR-2022-1280, 2024 WL 5182403, at *10 (Ala. Crim. App. Dec. 20, 2024) (citing *Perkins*). At every stage in this case, the court below acknowledged that Smith's claim "turns on whether

he has an IQ equal to or less than 70." App.35a; *see also* App.3a; *Smith*, 620 F.App'x at 747.

Alabama's definition is not unusual. Although the American Psychiatric Association has loosened the definition of intellectual disability with each new edition of its manual, the line for the first element has long been drawn two standard deviations below the mean, which is an IQ score of 70 on the major tests.[4]

Hall did not move the line to 75. The Court held that Florida could not employ a "strict cutoff" such that an offender must "show an IQ test score of 70 or below." 572 U.S. at 707; *cf. Pizzuto v. Yordy*, 947 F.3d 510, 520 n.8 (9th Cir. 2019). Because tests can err, a person who scores a 71 could have a true IQ of 70. Courts must account for that possibility, *Hall* said, and that was enough to reject Florida's rule. But the Court did not go further and *redefine* the first prong. Even if it had, the line could not be 75, for each test has its own standard error of measurement. As the Court recited in *Hall*, "the average SEM for the WAIS-IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points." 572 U.S. at 713-14 (quoting Br. of Am. Psychological Ass'n et al. as *Amici Curiae* at 23); *but see, e.g.*, *Jackson v. Payne*, 9 F.4th 646, 654 (8th Cir. 2021) (rejecting "the possibility that a lower SEM may apply").

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[4] *See, e.g.*, DSM-5 at 37 ("[With] a margin for measurement error …, this involves a score of 65–75 (70 ± 5)."); DSM-IV at 39 ("Significantly subaverage intellectual functioning is defined as an IQ of *about* 70 or below." (emphasis added)); DSM-III at 36 ("Significantly subaverage intellectual functioning is defined as an IQ of 70 or below."); DSM-II at 14 ("Mild mental retardation [relates to an] IQ [of] 52–67").

If a State can maintain that an essential feature of intellectual disability is a true IQ of 70 or less, the courts must address what proof can be required. *Atkins* itself "did not address the burden of proof." *Raulerson v. Warden*, 928 F.3d 987, 1001 (11th Cir. 2019). At least as a matter of Eighth Amendment doctrine, that "task" was "le[ft] to the States." *Id.* at 1002; *see also Young v. State*, 860 S.E.2d 746, 768-76 (Ga. 2021) (plurality op.); *Hill v. Humphrey*, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc). In Alabama, a post-conviction petitioner must prove all "facts necessary to entitle [him] to relief" "by a preponderance of the evidence." *See* Ala. R. Crim. P. 32.3.

But on the Eleventh Circuit's approach, an offender needs to show only that his IQ "*could be*" 70 or less. App.5a (emphasis added). If the IQ evidence establishes a "possibility" that the offender is disabled, a court must "move on" unless the State can somehow "foreclose" or "rule out the possibility." App.4a-6a. Here, there was no finding that Smith's true IQ is *likely* to be 70 or less; indeed, the district court seemed to accept the opposite, App.60a-61a. Yet Smith easily carried his new burden on the ground that some of his scores "individually suggest [his] true IQ *may be* 70 or lower." App.6a (emphasis added).

To rule for Smith, the Eleventh Circuit had to hold that Alabama's preponderance burden—as applied to *Atkins* claims—violates the Eighth Amendment. That surprising result, made clear on remand, deepened a divide of authority, supplanted the State's judgment in favor of an arbitrary and unworkable standard, and eviscerated the first prong of *Atkins*. If that result is the law after *Hall* and *Moore*, then those cases should be revisited.

A. The decision below deepened a divide with other circuits that require more than a "possibility" of a qualifying IQ.

By jettisoning the State's preponderance burden, the Eleventh Circuit deepened a divide among the lower courts over how to handle IQ evidence. On one side, the Fifth, Sixth, and Tenth Circuits clearly ask for more than a possibility of an IQ below 70. Even when an offender presents a score (or scores) "within the range of about 65 to 75," App.7a, these courts will apply state law and assess what the offender's IQ is *likely* to be. On the other side of the split, the Eighth, Ninth, and now Eleventh Circuits move on to adaptive deficits even when the offender's IQ is likely to be 71 or higher by a preponderance of the evidence.

Sixth Circuit. Squarely opposed to the decision below is *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017). *Atkins* "incorporates state law," the Sixth Circuit explained, so "Black had to prove every element … 'by a preponderance of the evidence.'" *Id.* at 743. He had ten scores of 83, 97, 92, 91, 83, 76, 73, 76, 69, and 57. *See id.* at 744-45, 748. On the Eleventh Circuit's logic, several of the scores "individually suggest" an IQ below 70, App.6a, especially if the court were to "apply a downward adjustment," 866 F.3d at 748. But that fact was irrelevant in light of the claimant's burden. The court concluded:

> To be sure, there is almost always a *possibility* that a reported IQ score significantly higher than 70 is an inaccurate reflection of a true IQ score of 70 or below—indeed, there is approximately a one-in-300 chance that a reported IQ of 92 on a group-administered test (like Black's 1966 Lorge Thorndike score) reflects a true

> score lower than 70. But that possibility does not satisfy Black's burden to prove his intellectual disability by a preponderance of the evidence.

866 F.3d at 748-49.

Fifth Circuit. Likewise, in *Garcia v. Stephens*, the Fifth Circuit reviewed an *Atkins* claim involving scores of 75, 100, 91, 83, and 83. *See* 757 F.3d 220, 224 (5th Cir. 2014). While Garcia's 75 fell "just within the margin of … error," *id.* at 226, the court did not end the inquiry with the *possibility* that his IQ may be 70. Instead, it recognized that "his actual IQ is as likely to be 80 as it is to be 70." *Id.* Garcia failed to make the required showing because his "four other, pre-conviction, IQ scores rang[ing] from 83 to 100 indicated that his actual IQ is *likely* higher than 75." *Id.* (emphasis added). By contrast, because the Eleventh Circuit transformed Smith's burden, it never asked, let alone answered, what Smith's IQ is "likely" to be. *See also Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014) (noting that scores "below 70" do not "conclusively" end the inquiry under the first prong).

Tenth Circuit. Before *Hall*, the Tenth Circuit held that a claim with "a number of IQ scores, some below and some above" 70 falls into a "gray area" in which a rational trier of fact could find the first prong satisfied or not. *Hooks v. Workman*, 689 F.3d 1148, 1170-71 (10th Cir. 2012). Even after *Hall*, the court found no error in denying a claim premised on scores of 76, 79, and 71. *See Smith v. Duckworth*, 824 F.3d 1233, 1244 (10th Cir. 2016). Because Oklahoma law "provides that a score of 76 or higher on *any* IQ test bars a defendant from being found intellectually disabled," the state courts rightly rejected the claim. *Id.* at

1244-46. Had the panel below handled that case, the score of 71, implying an IQ that *may be* less than 70, would have been dispositive. *See, e.g.*, App.42a ("*Hall* require[s] lower courts to consider … adaptive functioning *if even one valid IQ test score* generates a range that falls to 70 or below" (emphasis added)).

Eighth Circuit. On the other side of the ledger, the Eighth Circuit's reasoning resembles that of the Eleventh. In *Sasser v. Payne*, the court considered a claim accompanied by scores of 83 and 75 (after adjustments). *See* 999 F.3d 609, 616 (8th Cir. 2021). Deeming the IQ evidence "inconclusive," the district court had "tied its analysis of [Sasser's] intellectual functioning to the analysis of his adaptive deficits." *Id.* at 616-17, 618-19. Despite state law requiring proof of each element by a preponderance, the Eighth Circuit found it proper to "move on" because "[t]he lowest end of Sasser's lower IQ score range was 70." *Id.* at 619.

Similarly, in *Jackson v. Payne*, the Eighth Circuit considered four scores of 72, 73, 74, and 81. 9 F.4th at 653. After subtracting five points from each, three of the scores "fell below 70," so Jackson satisfied the first prong, according to the panel. *Id.* at 653-54. In light of "inconclusive intellectual functioning evidence," it was "correct" to analyze adaptive deficits, despite that "Arkansas law has placed the burden of proof squarely on the party claiming exemption from capital punishment." *Id.* at 663 (Grasz, J., dissenting).

Ninth Circuit. The Ninth Circuit firmly rejected Idaho law requiring the offender "to establish an 'actual IQ' of 70 or below." *Pizzuto v. Yordy*, 947 F.3d 510, 526 (9th Cir. 2019). Though Pizzuto's claim failed under AEDPA, the court suggested that his single score of 72 would suffice on *de novo* review, despite the

State's argument that he needed to show an IQ of 70 "by a preponderance of the evidence." *Id.* at 517-18; *see id.* at 520 n.8, 526-29. In another case, the court suggested that it would be proper to move on from IQ scores based on an offender's "lowest" "IQ score of 74 alone" because he "*could*" or "*might* still be classified as intellectually disabled, depending upon the level of deficits at prong two." *Ochoa v. Davis*, 50 F.4th 865, 903 (9th Cir. 2022) (emphasis added).

B. A burden on the State to "rule out the possibility" of disability contradicts *Atkins*.

1. The "evolving standards of decency" protect only those "offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 311, 317. *Atkins* found a nationwide consensus about the culpability of "mentally retarded offenders," but it "le[ft] to the State[s] the task of developing appropriate ways to enforce the [new] constitutional restriction." *Id.* at 317. One of these "appropriate ways" is to assign a burden of proof to the defendant or claimant seeking exemption from capital punishment. Absent evidence of a nationwide consensus to the contrary, *Atkins* cannot be extended to prohibit a State from requiring proof by a preponderance of the evidence (or more). *Cf. Thompson v. Oklahoma*, 487 U.S. 815, 854-55 (1988) (O'Connor, J., concurring in judgment) (discussing the "danger in inferring a settled societal consensus" even over "narrower" issues); *Gregg*, 428 U.S. at 176.

To be sure, State discretion is not "unfettered," and *Hall* restricted it by requiring courts to "take into account that IQ scores represent a range." 572 U.S. at 719, 720. Further elucidating the concept of "decency," *Moore* added that "[t]he medical community's current standards supply one constraint on States' leeway in

this area." 581 U.S. at 12, 20. But assigning a preponderance burden does not conflict with the Court's teaching to account for error. A court reviewing under this standard must consider "the totality of the evidence," *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010), which will include any evidence about "the inherent imprecision of these tests," *Hall*, 572 U.S. at 723. *See, e.g.*, *Reeves v. State,* 226 So. 3d 711, 729 (Ala. Crim. App. 2016). Both the panel's new "possibility" rule and the State's traditional burden can account for testing error.

But the State's approach does it better. While the panel paid lip service to the risk of error "above and below" a score, App.3a, in truth, the dispositive fact for the panel was "the lower end of [Smith's] score range." App.4a (quoting *Moore*, 581 U.S. at 14); *see also* App.17a, App.41a-44a.[5] The panel's purportedly "holistic review" meant repeating the number 69—"the lower end" of Smith's lowest score, App.4a—never once considering the possibility that his 72 ± 3 could reflect an IQ of 75 or the *probability* that his true IQ lies above 70. *See* App.5a ("Smith had an IQ test score as low as 72," so "his true IQ could be as low as 69.").

[5] In fact, the case cited on remand for the proposition that a test can err upward or downward, *Ledford v. Warden*, 818 F.3d 600, 640 (11th Cir. 2016), is one the panel had said was "no longer good law" precisely *because* it had held that "the [SEM] is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls at the bottom of his IQ range." App.43a. Between this case and *Ferguson v. Commissioner*, it is clear that the Eleventh Circuit cannot figure out how to apply the SEM in a uniform way. *See* 69 F.4th 1243, 1255 (11th Cir. 2023) ("But, importantly, the SEM 'is merely a factor … one that may benefit or hurt [an] individual's *Atkins* claim….'" (quoting *Ledford*)).

It is wrong to ignore half the error range. This Court has "in no way *require[d]* a reviewing court to *make a downward* variation based on the SEM in *every* IQ score." *Black,* 866 F.3d at 746; *accord Raulerson,* 928 F.3d at 1008; *Mays,* 757 F.3d at 218 n.17; *Reeves,* 226 So. 3d at 740. Yet that is just what some lower courts have done, including the panel below. *See, e.g.*, *Jackson,* 9 F.4th at 653; *Pizzuto,* 947 F.3d at 520 n.8; *McManus v. Neal,* 779 F.3d 634, 650 (7th Cir. 2015) ("Accounting for the [SEM] … a full-scale IQ score of 70–75 or lower ordinarily will satisfy the first requirement."); *United States v. Wilson*, 170 F.Supp.3d 347, 366 (E.D.N.Y. 2016).

When courts adjust downward by one or more SEMs, they commit the same error identified in *Moore*. Just as the Texas courts could not "disregard[] the lower end of the standard-error range," *Moore*, 581 U.S. at 14, neither should courts ignore the upper end—the chance that an offender's test score underestimated his true IQ. As *Hall* explained, the SEM is "best understood as a range of scores on *either side* of the recorded score." 572 U.S. at 713 (emphasis added).

This Court can easily fix the problem by emphasizing the State's power to define burdens of proof. If a State can require that courts examine the totality of the evidence, they would be forced to confront the reality that measurement error "is not a one-way ratchet." *Mays,* 757 F.3d at 218 n.17. And the reality that not every test is equally prone to error. Applying Alabama's preponderance burden, this Court should dispense with the notion that *Hall* constitutionalized a "five-point SEM" for every test. *See, e.g.*, *Jackson*, 9 F.4th at 654; *Wilson*, 170 F.Supp.3d at 362-63. The State's expert testified that the SEM for a "Wechsler

intelligence test, for example, … is approximately 2.5." DE120:308. But the panel below ignored that evidence, relying on *Hall*'s remark that measurement error is "generally +5 points." App.7a. That mistake was dispositive, by the panel's own logic, for Smith needed a SEM of at least ± 4 for a majority of his score ranges to reach 70.[6] Likewise, the panel paid no mind to the expert testimony that error is not "linearly" distributed; within a given score's error range, a higher IQ may be more likely than a lower one, and an IQ closer to the score may be more likely than one further away. DE120:308.[7] But the panel had no need for nuance because Smith had already shown a "possibility" that his IQ is 69.

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[6] The SEM is not the exclusive way to account for error, although courts treat it as such. For example, if one is trying to infer a probability distribution from an observed score, a better tool could be the standard error of estimate (SEE). *See, e.g.*, Richard A. Charter & Leonard S. Feldt, *The Importance of Reliability as It Relates to True Score Confidence Intervals*, 35 Measurement & Evaluation Counseling & Development 104, 105-07 (2002); Richard A. Charter & Leonard S. Feldt, *Confidence Intervals for True Scores: Is There A Correct Approach?*, 19 J. Psychoeduc. Assessment 350, 353, 359-60, 362-63 (2001) (hereinafter *Confidence*); Br. of the Crim. Just. Legal Found. as *Amicus Curiae* at 13-15, *Hall v. Florida*, No. 12-10882 (filed Feb. 3, 2014) (citing Leo M. Harvill, *Standard Error of Measurement*, 10 Educ. Measurement 33 (1991)); *State v. Vela*, 777 N.W.2d 266, 296 (Neb. 2010) (citing testimony distinguishing SEM from SEE).

[7] *See, e.g.*, Charter & Feldt, *Confidence*, *supra* at 357, 359; Mary J. Allen & Wendy M. Yen, Introduction to Measurement Theory 88-91 (2001) (describing a type of confidence interval constructed on the assumption that error is normally distributed); W. Joel Schneider, *Statistical and Clinical Interpretation Guidelines for School Neuropsychological Assessment* 164-67, in Daniel C. Miller et al., *Best Practices in School Neuropsychology: Guidelines for Effective Practice, Assessment, and Evidence-Based Intervention* (2d ed. 2022).

It would be one thing if the "possibility" burden were an objective and workable standard. But it's not. As Judge Boggs explained in *Black*, 866 F.3d at 748, any test score theoretically reflects a "*possibility*" that the offender has an IQ of 70. For example, in one case an expert computed that the offender's test score gave him a "1 in 500 million" chance of having a true IQ of 70 or less. *Vela*, 777 N.W. at 133. Did the State fail to "rule out the possibility"? The Eleventh Circuit's reasoning has no limit; an *Atkins* claim will *never* fail at prong one so long as a court or an expert has even an inkling that the offender may be mildly disabled. And for the same reason, although the panel disavowed reliance on a single IQ score, its "possibility" test would plainly permit such reliance. After all, a single IQ score of 72 "could mean" Smith's IQ is 69. App.31a; *see also* App.6a (requiring "confiden[ce] that the lowest score can be thrown out as an outlier").

The Eleventh Circuit's departure from *Atkins* is especially egregious because the intellectual functioning prong is the one that corresponds most closely with diminished culpability. By sacrificing the first prong to the second, the court relied on testimony like Smith's mother saying "he was a follower," App.87a, a friend's recollection that he didn't "seem to cook" or "buy groceries" in his 20s, *id.*, and an expert's (disputed) testimony that Smith could only recite the last four digits of his social security number, App.83a. True, this testimony came to the court through the mouths of experts, but it is hard to see why it's worth more than "lay stereotypes," *Moore*, 581 U.S. at 18, let alone superior to five full-scale IQ scores obtained over the course of Smith's lifetime.

2. If this is what a "holistic review" looks like under *Hall*, then *Hall* should be overruled. And to the extent that *Moore* sustained *Hall*'s problems, then *Moore* should be reconsidered too. Both cases implied that *Atkins* protects against "an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704; *Moore*, 581 U.S. at 6. Not so: *Atkins* protects offenders who *are* intellectually disabled and who *have* significantly subaverage IQ. There is no national consensus about the death penalty for murderers who "may" have a low IQ.

While the evolving-standards test generally has questionable grounding, *see United States v. Grant*, 9 F.4th 186, 201-07 (3d Cir. 2021) (Hardiman, concurring), *Hall* and *Moore* exhibit an approach of the worst kind. Instead of relying on objective evidence, courts are invited to consult "the medical community," App.3a, which usually means picking out snippets from the latest diagnostic manuals. Constitutional law thus evolves not by amendment, national consensus, or even this Court's "independent evaluation" of culpability. *Atkins*, 536 U.S. at 321.

Instead, our Eighth Amendment "evolves" every time the APA relaxes its diagnostic criteria. For example, in the 2022 revision to the DSM-5, the APA struck the number "70" from a sentence on which *Hall* relied and replaced it with "65-75." DSM-5-TR at 42. A person with an IQ score *above 75* can now be diagnosed with an intellectual disability based on his "actual functioning." *Id.* Of course, "actual functioning" is not the criterion *Atkins* endorsed. *See* 536 U.S. at 308 n.3. Nor is the constitutional test whether an offender could be "diagnosed" with an intellectual disability. But that did not stop the court below from granting

Smith's claim because it thought his "actual functioning is comparable" to someone "with a lower IQ score" than those he actually obtained. App.8a.

The clinical standards used to adjudicate *Atkins* claims do not merely evolve; they mutate—sometimes "inadvertently."[8] "Psychiatry is not … an exact science, and psychiatrists disagree widely and frequently" on diagnostic criteria. *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). "Although we have no reason to doubt that these groups are composed of educated men and women acting in good faith," they "cannot define the boundaries of constitutional rights." *Otto v. City of Boca Raton*, 981 F.3d 854, 869-70 (11th Cir. 2020); *cf.* Br. of Ala. as *Amicus Curiae*, *United States v. Skrmetti*, No. 23-477 (filed Oct. 15, 2024) (providing reason to doubt at least some medical groups). Where "uncertainties about the human mind … intersect with differing opinions about how far, and in what ways, mental illness should excuse criminal conduct," the matter is "best left to each State to decide on its own." *Kahler v Kansas*, 589 U.S. 271, 280-81 (2020).

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[8] Another crucial sentence (on which the Court relied in *Moore*) was deleted from the DSM altogether: "To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments." *Compare* DSM-5 at 38 *with* DSM-5-TR at 42; *accord Ex parte Mays*, 686 S.W.3d 745, 748 n.5 (Tex. Crim. App. 2024). The stated reason for this change was that the original "appear[ed] to inadvertently change the diagnostic criteria." *See* Am. Psychiatric Ass'n, *Text Updates: Intellectual Developmental Disorder* (2021), perma.cc/AN99-FKHN. But that's not what the APA told this Court. *See* Br. of Am. Psychological Ass'n et al. as *Amici Curiae* at 9, *Moore v. Texas*, No. 15-797 (filed Aug. 4, 2016) ("The current diagnostic criteria require a connection between the deficits in intellectual functioning and adaptive functioning….").

While the evolving-standards-of-decency project is suspect as a whole, binding our constitutional law to changing *clinical* standards sets *Hall* and *Moore* apart. In comparison to the standards of decency announced in *Roper*, *Kennedy*, or *Graham*, these two cases have spawned significantly more litigation and confusion. Once the Court outsourced *Atkins* doctrine to the whims of professional groups, it guaranteed that the standards will "never stop" evolving. *Cf. Graham*, 560 U.S. at 85 (Stevens, J., concurring).

That's not what *Atkins* set out to do, and it's not what *Atkins*'s methodology licensed. The Court should grant certiorari to reaffirm that States can develop reasonable and "appropriate ways" to identify the intellectually disabled. *Atkins*, 536 U.S. at 317. Requiring proof by a preponderance of the evidence is one of those ways, but States might also find "some high[er] threshold showing" to be "necessary." *Cf. Ford*, 477 U.S. at 417; *Young*, 860 S.E.2d at 768-76 (plurality op.). And there may be other ways to afford a "fair opportunity" to offenders, *Hall*, 572 U.S. at 724, who make "a prima facie showing," *Rivera v. Quarterman*, 505 F.3d 349, 357 (5th Cir. 2007). In any event, the Constitution neither "provides" nor "forbids" a "particular standard of proof," and Alabama's standard is the "typical[]" one. *E.M.D. Sales, Inc. v. Carrera*, No. 23-217 (U.S. Jan. 15, 2025) (Gorsuch, J., concurring) (slip op., at 1).

II. Multiple Scores Of 71 To 75 Can Count Jointly Against An *Atkins* Claim.

A. The Court should also grant certiorari to clarify how and why courts should conduct an "analysis of multiple IQ scores jointly." App.12a. On remand, the Eleventh Circuit seemed to appreciate that "scores

across multiple tests may help identify a test-taker's true IQ score." App.4a. But its analysis did not shed light on this "complicated endeavor." App.12a. Instead, the panel retreated to findings about what Smith's scores "individually suggest," App.6a, and its opinion never tried to identify Smith's true IQ.

The court first held that scores "within the range of about 65 to 75" are "consistent with mild intellectual disability." App.7a. The court then noted that Smith's scores were 74, 75, 72, 74, and 78. *Id.* Thus, "four out of Smith's five IQ scores are consistent with an intellectual disability" and "trump[]" the fifth. *Id.*

The reasoning is "[un]complicated" because the Eleventh Circuit did not, in fact, analyze the scores "jointly." App.12a. The court just asked how many of the scores were 75 or lower. Answer: four for Smith; one for Alabama. If it were that easy, the Court could have "specified how courts should evaluate multiple IQ scores" long ago. App.12a.

It's not that easy, but it's not much harder—at least in Smith's case. Here is how the Eleventh Circuit should have analyzed Smith's five IQ scores "jointly." As the State's expert testified, five IQ tests provide a more reliable estimate of the test-taker's true IQ than one test alone. App.70a. Accordingly, a court should account for the conjunction of an offender's scores, rather than rely on what each score might suggest separately. One way to account for the conjunction of scores is averaging. Other ways include the median and mode. A more complicated method is the "composite score," which treats each score as part of a larger test by accounting for the correlation between the different tests administered. *See, e.g.*, W. Joel Schneider, *Principles of Assessment of Aptitude and Achievement*

289-90, in D. Saklofske et al., The Oxford Handbook of Child Psychological Assessment (2013).

Smith obtained five valid IQ scores. The average of his scores is 74.6, and both the median and modal scores are 74. While the composite score could be computed if the court knew the correlations among the different tests, such precision is not necessary to decide the case. The average provides "a rough approximation of a composite score," although it may be slightly higher. *Id.* at 290. On balance, the evidence suggests that Smith's IQ is likely to be higher than 70, and his claim fails at prong one under Alabama law.

This Court can conduct the foregoing analysis of Smith's IQ scores without running afoul of *Hall*'s admonition to consider the risk of error. For starters, analyzing multiple IQ scores *is* a way to account for the risk of error. *Hall* taught only that a State cannot treat a single IQ test score as "final and conclusive evidence" of intellectual functioning. 572 U.S. at 702. But *Hall* said nothing about how experts would treat an average or composite score. *See Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) ("*Hall* also reached no holding as to the evaluation of IQ when an *Atkins* claimant presents multiple scores…."); *accord* App.12. "The SEM" is one way to "reflect[] the reality" of intellectual functioning, *Hall*, 572 U.S. at 713, but it is not the only appropriate way, and it may not be the best way. *See supra* 22 n.6.

Even if courts must apply "the SEM," as a matter of constitutional law, they should still consider the effect of multiple IQ test scores to narrow the error range. "In technical terms, because the SEM for a single score is greater than the standard error of the average of several scores, using the single-score SEM

as a measure of the probable error in the average score would be a mistake." David H. Kaye, *Deadly statistics: quantifying an 'unacceptable risk' in capital punishment*, 16 Law, Probability, & Risk 7, 29 (2017); *see also* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychology, Public Policy, & Law 170, 186 (2006) ("[B]ecause this defendant has three scores … the possibility of measurement error is much reduced."). For example, one author illustrated how the average of four IQ scores with a SEM of ± 2.16 (*e.g.*, the WAIS-IV) produces an error range of ± 0.73. *See* Kaye, *supra* at 29 n.142. Mechanically applying a SEM of ± 5 to each of Smith's scores, the Eleventh Circuit failed to consider them jointly. Even if the SEM were ± 5 for every test, the error range for Smith's *average score* of 74.6 would be much smaller. Ignoring the combination of Smith's scores, the panel wrongly ended the inquiry "when experts in the field would consider other evidence." *Hall*, 572 U.S. at 712.

The Eleventh Circuit's "holistic review" was not only unscientific; it drastically expanded the set of *Atkins*-eligible offenders. First, by counting scores up to 75 in Smith's favor, the panel started with a thumb on the scale. Scores between 70 and 75 may be "consistent with mild intellectual disability," App.7a, but they are (at least) equally consistent with borderline intellectual functioning. At best for Smith, his scores of 74, 75, 72, and 74 should count for *neither* side, not as evidence that his IQ is 70 or less. *See supra* §I.B. Further, the panel's test would create the absurd result that an offender can satisfy prong one despite scoring 75 on tens or hundreds or *any number* of tests. In that scenario, his true IQ likely would be 75, so the claim should fail. Second, the panel placed another

thumb on the scale by requiring the State to "foreclose" or "rule out" an intellectual disability. App.5a-6a. The result of an "analysis of multiple IQ scores jointly" (App.12a) should be a finding about the offender's likely IQ. But by ending the inquiry after deciding only what Smith's IQ "could be," the panel asked and answered the wrong question, and it let Smith off the hook. *See supra* §I.B.

B. *Hall* and *Moore* did not endorse the Eleventh Circuit's test. The Court did not hold that IQ scores of 75 or less always favor the offender regardless of what they suggest in combination. But if that rule can be drawn straightforwardly from *Hall* and *Moore*, then those cases were wrong and must be reconsidered.

At a minimum, *Hall* and *Moore* should be clarified. In *Hall*, the offender had seven valid test scores between 71 and 80, yet the Court focused on the lowest score. *See, e.g.*, 572 U.S. at 716 ("Thus in 41 States an individual in Hall's position—an individual with an IQ score of 71—would not be deemed automatically eligible for the death penalty."); *id.* at 724 ("Florida seeks to execute a man because he scored a 71 instead of a 70 on an IQ test."). But the Court "never explain[ed]" how or why its analysis should "apply when a defendant consistently scores above 70 on *multiple* tests." *Id.* at 742 (Alito, J., dissenting); *see also Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting); *Wilson*, 170 F.Supp.3d at 366 ("*Hall* does not provide explicit guidance with respect to how courts should treat multiple IQ test results…."). In *Brumfield v. Cain*, the Court theorized that "evidence of a higher IQ test score … could [have] render[ed] the state court's determination reasonable." 576 U.S. 305, 316 (2015). But there was no higher score and thus no opportunity

to pass on the question. And while *Moore* cited the average of six scores, the Court again focused on the lowest score. 581 U.S. at 8, 14 ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning."); *but see id.* at 34 n.1 (Roberts, C.J., dissenting).

Following *Hall*, some courts have focused on the low end of the lowest score's error range. *See, e.g.*, App.5a, 42a, 44a-45a; *Sasser*, 999 F.3d at 619; *Pizzuto*, 947 F.3d at 520 n.8, 528. And others take a wider view of IQ evidence. *See, e.g.*, *Black*, 866 F.3d at 748-49; *Smith*, 824 F.3d at 1245; *Garcia*, 757 F.3d at 226.

The Court should grant certiorari to resolve the split and clarify that *Hall* and its progeny did not command courts to ignore the import of multiple IQ scores. The problem will only worsen as courts import the latest clinical standards, expanding the set of eligible claimants without any "national consensus" or "independent evaluation" of culpability. The result not only frustrates the Court's reasoning in *Atkins* but also threatens to disturb state sentences of violent murderers around the country. Those sentences carry a presumption of finality and legality. When the panel below demanded proof that would "foreclose" Smith's claim, his habeas proceedings started to resemble not a collateral attack, not an appeal, but a retrial. The State already carried its burden twenty-seven years ago when it secured Smith's conviction and sentence. Now the burden should lie with Smith.

CONCLUSION

The Court should grant Alabama's petition for a writ of certiorari and reverse.

Respectfully submitted,

Steve Marshall
Attorney General
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record
Robert M. Overing
Deputy Solicitor General
Dylan Mauldin
Assistant Solicitor General

Office of the Att'y Gen.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

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