APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-14519

JOSEPH CLIFTON SMITH,

Petitioner-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:05-cv-00474-CG-M

ON REMAND FROM THE SUPREME COURT OF
THE UNITED STATES

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

This matter returns to us on remand from the Supreme Court. *Hamm v. Smith*, No. 23-167, 604 U.S. ___, 2024 WL 4654458, at *1 (U.S. Nov. 4, 2024) (per curiam). Previously, we affirmed the district court's order granting Joseph Clifton Smith's 28 U.S.C. § 2254 petition seeking to set aside his death sentence for capital murder because he is intellectually disabled. *Smith v. Comm'r, Ala. Dep't of Corr. ("Smith V")*,

67 F.4th 1335, 1354 (11th Cir. 2023) (per curiam). Alabama sought certiorari, and the Supreme Court remanded the case to us to specify whether we rested our conclusion that the district court did not clearly err in finding Smith had significantly subaverage intellectual function on (a) solely "the fact that the lower end of the standard-error range for Smith's lowest IQ score is 69" or (b) a "holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." *Hamm*, 2024 WL 4654458, at *1.

The answer to the Supreme Court's question is (b): a "holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." But to be even more precise, based on the complete record, including any relevant expert testimony, we concluded that the district court did not clearly err in its factual findings that Smith suffered from significantly subaverage intellectual function, that he had significant and substantial deficits in adaptive behavior, and that he manifested those qualities before he turned 18. *Smith V*, 67 F.4th at 1354. We unambiguously reject any suggestion that a court may ever conclude that a capital defendant suffers from significantly subaverage intellectual functioning based solely on the fact that the lower end of the standard-error range for his lowest of multiple IQ scores is 69. And we didn't so conclude the last time we opined in this case.

We summarize below how we reached our determination.

We begin with the law we applied. The Eighth and Fourteenth Amendments prohibit states from executing intellectually disabled individuals. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). A person is intellectually

disabled if he (1) has significantly subaverage intellectual functioning, (2) has significant or substantial deficits in adaptive behavior, and (3) has manifested those qualities during his developmental period (before the age of 18). *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002); *see Hall v. Florida*, 572 U.S. 701, 710 (2014). The first prong is at issue on remand, but the question of whether a person has significantly subaverage intellectual functioning often overlaps with whether that person also has significant or substantial deficits in adaptive behavior. *See Hall*, 572 U.S. at 723 (explaining that when diagnosing an intellectual disability, "[i]t is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment").

Generally, a person has significantly subaverage intellectual functioning if his IQ is 70 or lower. *Ex parte Perkins*, 851 So. 2d at 456; *Hall*, 572 U.S. at 711. But the medical community recognizes "that the IQ test is imprecise." *Hall*, 572 U.S. at 723. So each IQ test score has a standard error of measurement that accounts for the margin of error above and below the test-taker's score. *Id.* at 713; *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016). That standard error of measurement "allows clinicians to calculate a range within which one may say an individual's true IQ score lies." *Hall*, 572 U.S. at 713. As a result, the intellectual-functioning inquiry must recognize "that an IQ test score represents a range rather than a fixed number." *Id.* at 723.

For related reasons, qualitative factors are also important. Clinicians who attempt to diagnose whether an individual has significantly subaverage intellectual functioning do not limit themselves to IQ tests; "[i]ntellectual disability is a condition, not a number."

Id. at 723. That is why the "relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist." *Id.* at 712 (citation omitted); *see also id.* ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning is comparable to that of individuals with a lower IQ score." (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37 (5th ed. 2013))).

So for instance, when the standard error of measurement of an individual's IQ score suggests that his true IQ may be less than or equal to 70, he "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723; *Moore v. Texas*, 581 U.S. 1, 14 (2017) ("Because the lower end of Moore's score range falls at or below 70, the [Texas Court of Criminal Appeals] had to move on to consider Moore's adaptive functioning.").

Here, Smith had multiple IQ scores. And that "complicate[s]" matters. *Hall*, 572 U.S. at 714. On the one hand, consistent scores across multiple tests may help identify a test-taker's true IQ score; we'd expect consistent results to reflect a person's intellectual ability as opposed to random chance. But on the other hand, "because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." *Id.* As a result, "[e]ven when a person has taken multiple tests, each separate score must be assessed using the [standard-error margin]." *Id.* Still, the throughline remains: if a "holistic" review of a person's "multiple IQ scores" does

not foreclose the conclusion that he has significantly subaverage intellectual functioning, *Hamm*, 2024 WL 4654458, at *1, "the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime," *Hall*, 572 U.S. at 724.

The district court adhered to that legal framework. It first found that Smith had an IQ test score as low as 72, which, according to expert testimony, meant his true IQ could be as low as 69. *Smith v. Dunn ("Smith IV")*, No. 05-CV-00474, 2021 WL 3666808, at *2–5 (S.D. Ala. Aug. 17, 2021). So the district court properly accounted for the standard-error range for IQ tests. And that suggested additional evidence may be required to determine whether Smith has significantly subaverage intellectual functioning. *Hall*, 572 U.S. at 713, 724.

Then, the district court properly considered the "complicat[ing]" factor of Smith's other IQ scores. *Id.* at 714. It assessed whether Smith's IQ test results, taken together and in context of expert testimony, foreclosed the conclusion that Smith had significantly subaverage intellectual functioning. *See id.* It evaluated the rebuttal from Dr. King (Alabama's expert) that Smith's "multiple IQ scores"—75, 74, 72, 78, and 74—"taken over a long period of time place him in the borderline range, functioning just above intellectual disability." *Smith IV*, 2021 WL 3666808, at *3. The district court accepted that Dr. King's logic "leans in favor of finding that Smith does not have significant subaverage intellectual functioning." *Id.* But it ultimately determined that Dr. King's testimony was not "strong enough to conclude that Smith is not intellectually disabled without considering evidence of his adaptive deficits." *Id.* As the district court

explained, "Smith did not consistently score so high that the [c]ourt is confident that the lowest score can be thrown out as an outlier or that the standard error for the" other tests, which individually suggest Smith's true IQ may be 70 or lower, "can be disregarded." *Id.* So the district court "move[d] on to consider" Smith's "adaptive functioning." *Moore*, 581 U.S. at 14.

We held that that was a proper application of governing law. In recognition that "[i]ntellectual disability is a condition, not a number," *Hall*, 572 U.S. at 723, the district court evaluated the body of evidence that Smith's IQ scores represent. When it found that Smith's IQ scores could not rule out the possibility that Smith is intellectually disabled, it followed the law's requirement that individuals must be able to present, and the district court must consider, additional evidence of their intellectual disability, including evidence of the individual's adaptive deficiencies. *Id.* at 724.

No part of the district court's analysis contained legal error. So we could reverse the district court's determination that Smith was intellectually disabled only if its factual findings were clearly erroneous. *See Ledford*, 818 F.3d at 632 ("A determination as to whether a person is intellectually disabled is a finding of fact." (cleaned up)).

"Clearly erroneous" is a "highly deferential standard of review." *Holladay v. Allen*, 555 F.3d 1346, 1354 (11th Cir. 2009) (citation omitted). "A finding that is plausible in light of the full record—even if another is equally or more so—must govern." *In re Wagner*, 115 F.4th 1296, 1305 (11th Cir. 2024) (quoting *Cooper v. Harris*, 581 U.S. 285, 293 (2017)) (cleaned up). In fact, we've said that we must accept a district court's factual findings on clearly erroneous review "unless

[they are] contrary to the laws of nature, or [are] so inconsistent or improbable on [their] face that no reasonable factfinder could accept [them]." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (quoting *United States v. Eddy*, 8 F.3d 577, 580 (7th Cir. 1993)).

And here, the district court's resolutions of the parties' factual disputes are not so inconsistent or improbable that no reasonable factfinder would accept them. To the contrary, the full record at least plausibly supports the district court's findings.

First, the record evidence plausibly supports the district court's finding that Smith's true IQ score could be less than or equal to 70. As Smith's experts testified, four out of Smith's five IQ scores are consistent with an intellectual disability. *See Smith V*, 67 F.4th at 1345–46. Smith's scores of 74, 75, 72, and 74 all fell within the "range of about 65 to 75" that is "consistent with mild intellectual disability." *Id.* at 1342; *see also Hall*, 572 U.S. at 713 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). . . . [T]his involves a score of 65–75." (citation omitted)); *Moore*, 581 U.S. at 14 ("Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79.").

And although Smith scored a 78, Smith's experts testified that the consistent evidence that Smith may have significantly subaverage intellectual functioning "trump[s] an overall score on one administration." *Smith V*, 67 F.4th at 1346. So expert evidence supported the district court's ultimate decision that Dr. King's testimony was not "strong enough to conclude that Smith is not intellectually disabled

without considering evidence of his adaptive deficits." *Smith IV*, 2021 WL 3666808, at *3. And the district court's decision in this regard fell within the range of permissible conclusions the court could reach based on this record. As a result, we determined that the district court did not clearly err in considering evidence of Smith's adaptive deficiencies. *Smith V*, 67 F.4th at 1347–50.

Second, and relatedly, we ruled that the district court did not clearly err in concluding Smith has significantly subaverage intellectual functioning. The additional evidence of Smith's adaptive deficiencies plausibly supports the district court's reasoning that although Smith scored above 70 on IQ tests, his "actual functioning is comparable to that of individuals with a lower IQ score." *Smith IV*, 2021 WL 3666808, at *5 (citation omitted); *see Hall*, 572 U.S. at 723 (same). The district court found that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics." *Smith IV*, 2021 WL 3666808, at *11. And it entered that finding after considering all the expert testimony, including the experts' analyses of Smith's school records and the tests the experts administered to Smith before the evidentiary hearing. *See Smith V*, 67 F.4th at 1349–54.

But in the end, the district court's finding that Smith is intellectually disabled "largely [came] down to which expert" the district court "believed." *Smith IV*, 2021 WL 3666808, at *11. The district court found Smith's experts more persuasive in part because Dr. King's prior testimony contradicted his criticism of Smith's experts' methods. *Smith V*, 67 F.4th at 1350. And because we cannot disturb the district court's findings as to Dr. King's credibility, *see Berenguela-*

Alvarado v. Castanos, 950 F.3d 1352, 1357–58 (11th Cir. 2020), it follows that the opinions Smith's experts drew from a test that Dr. King previously praised at least plausibly support the district court's finding that "Smith has shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior," *Smith IV*, 2021 WL 3666808, at *11.

For the reasons we set forth in *Smith V*, and now clarify above, we concluded that the district court used a "holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony," *Hamm*, 2024 WL 4654458, at *1, when it determined Smith is intellectually disabled. We then concluded that none of the district court's findings were clearly erroneous; the full record plausibly supports each of them. *In re Wagner*, 115 F.4th at 1305. So we affirmed the district court's judgment vacating Smith's death sentence.

APPENDIX B

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OFFICIAL REPORTS OF
THE SUPREME COURT

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REBECCA A. WOMELDORF

REPORTER OF DECISIONS

CASES ADJUDGED
IN THE SUPREME COURT OF
THE UNITED STATES AT

OCTOBER TERM, 2024

HAMM, COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS v. SMITH

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

No. 23–167. Decided November 4, 2024

The District Court below vacated the death sentence of Joseph Clifton Smith after concluding that he is intellectually disabled. Smith has obtained five full-scale IQ scores, ranging from 72 to 78, and his claim of intellectual disability depended in part on whether his IQ is 70 or below. The District Court found that Smith's IQ could be as low as 69 given the standard error of measurement for his lowest score of 72, and further determined that Smith's lowest score is not an outlier when considered together with his higher scores. The Eleventh Circuit affirmed.

Held: The judgment of the Eleventh Circuit is vacated. The Eleventh Circuit's opinion might be read to suggest a per se rule that the lower end of the standard-error range for an offender's lowest score is dispositive. Alternatively, the Eleventh Circuit's opinion might be read to suggest a more holistic approach that considers the relevant evidence, including as appropriate any relevant expert testimony. The case is remanded to the Eleventh Circuit to clarify the basis for its decision.

Certiorari granted; 67 F. 4th 1335, vacated and remanded.

PER CURIAM.

Joseph Clifton Smith was sentenced to death for the murder of Durk Van Dam. The U. S. District Court for the Southern District of Alabama vacated Smith's death sentence after concluding that he is intellectually disabled. See *Atkins v. Virginia*, 536 U. S. 304 (2002). Smith has obtained five full-scale IQ scores, ranging from 72 to 78. Smith's claim of intellectual disability depended in part on whether his IQ is 70 or below. The District Court found that Smith's IQ could be as low as 69 given the standard error of measurement for his lowest score of 72. The District Court then vacated the death sentence, and the U. S. Court of Appeals for the Eleventh Circuit affirmed. *Smith v. Commissioner, Ala. Dept. of Corrections*, 67 F. 4th 1335, 1354 (2023).

Analyzing Smith's intellectual functioning requires evaluating his various IQ scores. In *Hall v. Florida*, 572 U. S. 701, 714 (2014), this Court stated that "when a person has taken multiple tests, each separate score must be assessed" considering the standard error of measurement. The Court further noted that "the analysis of multiple IQ scores jointly is a complicated endeavor." *Ibid.* This court has not specified how courts should evaluate multiple IQ scores. See *ibid.*; *Moore v. Texas*, 581 U. S. 1 (2017); *Brumfeld v. Cain*, 576 U. S. 305 (2015).

The Eleventh Circuit's opinion can be read in two ways. On the one hand, the Eleventh Circuit's opinion might be read to afford conclusive weight to the fact that the lower end of the standard-error range for Smith's lowest IQ score is 69. That analysis would suggest a per se rule that the lower end of the standard-error range for an offender's lowest score is dispositive. On the other hand, the Eleventh Circuit also approvingly cited the District Court's determina-

tion that Smith's lowest score is not an outlier when considered together with his higher scores. That analysis would suggest a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony.

The Eleventh Circuit's opinion is unclear on this point, and this Court's ultimate assessment of any petition for certiorari by the State may depend on the basis for the Eleventh Circuit's decision. Therefore, we grant the petition for certiorari and Smith's motion for leave to proceed *in forma pauperis*, vacate the judgment of the Eleventh Circuit, and remand the case for further consideration consistent with this opinion.

It is so ordered.

JUSTICE THOMAS and JUSTICE GORSUCH would grant the petition for a writ of certiorari and set the case for argument.

REPORTER'S NOTE

The attached opinion has been revised to reflect the usual publication and citation style of the United States Reports. The revised pagination makes available the official United States Reports citation in advance of publication. The syllabus has been prepared by the Reporter of Decisions for the convenience of the reader and constitutes no part of the opinion of the Court. Other revisions may include adjustments to formatting, captions, citation form, and any errant punctuation. The following additional edits were made:

None

APPENDIX C

In the United States Court of Appeals For the Eleventh Circuit

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No. 21-14519

JOSEPH CLIFTON SMITH,

Petitioner-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1: 05-cv-00474-CG-M

(Filed Jun. 9, 2023)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

ORDER:

The State's motion to stay the issuance of the mandate pending a petition for writ of certiorari fails to show "that there is good cause for a stay." Fed. R. App. P. 41(d)(1); *see also, e.g., Nara v. Frank,* 494 F. 3d 1132 1133 (3d Cir. 2007) (observing that courts award such

relief in "exceptional cases"). We therefore deny the motion.

To establish good cause for a stay, "there must be a likelihood of irreparable harm if the judgment is not stayed." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The State invokes two reasons in service of its argument that it will suffer irreparable harm absent a stay. Neither is persuasive.

First, the State asserts that it "would likely need to resentence" Smith unless we stay our judgment affirming the district court's order vacating his death sentence. Ala.'s Mot. at 18. "Absent a stay," the State complains that it will "be forced to expend resources to conduct a new sentencing hearing for a murder that took place in the last century." *Id.* at 20. But even the State's own motion concedes that resentencing Smith will require minimal resources. As the State explained, "Because Smith's conviction of a capital crime is not disputed, the only sentence he could receive would be life without parole." *Id.* at 20.

Second, the State also claims that its certiorari petition risks becoming moot "if Smith's sentence is vacated and he is resentenced by the state circuit court to comply with this Court's ruling." *Id.* at 18. But even if Smith's death sentence is vacated and he is sentenced to life without parole before the Supreme Court resolves the State's petition for writ of certiorari, "neither the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing

nor the trial court's action in light of that mandate makes the case moot." *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017). Rather, the Supreme Court could still "undo what the *habeas corpus* court did" if it so desires. *Id.* (quoting *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 308 (1946)).

* * * *

"A stay is not a matter of right," but "is instead 'an exercise of judicial discretion.'" *Nken v. Holder, 556* U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 672-73 (1926)). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. That is a "heavy burden," *Scott*, 561 U.S. at 1302. And it is one the State has failed to carry here.

The State's motion not only fails to establish good cause for a stay, but it also mischaracterizes the panel opinion. According to the State's motion, the panel opinion applied "a presumption that an individual's IQ falls at the bottom of his IQ range." Ala.'s Mot. at 15 (quoting, allegedly, *Smith v. Comm'r, Ala. Dep't of Corr. ("Smith II")*, 67 F.4th 1335, 1348 (11th Cir. 2023)).

But the panel opinion did not apply a presumption that an individual's IQ score falls at the bottom of his IQ range; the panel opinion presumed that an individual's "IQ score *could*" fall at the bottom of his range of admissible IQ scores. *Smith II*, 67 F.4th at 1345; *see also id.* at 1346 (noting that the district court did not find the State's expert's testimony "strong enough" to throw out Smith's lowest IQ score, leading the district

court to find that Smith's "IQ *could be* 'as low as 69'" (citations omitted)). So if the bottom of a person's range of admissible IQ scores is equal to or less than 70, that individual *could* have significantly subaverage intellectual functioning. *E.g.*, *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (defining significantly subaverage intellectual functioning as an IQ of 70 or below). When a district court finds that an individual *could* have significantly subaverage intellectual functioning, binding Supreme Court precedent requires the district court to move on and consider other evidence of the individual's intellectual disability (or lack thereof). *See Smith II*, 67 F.4th at 1347 (first citing *Hall v. Florida*, 572 U.S. 701, 707, 724 (2014); then citing *Moore v. Texas*, 581 U.S. 1, 14 (2017)). And we review "a district court's finding that an individual is intellectually disabled" "for clear error" only. *Id.* at 1344.

The State's distortion of the panel opinion further undermines its claim "that there is good cause for a stay." Fed. R. App. P. 41(d)(1).

For these reasons, the State's motion to stay the issuance of the mandate pending a petition for writ of certiorari is DENIED.

APPENDIX D

[PUBLISH]

In the
United States Court of Appeals
for the Eleventh Circuit

No. 21-14519

JOSEPH CLIFTON SMITH,

Petitioner-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:05-cv-00474-CG-M

(Filed May 19, 2023)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM.

This appeal concerns whether the district court clearly erred in finding that Joseph Clifton Smith is intellectually disabled and, as a result, that his death sentence violates the Eighth Amendment. We hold that the district court did not clearly err. We therefore affirm the district court's judgment vacating Smith's sentence.

I.

A. *A jury found petitioner Joseph Clifton Smith guilty of capital murder.*

Durk Van Dam was brutally murdered on November 23, 1997. *Smith v. Campbell ("Smith III")*, 620 F. App'x 734, 736 (11th Cir. 2015). Police found Van Dam's body in an isolated area near his pick-up truck in Mobile County. *Id.* On the same day that police discovered Van Dam's body, they interviewed Petitioner Joseph Clifton Smith. *Id.*

Although Smith confessed to Van Dam's murder, he offered two conflicting versions of the crime. *Id.* At first, he said that he watched Van Dam's murder. *Id.* Then, he said that he participated, but that he didn't intend to kill Van Dam. *Id.*

A grand jury in Mobile County eventually indicted Smith for capital murder. *Id.* The case went to trial, and the jury found Smith guilty. *Id.* at 736–37.

B. *During the sentencing phase of Smith's trial, the parties presented evidence of Smith's intellectual abilities.*

During the sentencing phase, the parties presented evidence concerning aggravating and mitigating factors. One mitigating factor was whether Smith committed the crime while he "was under the influence of extreme mental or emotional disturbance." Ala. Code § 13A-5-51(2). Both sides presented evidence of Smith's childhood, family background, and intellectual

abilities to contest whether that mitigating factor applied to Smith.

Smith's mother and sister testified that his father was an abusive alcoholic. *Smith III*, 620 F. App'x at 738–39. Smith's father beat the children with belts and water hoses. *Id.* Smith's mother and father divorced when Smith was nine or ten years old. *Id.* at 738.

Soon after his parents divorced, Smith's mother remarried to a man named Hollis Luker. Like Smith's father, Luker beat the children and was drunk "just about every day." *Id.* at 739. Smith's neighbor testified that his mother would bring Smith and his siblings to the neighbor's home to escape Luker's beatings. *Id.*

In the meantime, Smith struggled in school. He had been described as a "slow learner" since he was in the first grade. Smith was eight years old when he reached third grade. At that point, he still needed help to function at a first-grade level, prompting his teacher to label him an underachiever and refer him for an "intellectual evaluation."

During that evaluation, Smith obtained a full-scale IQ score of 75. That score meant that Smith was "functioning in the Borderline range of measured intelligence." Smith's school then asked his mother for permission to do more testing.

At the beginning of Smith's fourth-grade year, which coincided with his parents' divorce, his mother

agreed to have the school perform additional testing. After undergoing more testing, Smith was placed in a learning-disability class.

After that placement, Smith developed an unpredictable temper and often fought with classmates. His behavior became so troublesome that his school placed him in an "emotionally conflicted classroom." These types of classrooms hosted special-education classes for students who could not adjust to a regular classroom, according to Dr. James Chudy, a clinical psychologist. Dr. Chudy met with Smith three times after Van Dam's murder, administered several tests, analyzed records from Smith's past, authored a report about his findings, and testified during Smith's sentencing phase. *Id.* at 738–39.

Smith's academic deficits persisted through junior high school. When he entered sixth grade, his school reevaluated his intellectual abilities. This time, he obtained a full-scale IQ score of 74, again placing him "in the Borderline range of measured intelligence." By grade seven, the school determined that Smith was eligible for the "Educable [Intellectually Disabled]" program. He went on to fail the seventh and eighth grades before dropping out of school for good. *Id.* at 740.

Smith spent much of the next fifteen years in prison. When he was nineteen, Smith went to prison for burglary and receiving stolen property. He was released from prison after six years. But he returned a year later when he violated the conditions of his parole.

There he remained until his release in November 1997, just two days before Van Dam's murder.

Dr. Chudy reevaluated Smith just after Van Dam's murder. When Dr. Chudy tested Smith's IQ, Smith obtained a full-scale score of 72. During the sentencing phase, Dr. Chudy testified that Smith's true IQ score could be as high as 75 or as low as 69 after accounting for the standard error of measurement inherent in IQ tests. "69 is considered clearly [intellectually disabled]," [1] he explained. Either way, Smith's raw score of 72 suggests that he functions at a lower level than 97% of the general population. Dr. Chudy also described Smith as "barely literate in reading."

The sentencing phase eventually came to an end, and the Alabama trial court found that the aggravating circumstances out-weighed the mitigating ones. The court thus sentenced Smith to death.

C. Smith petitioned for habeas relief and argued, among other things, that his sentence violates the Eighth and Fourteenth Amendments because he is intellectually disabled.

After exhausting his direct appeals, Smith sought habeas relief in state court. He argued, among other things, that his sentence violated the Eighth and

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[1] We alter quotations that use outdated language to describe intellectual disabilities. *E.g.*, *Brumfield v. Cain*, 576 U.S. 305, 308 n.1 (2015); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1303 n.1 (11th Cir. 2015).

Fourteenth Amendments because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

Consistent with the medical community's general consensus, Alabama law defines intellectual disability as including three criteria: (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the onset of those qualities during the developmental period (i.e., before the age of 18). *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

Applying that definition, the Alabama Court of Criminal Appeals ultimately rejected Smith's *Atkins* claim, finding that he could not meet the intellectual-disability criteria based on the evidence adduced during his trial and sentencing phase. *See Smith v. State ("Smith I")*, 71 So. 3d 12, 19–21 (Ala. Crim. App. 2008) ("[T]he record in Smith's direct appeal supports the circuit court's conclusion that Smith does not meet the broadest definition of [intellectually disabled] adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002)."), *cert denied*, No. 1080589 (Ala. 2010) (mem.).

Smith then invoked 28 U.S.C. § 2254 and pressed his *Atkins* claim in federal court. The district court rejected Smith's *Atkins* claim without holding an evidentiary hearing, concluding that the Alabama Court of Criminal Appeals did not unreasonably apply federal law. *Smith v. Thomas ("Smith II")*, No. 05-0474-CG-M, 2013 WL 5446032, at *29 (S.D. Ala. 2013). In doing so, the district court relied on Smith's failure "to

prove that his intellectual functioning was or is significantly subaverage," *id.* at *29 n.1, which is the first prong for Alabama's intellectual-disability definition and requires an IQ of 70 or below. *Ex parte Perkins*, 851 So. 2d at 456. The district court therefore treated "an IQ of 70 as the ceiling for significantly subaverage intellectual functioning" and held that Smith's full-scale IQ scores of 75, 74, and 72 were "fatal to Smith's *Atkins* claim." *Smith II*, 2013 WL 5446032, at *28–29.

Smith then appealed, and we reversed. *Smith III*, 620 F. App'x at 749–52. We first explained that Alabama law does not employ "a strict IQ cut-off of 70" to define significantly subaverage intellectual functioning. *Id.* at 749. And that was key because Dr. Chudy's testimony during the sentencing phase "showed that Smith's IQ could be as low as 69 given a standard error of measurement of plus-or-minus three points." *Id.* at 749–50 (citation omitted). We also noted that "other trial evidence" suggested that Smith had "deficits in intellectual functioning," *id.* at 750. Based on that evidence and "the fact that Alabama does not employ a strict IQ cut-off score of 70," we held that the Alabama Court of Criminal Appeals "determination that Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts." *Id.* (citation omitted).

We then turned to the Alabama Court of Criminal Appeals's finding "that Smith did not suffer from significant or substantial deficits in adaptive behavior."

Id. This, too, was an unreasonable determination of the facts, we said, because the record contained evidence "that would support a fact finding that Smith had significant limitations in at least" two areas of adaptive functioning: "(1) social/interpersonal skills and self-direction." *Id.* We therefore said that "the record affirmatively contradicts" the Alabama Criminal court of Appeals's finding that Smith did not suffer from significant defects in adaptive behavior. *Id.* at 750–51.

For those reasons, we remanded Smith's *Atkins* claim to the district court. *Id.* at 751. We instructed the district court "to allow Smith . . . to present an expert witness on his behalf." *Id.* at 750–51. And we also instructed the district court to consider "Smith's requests for discovery and an evidentiary hearing." *Id.* at 752.

D. The district court held an evidentiary hearing to determine whether Smith is intellectually disabled.

On remand, the district court held an evidentiary hearing to assess whether Smith is intellectually disabled. The district court heard lay and expert testimony and received reports from experts who evaluated Smith and analyzed his records.

i. Evidence of Smith's Intellectual Functioning

Smith's first witness was Dr. Daniel Reschly, a certified school psychologist with fifty years of experience

in assessing intellectual disability. Since 1998, Dr. Reschly has taught at (and sometimes chaired) the top-ranked Department of Special Education at Peabody College of Education and Human Development. His teaching and research focus on identifying and treating "persons with mild intellectual disability."

Dr. Reschly testified that people with mild intellectual disability exhibit "borderline and overall low intellectual performance." "It's important" to treat a person's IQ score as indicating a range of scores, he said, because the medical community can only approximate a person's true IQ. This concept reflects the standard error of measurement inherent in IQ tests. So "a range of about 65 to 75" is the "level for someone's performance on an IQ test consistent with mild intellectual disability," Dr. Reschly explained.

Smith also called Dr. John Fabian, who holds a doctorate in clinical psychology and works as a forensic psychologist. When Dr. Fabian assessed Smith's IQ, Smith obtained a full-scale IQ score of 78. Although Dr. Fabian conceded that "a 78 is definitively above" the "70 to 75 IQ range," he testified that Smith's 78 does not eliminate the possibility that Smith is intellectually disabled. To support that answer, he cited Smith's other IQ scores, all of which were lower than 75. Those scores, he said, "trump an overall score on one administration."

For its part, the state called Dr. Glen King, a clinical and forensic psychologist who also practices law. When Dr. King assessed Smith's IQ, Smith

obtained a full-scale IQ score of 74. As a result, Smith has taken five IQ tests during his lifetime. And he has obtained full-scale IQ scores of 75, 74, 72, 78, and 74. Dr. King therefore testified that Smith displayed "a very consistent pattern of intellectual quotient scores" on all five tests. In other words, he testified that the standard error of measurement deserves less weight here because Smith's scores all "fall in the borderline range of intellectual functioning." "I think that the scores speak for themselves," and "they are what they are," he said.

ii. Evidence of Smith's Adaptive Behavior

While intellectual functioning aims "to assess the individual's best level of functioning," Dr. Reschly testified that adaptive behavior looks at the person's "typical performance" and asks, "[W]hat do they do on a day-to-day basis?" A person has significant adaptive behavior limitations if he has "significant deficits in one of [three] areas: conceptual, social, and practical." The conceptual domain includes literacy skills, language, and financial literacy. "The social domain of adaptive behavior refers to various social competencies" that a person "use[s] on an everyday basis." "The practical domain includes a wide diverse set of behaviors that" involve "simple self-care" including "eating, toileting, [and] dressing oneself." A person who shows "significant deficits in one of those areas" meets the medical community's standard for having significant deficits in adaptive behavior.

Dr. King testified that the ABAS-3 test is the "only" test that is "appropriate" for assessing a person's adaptive functioning. The test requires the subject to read a series of statements describing a behavior and rate, on a scale of one to three, how often they perform that behavior without a reminder and without help.

Dr. King administered the ABAS-3 test when he met with Smith before the evidentiary hearing. At the evidentiary hearing, Dr. King testified that in his "experience with capital litigation cases," Smith "generated the highest scores" on the ABAS-3 that Dr. King has seen.

For his part, Dr. Fabian used a different test—called the Independent Living Scales test—to assess Smith's adaptive behavior. The results suggested to Dr. Fabian that Smith had "deficits in every area."

Dr. King sought to undermine those results by testifying that the Independent Living Scales test "is not a recommended device for assessing adaptive behavior." But in other cases where he provided expert testimony, Dr. King testified that the Independent Living Scales test "measures adaptive functioning in a number of different domains," *Tarver v. State*, 940 So. 2d 312, 324 (Ala. Ct. Crim. App. 2004) (Cobb, J., concurring in part and dissenting in part).

Dr. Reschly discussed Smith's "failure to acquire literacy skills at an age-appropriate level, which relates to the conceptual demand of adaptive behavior." Dr. Fabian agreed. Smith's school records show signs

"consistent with significant limitations in at least [the] conceptual domain," he said.

Dr. Reschly and Dr. Fabian also testified that Smith exhibited deficits in the social domain of adaptive behavior. Relying on Smith's school records, Dr. Reschly testified that Smith was poor at following rules, obeying instructions, and forming relations with his peers. Dr. Fabian agreed.

Dr. Fabian assessed Smith's communication skills using the Expressive One-Word Picture Vocabulary and the Receptive One-Word Picture Vocabulary tests. The Expressive test assessed Smith's ability to express through language; the Receptive test assessed his receptiveness to language. Both tests relate "to functional academics or conceptual areas of adaptive functioning and even academic achievement," said Dr. Fabian. Smith scored in the first percentile on the expressive test and in the third percentile on the receptive test. The age equivalents for those scores are thirteen and fifteen, respectively. Those scores, according to Dr. Fabian, "are consistent with someone who is intellectually disabled."

iii. Evidence of Smith's Developmental Period

As Dr. Reschly explained, the medical community defines intellectual disability to include not only deficits in intellectual and adaptive functioning, but also the onset of those qualities during the developmental period. Dr. Reschly said that Smith satisfies this prong of the intellectual-disability definition because Smith

was placed in an "Educable [Intellectually Disabled]" program while he was in school, the criteria for which is "largely parallel to the criteria used to identify mild intellectual disability today." Dr. Reschly also testified that Smith's school records reflect that Smith exhibited symptoms "consistent" with someone who has "adaptive behavioral deficits and the intellectual functioning deficits."

Dr. Fabian also concluded that Smith exhibited behavior "consistent with mild intellectual disability" during the developmental period. Dr. Fabian reached that conclusion after reviewing Smith's school records and Dr. Chudy's report.

E. After the evidentiary hearing, the district court found that Smith is intellectually disabled and therefore granted his habeas petition.

After the evidentiary hearing, the district court issued an order and found that Smith is intellectually disabled. *Smith v. Dunn ("Smith IV")*, No. 05-00474-CG, 2021 WL 3666808, at *1 (S.D. Ala. Aug. 17, 2021). Under Alabama law, the court explained, Smith had the burden of establishing (1) that he has significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) that he has significant or substantial deficits in adaptive behavior; and (3) that those qualities manifested during the developmental period (i.e., before he turned 18). *Id.* at *2 (citation omitted).

Starting with the first prong, the district court explained that when an offender's IQ score is close to, but higher than, 70, he "must be allowed to present additional evidence of intellectual disability, including testimony of adaptive deficits." *Id.* (quoting *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019)). The court then noted that Smith had "scores as low as 72, which according to testimony could mean his IQ is actually as low as 69 if you take into account the standard error of measurement." *Id.* At the same time, the court recognized that "all of Smith's IQ scores" are higher than 70. *Id.* at *3. The court then acknowledged Dr. King's testimony that the consistency with which Smith scored above 70 makes it more likely that his true IQ is higher than 70. *Id.* But the court did not find Dr. King's testimony "strong enough" to throw out the lowest score "as an outlier" or to disregard the standard error of measurement. *Id.* The court therefore determined that it needed to consider additional evidence, including testimony about Smith's adaptive deficits. *Id.*

Then the court turned to Smith's adaptive behavior. *Id.* at *4. Invoking our decision in *Smith III*, the court explained that evidence from Smith's sentencing phase "support[ed] a fact finding that Smith had significant limitations in at least two" areas of adaptive behavior: "(1) social/interpersonal skills and (2) self-direction." *Id.* at *5 (quoting *Smith III*, 620 F. App'x at 750). Besides evidence, the court noted that evidence from the evidentiary hearing, like the results from Dr. Fabian's Independent Living Scales Test, "indicated

that Smith had deficits in most areas" of adaptive functioning. *Id.* at *10.

The court acknowledged Dr. King's criticism of the Independent Living Scales test. *Id.* But the court "question[ed] the veracity of Dr. King's criticism" because he used the Independent Living Scales test in another case and testified that the test "measures adaptive functioning in a number of different domains." *Id.* (quoting *Tarver*, 940 So. 2d at 324.)

In the end, the court explained that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed." *Id.* at *11. The court then found that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics." *Id.* at *11. For that reason, the court found that "Smith has shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior." *Id.*

The question thus became whether Smith's deficits in intellectual and adaptive functioning manifested during the developmental period. The court noted that Smith "enrolled in [Educable Intellectually Disabled] classes in the 7th and 8th grades" and that, according to Dr. Reschly, the criteria for such classes "was largely parallel to the criteria used to identify mild intellectual disability today." *Id.* at *11–12 (internal quotations omitted). The court also cited testimony from Dr. Fabian, who similarly concluded that Smith

exhibited behavior "consistent with intellectual disability" during the developmental period. *Id.* at *12. The court therefore found "that Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age." *Id.*

For those reasons, the court granted Smith's habeas petition and vacated his death sentence, explaining that "Smith is intellectually disabled and cannot constitutionally be executed." *Id.* at *13.

II.

Whether a capital offender suffers from an intellectual disability is a question of fact. *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 632 (11th Cir. 2016) (quoting *Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014)). We thus review for clear error a district court's finding that an individual is intellectually disabled. *Id.* (citing *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015)). "Clear error is a highly deferential standard of review." *Holladay v. Allen*, 555 F.3d 1346, 1354 (11th Cir. 2009) (citation omitted). "Under that standard, we may not reverse just because we 'would have decided the [matter] differently.' A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (citations omitted).

III.

The question presented is whether the district court clearly erred by finding that Smith is intellectually disabled and, as a result, that his sentence violates the Eighth and Fourteenth Amendments. The Eighth and Fourteenth Amendments prohibit states from executing intellectually disabled offenders. *Atkins*, 536 U.S. at 321. That prohibition stems from "a national consensus" against the practice of executing such offenders. *Id.* at 316. "To the extent there is serious disagreement about the execution of [intellectually disabled] offenders, it is in determining which offenders are in fact [disabled]." *Id.* at 317.

To resolve that disagreement, the Supreme Court has granted the states some discretion to develop standards for assessing whether an offender is intellectually disabled. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). But states do not wield "unfettered discretion" to determine "how intellectual disability should be measured and assessed." *Hall v. Florida*, 572 U.S. 701, 719 (2014).

Instead, a state's assessment of whether an offender is intellectually disabled "must be 'informed by the medical community's diagnostic framework.'" *Moore v. Texas*, 581 U.S. 1, 13 (2017) (quoting *Hall*, 581 U.S. at 721). Courts identify that framework using "the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and the AAIDD-11." *Id.* (citing *Hall*, 572 U.S. at 704–05, 713); *see also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual*

of Mental Disorders (5th ed. 2013) (hereinafter DSM-5); Am. Ass'n on Intell. & Dev. Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* (12th ed. 2021) (hereinafter AAIDD-12).

We start, then, with Alabama's standard for determining intellectual disability. Under Alabama law, Smith "has the burden of proving by a preponderance of the evidence that he . . . is [intellectually disabled] and thus ineligible for the death penalty." *Smith v. State*, 213 So. 3d 239, 252 (Ala. 2007). Carrying that burden requires Smith "to show significant subaverage intellectual functioning at the time the crime was committed, to show significant deficits in adaptive behavior at the time the crime was committed, and to show that these problems manifested themselves before the defendant reached the age of 18." *Id.* at 249.

IV.

Whether Smith has significantly subaverage intellectual functioning turns on whether he has an IQ equal to or less than 70. *Ex parte Perkins*, 851 So. 2d at 456. But the medical community recognizes "that the IQ test is imprecise." *Hall*, 572 U.S. at 723. "Each IQ test score has a 'standard error of measurement.'" *Id.* at 713 (citation omitted). "The standard error of measurement accounts for a margin of error both below and above the IQ test-taker's score." *Ledford*, 818 F.3d at 640. The standard error of measurement thus "allows clinicians to calculate a range within which one may

say an individual's true IQ score lies." *Hall*, 572 U.S. at 713.

For that reason, the intellectual functioning inquiry must recognize "that an IQ test score represents a range rather than a fixed number." *Id.* at 723. So when the lower end of that range is equal to or less than 70, an offender "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723; *see also Moore*, 581 U.S. at 14 ("Because the lower end of Moore's score range falls at or below 70, the [Texas Court of Criminal Appeals] had to move on to consider Moore's adaptive functioning.").

A. The district court did not err by turning to evidence of Smith's adaptive functioning after finding that his IQ score could be as low as 69.

While he was in school, Smith took two IQ tests. He obtained a full-scale IQ score of 75 on the first test. On the second test, he obtained a full-scale score of 74. Dr. Reschly testified that those scores are consistent with mild intellectual disability, "particularly if you consider the standard error of measurement."

Dr. Chudy assessed Smith's IQ for a third time after Van Dam's murder. Smith obtained a full-scale score of 72 on that test. Based on that test, Dr. Chudy testified that Smith's true IQ score could be as high as 75 or as low as 69 after accounting for the test's standard error of measurement. He added that "69 is

considered clearly [intellectually disabled]." And when he was asked whether that finding was consistent with the results on Smith's prior IQ tests, Dr. Chudy said, "Yes, all the scores are very much the same."

Then, before the evidentiary hearing, Smith obtained a full-scale IQ score of 74 on the test that Dr. King administered. Because that score falls within the 70 to 75 range, Dr. Fabian testified that the results of Dr. King's IQ test are consistent with mild intellectual disability.

Dr. Fabian also tested Smith's IQ ahead of the evidentiary hearing. Smith obtained a full-scale score of 78 on that test. Although Dr. Fabian conceded that "a 78 is definitively above" the "70 to 75 IQ range," he testified that Smith's 78 does not eliminate the possibility that Smith is intellectually disabled. Instead, he cited Smith's other scores, all of which were lower than 75, and said that those scores "trump an overall score on one administration."

Dr. King contradicted Dr. Fabian. According to Dr. King, Smith displayed "a very consistent pattern of intellectual quotient scores" on all five tests. Dr. King therefore testified that the standard error of measurement deserves less weight because Smith's scores all "fall in the borderline range of intellectual functioning." "I think that the scores speak for themselves," he said, "they are what they are."

In the end, the district court said that Dr. King's testimony was not "strong enough" for the court to find "that the lowest score can be thrown out as an outlier

or that the standard error for the tests can be disregarded." *Smith IV*, 2021 WL 3666808, at *3. As the district court twice noted, Smith had an IQ score of 72, meaning that his IQ could be "as low as 69 if you take into account the standard error of measurement." *Id.* at *2; *id.* at *3. The court therefore "conclude[d] that additional evidence must be considered, including testimony on [Smith's] adaptive deficits." *Id.* at *3.

In reaching that conclusion, the district court merely applied the Supreme Court's decisions in *Hall* and *Moore*, which hold that a district court must move on to consider an offender's adaptive functioning when the lower end of his lowest IQ score is equal to or less than 70.

We start with *Hall*, which arose after the Florida Supreme Court denied Freddie Lee Hall's *Atkins* claim that he could not be put to death because he was intellectually disabled. Hall "had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80," *Hall*, 572 U.S. at 707. Because "the sentencing court excluded the two scores below 70 for evidentiary reasons," that left only seven "scores between 71 and 80." *Id.* And because none of those scores were equal to or lower than 70, the Florida Supreme Court rejected Hall's *Atkins* claim and affirmed his death sentence. *Id.* (citation omitted).

The Supreme Court reversed. It said that when an offender's "IQ test score falls within the test's acknowledged and inherent margin of error, the [offender] must be able to present additional evidence

of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. Because Hall had obtained an IQ score as low as 71, the Court held that "the law require[d] that he have an opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724

Now for *Moore*, which arose after the Texas Court of Criminal Appeals denied Bobby Moore's *Atkins* claim. *Moore*, 581 U.S. at 5. Although Moore had obtained IQ scores of 74 and 78,[2] the Texas Court of Criminal Appeals "discounted the lower end of the standard-error range associated with those scores" and concluded that Moore functioned above the intellectually disabled range. *Id.* at 10 (citation omitted).

Again, the Supreme Court reversed, this time explaining that "Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79," *id.* at 14. "Because the lower end of Moore's score range falls at or below 70," the Supreme Court said that the Texas Court of Criminal Appeals "had to move on to consider Moore's adaptive functioning." *Id.*

In sum, then, both *Hall* and *Moore* hold that when an offender's lowest IQ score, adjusted for the test's standard error of measurement, is equal to or less than 70, a court must move on and consider evidence of the

[2] Although the habeas court credited seven of Moore's IQ scores, the Texas Court of Criminal Appeals rejected five of those scores as unreliable and "limited its appraisal to Moore's scores" of 78 and 74. *Id.* at 8, 10.

offender's adaptive deficits. *See Hall*, 572 U.S. at 707, 724 (holding that "the law require[d]" that Hall have an "opportunity to present evidence" concerning his "adaptive functioning" when his lowest score was a 71, even though he also obtained six other IQ scores, including an 80); *Moore*, 581 U.S. at 14 (holding that the Texas courts "had to move on to consider Moore's adaptive functioning" when his lowest score, "adjusted for the standard error of measurement, yield[ed] a range of 69 to 79"); *see also Jackson v. Payne*, 9 F.4th 646, 654 (8th Cir. 2021) (disregarding a habeas petitioner's IQ score of 81 and holding that "the district court 'had to move on to consider [the petitioner's] adaptive functioning' " when his lowest score's score range was less than 70 (quoting *Moore*, 581 U.S. at 14)).

And that is exactly what the district court did here. It first noted that Smith "had IQ test scores as low as 72," suggesting that "his IQ is actually as low as 69 if you take into account the standard error of measurement." *Smith IV*, 2021 WL 3666808, at *2. The court then court declined to treat that score as an outlier. *Id.* at *3. And as a result, the court "conclude[d] that additional evidence must be considered, including testimony" concerning Smith's "adaptive deficits." *Id.*

B. Alabama's arguments to the contrary are unpersuasive.

Alabama argues that the district court erred in three ways. We'll start with Alabama's argument that the district court clearly erred when it found that

Smith suffers from significantly subaverage intellectual functioning. That finding was clear error, Alabama says, because all Smith's IQ scores "place him in the borderline range of intelligence." Given that consistency, Alabama contends that the standard error of measurement warrants less weight.

This argument ignores *Hall* and *Moore*. Just as Smith scored between 72 and 78 on five IQ tests, Freddie Lee Hall scored between 71 and 80 on seven IQ tests. *Hall*, 572 U.S. at 707.[3] Relying on the lowest of those scores, the Supreme Court mandated that Hall "have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his life-time." *Id.* at 724. The Supreme Court reached this conclusion, even though Hall's highest score was an 80—two points more than Smith's highest score here. Heeding *Hall*'s command, the district court relied on Smith's lowest score and turned to "additional evidence" including testimony concerning Smith's adaptive deficits. *Smith IV*, 2021 WL 3666808, at *3.

Alabama contends that we have read *Hall* in a way that permits the district court to ignore the lower end of an offender's standard-error range. Alabama is not wrong. In *Ledford*,[4] we suggested that *Hall*'s

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[3] In fact, Hall had nine IQ scores between 60 and 80, "but the sentencing court excluded the two scores below 70 for evidentiary reasons," *id.*

[4] Although Alabama also relies on our decision in *Jenkins v. Commissioner, Alabama Department of Corrections*, 963 F.3d 1248 (11th Cir. 2020), we declined to apply *Hall* retroactively in

"consideration of the standard error of measurement 'is not a one-way ratchet.'" *Ledford*, 818 F.3d at 641 (quoting *Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014)). Instead, we said that "the standard error of measurement is merely a factor to consider when assessing an individual's intellectual functioning—one that may benefit or hurt that individual's *Atkins* claim, depending on the content and quality of expert testimony presented." *Id.* at 640–41; *but see United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) ("[T]he facts in *Hall* require lower courts to consider evidence of adaptive functioning if even one valid IQ test score generates a range that falls to 70 or below.").

Our decision in *Ledford* predates *Moore*, though. And *Moore* rejects *Ledford*'s assertion that a district court can consider anything other than the lower end of an offender's standard-error range. *See Moore*, 581 U.S. at 10, 14; *see also Jackson*, 9 F.4th at 655 n.8.[5]

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that case. *See id.* at 1275 (declining to apply *Hall* because "our Circuit has specifically held that *Hall* is not retroactive to cases on collateral review"). We need not address *Hall*'s (or *Moore*'s) non-retroactivity here (1) because we already set aside the Alabama court's denial of Smith's *Atkins* claim, *see Smith III*, 620 F. App'x at 746-52; and (2) because this is Smith's first § 2254 petition.

[5] *Moore* arose after the Texas Court of Criminal Appeals "discounted the lower end of the standard-error range associated" with Moore's lowest admissible score (a 74). 581 U.S. at 10 (citation omitted). Instead of focusing on the standard-error range associated with Moore's 74, the Texas court cited Moore's academic history and his depression and suggested that those factors "might have hindered his performance" on the IQ test that generated the 74. *Id.* (citation omitted). But the Supreme Court reversed, explaining that "the presence of other sources of

Indeed, *Moore* requires courts to move on and consider adaptive deficits when the lower end of an offender's standard-error range is equal to or less than 70. And to the extent that *Ledford* holds otherwise, *see Ledford*, 818 F.3d at 641 (suggesting that "the standard error of measurement 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"), *Ledford* is no longer good law.

In sum, the district court did not clearly err by considering Smith's adaptive deficits. To the contrary, *Hall* and *Moore* required the district court to turn to evidence of Smith's adaptive deficits because the lower end of his standard-error range was 69. *See Smith IV*, 2021 WL 3666808, at *3.

Alabama also argues that the district court erred by failing "to require Smith to prove by a preponderance of the evidence that he has significantly subaverage intellectual functioning." On this view, the district court's order "focused only on the testimony of" Dr. King and Dr. Chudy,[6] "both of whom found that Smith functions in the borderline range of intelligence."

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imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range." *Id.* at 14 (cleaned up). Because the lower end of Moore's score range fell at or below 70, the Texas court "had to move on to consider Moore's adaptive functioning." *Id.*

[6] The district court's order never says that Dr. King's and Dr. Chudy's testimony was the only evidence it considered when assessing Smith's intellectual functioning. So Alabama's argument builds from an incorrect premise, for "we assume all courts base

We disagree, though, because Smith carried his burden under the intellectual prong through Dr. Chudy's testimony. To satisfy the intellectual-functioning prong, as we have observed, Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70. And while Dr. Chudy found that Smith functions in the borderline range of intelligence, Dr. Chudy explained that functioning in the borderline range "means that [Smith] operates between the Low Average and [intellectually disabled] range." *Smith III*, 620 F. App'x at 740.

In other words, Dr. Chudy treated Smith's IQ score "not as a single fixed number but as a range." *Hall*, 572 U.S. at 712. And Dr. Chudy found that the lower end of that range was 69. *Smith III*, 620 F. App'x at 738. "69 is considered clearly [intellectually disabled]." *Id.* at 738.

Alabama's final argument is that the district court committed legal error by failing to make a finding concerning Smith's intellectual functioning. But of course, the district court did make a finding concerning Smith's intellectual functioning—it found that Smith "had IQ test scores as low as 72" and that a score of 72

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rulings upon a review of the entire record." *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1249 (11th Cir. 2015) (quoting *Funchess v. Wainwright*, 722 F.2d 683, 694 (11th Cir. 1985)). So regardless of what evidence the district court's order did or did not cite, we will not find clear error when "the district court's account of the evidence is plausible in light of the record *viewed in its entirety*," *Anderson v. Bessemer City*, 470 U.S. 564, 674 (1985) (emphasis added).

"is actually as low as 69 if you take into account the standard error of measurement." *Smith IV*, 2021 WL 3666808, at *2. As a result, the district court had to move on to assess Smith's adaptive deficits. *See Moore*, 581 U.S. at 14 (requiring the Texas courts "to move on" and "consider Moore's adaptive functioning" when his lowest score, "adjusted for the standard error of measurement, yield[ed] a range of 69 to 79"); *Hall*, 572 U.S. at 724 (requiring that Hall have an "opportunity to present evidence" concerning his "adaptive functioning" when his lowest score was a 71).

V.

We turn now to the adaptive-functioning prong. To satisfy this prong, Smith needed to demonstrate "significant or substantial deficits in adaptive behavior." *Ex parte Perkins*, 851 So. 2d at 456; *see also Carroll v. State*, 300 So. 3d 59, 65 (Ala. 2019) (noting that "assessments of adaptive functioning must adhere to the 'medical community's current standards' " (quoting *Moore*, 581 U.S. at 20)). This criterion refers "to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and social background." DSM-5, at 37; AAIDD-12, at 29 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

"Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical."

DSM-5, at 37. Deficits in any one of those domains satisfies the adaptive-functioning prong. *See Moore*, 581 U.S. at 15–16 (citation omitted); DSM-5 at 38 (explaining that the adaptive-functioning criterion "is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired" such that "ongoing support" is necessary "for the person to perform adequately in one or more life settings at school at work, at home, or in the community"); AAIDD-12, at 31 (explaining that "the 'significant limitations in adaptive behavior' criterion" requires "an adaptive behavior score that is approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains, conceptual, social, or practical").

After the evidentiary hearing, the district court found that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics." *Smith IV*, 2021 WL 3666808, at *11. That conclusion aligns with the one we reached before the evidentiary hearing, when we said that the record contained evidence "that would support a finding of fact that Smith had significant limitations in at least two" areas: "(1) social/interpersonal skills and self-direction." *Smith III*, 620 F. App'x at 750.[7] And the evidentiary hearing only reinforced that conclusion.

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[7] According to Dr. Reschly and Dr. Fabian, self-direction is a subcategory that falls within the conceptual domain.

Dr. Fabian used the Independent Living Scales test to assess Smith's adaptive behavior. "The ILS is probably the most readily used adaptive functioning one-on-one test used nationally in forensic psychology," said Dr. Fabian. The test required Smith to answer questions like "what the purpose of a will is, what would he do if he had a pain in his chest," how would he fix things in his home, and how would he use a map "to drive from point A to point B." Based on that assessment, Dr. Fabian concluded that Smith had "deficits in every area" of adaptive functioning.

To be sure, Dr. King testified that the ILS test "is not a recommended device for assessing adaptive behavior." But Dr. King uses the ILS test to evaluate whether someone "can manage themselves personally." "That really is what the device was designed to do." Of course, whether a person "can manage themselves" is at the very core of adaptive functioning. *See* DSM-5, at 37; AAIDD-12, at 29. So Dr. King's own testimony contradicts his criticism of the ILS test. In fact, the district court "question[ed] the veracity of Dr. King's criticism" of the ILS test—not because his testimony in this case contradicted his criticism of the ILS test, but because his testimony in another case also contradicted his criticism of the ILS test. *See Smith IV*, 2021 WL 3666808, at *10 (observing that Dr. King has previously testified that ILS test "measures adaptive functioning in a number of different domains" (quoting *Tarver*, 940 So. 2d at 324 (Cobb, J., concurring in part and dissenting in part))).

Because we cannot disturb the district court's finding that Dr. King's criticism of the ILS test lacked credibility, *see*, *e.g.*, *Berenguela-Alvarado v. Castanos*, 950 F.3d 1352, 1357 (11th Cir. 2020), it follows that the conclusion that Dr. Fabian drew from the ILS test—that Smith had "deficits in every area" of adaptive functioning—supports the district court's conclusion about Smith's adaptive deficits.[8]

The record also reveals that Smith struggled to communicate effectively, which supports the district court's finding that Smith has deficits in the "functional academics" realm. *Smith IV*, 2021 WL 3666808, at *11. Functional academics is a subcategory within the conceptual domain, which also includes communication skills. *See* DSM-5, at 37 (explaining that the conceptual domain involves "language, reading, writing, math reasoning," and other academic skills); AAIDD-12, at 30 (listing difficulty communicating effectively as an example of significant deficits in the conceptual domain).

Dr. Reschly, Dr. Chudy, and Dr. Fabian all testified that Smith's illiteracy suggests that he suffers significant deficits in the conceptual domain. For his part, Dr.

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[8] Alabama also criticizes the district court for failing to make "findings concerning Dr. Fabian's reliance" on the ILS. But as we've explained, *see supra* n.6, our task is to determine whether the district court's conclusion—that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics," *Smith IV*, 2021 WL 3666808, at *11—"is plausible in light of the record *viewed in its entirety,*" *Anderson*, 470 U.S. at 573–74 (emphasis added).

Reschly discussed Smith's "failure to acquire literacy skills at an age-appropriate level, which relates to the conceptual demand of adaptive behavior." Indeed, Dr. Chudy's administered a WRAT-3, an achievement test used to gauge scholastic abilities, which revealed that "Smith is barely literate in reading." That test is "consistent with significant limitations in at least [the] conceptual domain," according to Dr. Fabian.

Dr. Fabian also evaluated Smith's communication skills using the Expressive One-Word Picture Vocabulary and the Receptive One-Word Picture Vocabulary tests. These tests relate "to functional academics or conceptual areas of adaptive functioning and even academic achievement," said Dr. Fabian. Smith scored in the first percentile on the expressive test and in the third percentile on the receptive test. The age equivalents for those scores are thirteen and fifteen, respectively. Those scores, according to Dr. Fabian, "are consistent with someone who is intellectually disabled."

Contending that Smith does not struggle with communication skills, Alabama repeatedly describes Smith as "savvy" and says that he "had no problem understanding or appropriately responding to questions" during the evidentiary hearing. But the record contradicts that description of Smith's testimony. Take, for instance, an exchange between Smith and his attorney. During this exchange, Smith read a prompt that described a behavior. Smith was then asked to rate, on a scale from zero to three, whether he was able to perform that behavior and, if so, how often he performed

that behavior without reminders and without help. A zero would convey that he was unable to perform that behavior while a three would convey that he always or almost always performed that behavior without reminders and without help:

A: "Name 20 or more familiar objects."

Q: Would you give yourself a rating of zero, one, two or three?

A: Yeah, I would.

Q: Would you?

A: Yeah, yeah, I would.

Q: What would that rating be?

A: Huh?

Q: What rating would you give yourself for that?

A: I don't—I don't know. I don't understand the question. Why would I name 20 or more—oh, it says familiar. I thought it said—"name 20 or more familiar objects." One.

Q: But you can name familiar objects to yourself; correct?

A: Huh?

Q: You can name familiar objects to yourself; correct?

A: I can.

Q: Okay. Do you think you could name 20 things?

A: Yeah.

Q: So would the more correct response to that be a three?

A: Yeah, if you ask—if I can, yeah.

As that excerpt demonstrates, the record refutes Alabama's claim that Smith "had no problem understanding or appropriately responding to questions" during the evidentiary hearing.

Indeed, that example adds to the mountain of evidence that suggests Smith struggles to communicate effectively and therefore suffers deficits in the conceptual domain of adaptive functioning. And because deficits in any one domain satisfy the adaptive-functioning criteria, *see Moore*, 581 U.S. at 15–16 (citation omitted); DSM-5 at 38; AAIDD-12, at 31, we cannot say that the district court did clearly erred by finding that Smith satisfied the adaptive-functioning prong.

Resisting that conclusion, Alabama advances three additional arguments as to why the district court clearly erred by finding that Smith satisfied the adaptive-functioning prong. First, Alabama argues that the district court clearly erred by failing to make any findings concerning the ABAS-3,[9] a test that Dr. King

[9] We just described the ABAS-3 test; it requires the subject to read a description of a behavior and rate, on a scale of zero to three, whether the subject can perform that behavior and, if so, how often the subject performs that behavior without reminders

administered to assess Smith's adaptive functioning. Based on the results from that test and his interview with Smith, Dr. King concluded that Smith lacked "any serious problems with adaptive functioning."

But contrary to Alabama's claim, the district court addressed and discredited Dr. King's adaptive-functioning findings because they relied "solely" on "Smith's self-reports." *See Smith IV*, 2021 WL 3666808, at *7–8. Unlike the other tests we've described,[10] the ABAS-3 relies on "an individual giving a report on himself." And as the district court explained, Dr. King's reliance on Smith's self-reports made his findings unreliable for two reasons.

First, the district court explained that the AAIDD "cautions against reliance on self-reporting." *Id.* at *7. The AAIDD warns against "using self-report[ing] for the assessment of adaptive behavior" because self-reporting "may be susceptible to biased responding." AAIDD-12, at 40–41. To that end, Dr. Fabian testified that Smith "has not wanted to be found intellectually disabled." In Dr. Fabian's opinion, Smith is "embarrassed/offended by this."

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and without help. Dr. King administered the ABAS-3 to Smith before the evidentiary hearing.

[10] The ILS test, for example, requires Smith to show (rather than tell) his adaptive abilities by requiring him to answer questions like what is the purpose of a will, what would you do if you had chest pains, how do you fix things in your home, and how do you use a map to get from point A to point B. The administering professional then assesses the test taker's answers to evaluate his adaptive abilities.

Second, and relatedly, the district court explained that much of the information Smith reported to Dr. King was demonstrably untrue:

> For instance, Smith's mother was 63 (not 69) when she died, and Smith's father was 64 (not 70) when he died. Dr. King also acknowledged that Smith told him that he had not attended school beyond the sixth grade, but records show he did not leave school until he was in the eighth grade. Smith also reported to Dr. King that he was drinking on a daily basis from the age of 20 until age 27 when he was arrested. But Smith was actually incarcerated from age 19 to 26 and then again at 27.

Smith IV, 2021 WL 3666808, at *7.

We also note a third reason to doubt Dr. King's reliance on the ABAS-3 test: Smith took that test twice and reported different answers each time, and as we've mentioned (*see supra* at 32–33), a review of Smith's responses the second time he took the test (during the evidentiary hearing) reveal that it's not clear he understood what was being asked.

As we've explained, the ABAS-3 test required Smith to rate, on a scale from zero to three, whether he was able to perform a particular behavior and, if so, how often he performed that behavior without reminders and without help. Smith first took the ABAS-3 test when he met with Dr. King before the evidentiary hearing. Then, Smith's counsel administered the ABAS-3 test during the evidentiary hearing. During the second administration of the test, Smith reported different

ratings than the ones he reported when Dr. King administered the test before the evidentiary hearing. When Dr. King administered the ABAS-3, for example, Smith gave himself a three for the following prompt: "Answers the telephone by saying 'Hello.'" In other words, Smith reported that he always performs that behavior. But when he read that same prompt during the evidentiary hearing, Smith said, "I don't answer no telephone." Similarly, Smith gave himself a one at the evidentiary hearing in response to the prompt that reads: "Nods or smiles to encourage others when they are talking." But Smith gave himself a three in response to the same prompt when Dr. King administered the test before the evidentiary hearing.

The court ultimately discredited Dr. King's testimony concerning Smith's adaptive deficits. *See id.* at *11 (explaining that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed"). We cannot say that the district court clearly erred in doing so given the problems with Dr. King's testimony.

For the same reason, we must reject Alabama's second argument as to why the district court clearly erred when finding that Smith satisfied the adaptive deficits prong. To support this argument, Alabama contends that Dr. King "found that Smith had strengths in his home living and functional academics." This argument fails because, as we have observed, the district court discredited Dr. King's testimony concerning Smith's adaptive deficits. But even if the district court had credited Dr. King's testimony, this piece of

testimony does not help Alabama to show clear error, for "'the medical community focuses the adaptive-functioning inquiry on adaptive deficits,' not strengths." *Carroll*, 300 So. 3d at 63 (quoting *Moore*, 581 U.S. at 16).

Finally, Alabama claims that the district court improperly "discounted" Dr. King's reliance on records from the Alabama Department of Corrections about Smith's behavior in prison. Those records were "significant," Alabama claims, "because there was no indication that Smith has a mental disability or psychiatric problems, and because the records indicated that he functioned normally."

But the Supreme Court has explained that "[c]linicians . . . caution against reliance on adaptive strengths 'in a controlled setting,' as a prison surely is." *Moore*, 581 U.S. at 16; *see also* DSM-5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)[.]"). So the prison records do not allow Alabama to show clear error.

In sum, we cannot say that the district court clearly erred by finding that Smith satisfied the adaptive-functioning prong. We have already explained that the record contains evidence "that would support a finding of fact that Smith had significant limitations in at least two" domains. *Smith III*, 620 F. App'x at 750. Dr. King's testimony is the only new evidence that has undermined that conclusion. But the district court discredited Dr. King's testimony. As a result, the district court did not clearly err.

VI.

Finally, we turn to the district court's finding that "Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age." *Smith IV*, 2021 WL 3666808, at *12. While in school, Smith took two IQ tests and obtained scores of 74 and 75. As a result, the school recommended placing Smith in the "EMR program." EMR at that time referred to "educable [intellectually disabled]," according to Dr. Reschly,[11] who added that "the criteria for identifying someone with educable [intellectual disability] at that time was largely parallel to the criteria used to identify mild intellectual disability today." Those criteria were an IQ score "below 75" and "documented deficits in adaptive behavior." Dr. Fabian shares Dr. Reschly's "understanding" that EMR is "pretty consistent with modern day intellectual disability mild."

In sum, then, the record supports the district court's conclusion that Smith's deficits in intellectual and adaptive functioning "were present at an early age." *Id.* As a result, we cannot say that the district court clearly erred by finding that Smith satisfied the final prong of his *Atkins* claim.

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[11] Alabama asks us to hold that the district court clearly erred by refusing to discredit Dr. Reschly's testimony. On this view, "Dr. Reschly made his diagnosis that Smith was intellectually disabled as a child . . . without personally evaluating him." But because we cannot go back in time, it was impossible for Dr. Reschly (or anyone else, for that matter) to "personally evaluat[e]" whether Smith exhibited deficits in intellectual and adaptive functioning before turning 18.

VII.

We hold that the district court did not clearly err in finding that Smith is intellectually disabled and, as a result, that his sentence violates the Eighth Amendment. Accordingly, we affirm the district court's judgment vacating Smith's death sentence.

AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 05-00474-CG**
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

ORDER

(Filed Nov. 30, 2021)

This case is before the Court on Respondent's motion to alter or amend the judgment Pursuant to Rule 59(e). (Doc. 136). Respondent moves this Court to withdraw the order granting Joseph Clifton Smith's habeas petition as to his claim that he is intellectually disabled, and thus ineligible for the death penalty, and replace it with an order denying Smith's claim. Respondent claims that Smith failed to satisfy his burden of proving by a preponderance of the evidence that he has significantly subaverage intellectual functioning. Alternatively, Respondent argues that this Court should Reconsider its Order because it did not make clear and specific factual findings in ruling that Smith has significantly subaverage intellectual functioning.

A Rule 59(e) motion "gives a district court the chance 'to rectify its own mistakes in the period immediately

following' its decision". *Banister v. Davis*, 140 S. Ct. 1698 (2020) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982)). To succeed, a Rule 59(e) motion must be based on "newly-discovered evidence or manifest errors of law or fact." *Friedson v. Shoar*, 2021 WL 5175656, at *5 (11th Cir. Nov. 8, 2021) (quoting *Arthur v. King*, 500 F.3d 1343, 1343 (11th Cir. 2007) (quotation omitted)). Respondent has not offered newly discovered evidence. Thus, the only grounds for granting the motion would be to correct manifest errors of law or fact. "A manifest error is not just any error but one that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Marshall v. Dunn*, 2021 WL 3603452, at *1 (N.D. Ala. Aug. 13, 2021) (citation and internal quotations omitted). "Manifest error does not mean that one does not like the outcome of a case, or that one believes the court did not properly weigh the evidence." *Id.* (citation omitted).

In the instant case, Respondent attempts to make the same arguments about the same evidence that was raised prior to entry of judgment. A Rule 59(e) motion should be denied if it simply relitigates old matters and argues about evidence that was raised prior to the entry of judgment. *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1246 (11th Cir. 2021) (citing *Arthur*, 500 F.3d at 1343). Rule 59(e) motions do not afford an unsuccessful litigant "two bites at the apple." *American Home Assur. Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1239 (11th Cir.1985).

Respondent asserts that Petitioner has not met his burden of proving by a preponderance of the evidence that he has significantly subaverage intellectual functioning, significant or substantial deficits in adaptive behavior, and that both conditions were present at the time the crime was committed and manifested before age 18. Respondent's arguments focus primarily on the scores Petitioner received on the various tests Petitioner has taken throughout his life. Respondent appears to contend that the Court should change its ruling because the evidence shows Petitioner's IQ is above 70. However, as the Eleventh Circuit previously stated in this case,[1] Alabama does not employ a strict IQ cut-off score of 70. This Court reviewed the evidence regarding Petitioner's scores and after considering the standard error inherent in IQ tests, this Court found that it must consider additional evidence, including testimony on Petitioner's adaptive deficits, to determine whether Petitioner falls at the low end of the Borderline range of intelligence or at the high end of the required significantly subaverage intellectual functioning. This Court could not determine solely by Petitioner's scores whether he had significantly subaverage intellectual functioning. As this Court explained:

> a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the

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[1] See Doc. 72, PageID.957-958.

> person's actual functioning is comparable to that of individuals with a lower IQ score.

(Doc. 135, PageID.4477) (quoting *Freeman v. Dunn*, 2018 WL 3235794 at *70 (M.D. Ala. July 2, 2018). For an individual to have significant or substantial deficits in adaptive behavior, he must have concurrent deficits or impairments in at least two skill areas. This Court found Petitioner had significant deficits in at least four areas: social/interpersonal skills, self-direction, independent home living, and functional academics. (Doc. 135, PageID.4491). To the extent it was not clear in this Court's prior order, this Court clarifies that the evidence regarding Petitioner's adaptive deficits persuaded this Court that Petitioner's actual functioning is comparable to that of an individual with significantly subaverage intellectual functioning. Although Petitioner has scored above 70 on many of his IQ tests, his adaptive behavior problems are severe enough that his actual functioning is lower.

The Court finds that Respondent has not shown that the Court committed a manifest error of law or fact. Accordingly, Respondent's motion to alter or amend the judgment Pursuant to Rule 59(e) (Doc. 136) is **DENIED**. Respondent's alternative motion for reconsideration, which seeks a clarification of this Court's findings is **GRANTED only to the extent that the above discussion clarifies this Court's basis and/or reasoning**.

DONE and **ORDERED** this 30th day of November, 2021.

/s/ Callie V. S. Granade
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 05-00474-CG**
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

ORDER

(Filed Aug. 17, 2021)

This case is before the Court on remand from the Eleventh Circuit. (Docs. 72, 73). For reasons which will be explained below, the Court finds that the Petitioner is intellectually disabled. Accordingly, Petitioner's Writ of Habeas Corpus will be granted, and his death sentence will be vacated.

BACKGROUND

The Eleventh Circuit found that the factual determination by the Alabama Court of Criminal Appeals that "Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts." (Doc. 72, PageID.958). The Eleventh Circuit noted that the Alabama Court of Criminal Appeals came to that conclusion without

conducting an evidentiary hearing and despite there being "trial evidence pointing to significant deficits in Smith's intellectual functioning." (Doc. 72, PageID.957).[1] The Eleventh Circuit found the determination unreasonable given the record evidence and "the fact that Alabama does not employ a strict IQ cut-off score of 70." (Doc. 72, PageID.957-958). The Court also found that "the Alabama Court of Criminal Appeals' finding that there was 'no indication that Smith had significant defects in adaptive behavior' is unsupported (and, in fact, contradicted) by the record and therefore unreasonable."[2] (Doc. 72, PageID.960 (internal citations omitted)). The Eleventh Circuit reversed and remanded the case indicating that Smith should be allowed "to present an expert witness on his behalf" and directing the district court to determine whether to order discovery or an evidentiary hearing. (Doc. 72, PageID.961-962). The Eleventh Circuit stated that "[i]n doing so, we

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[1] The Eleventh Circuit found that the Alabama appellate court was unreasonable in finding that Smith had pled only conclusory allegations that he met each of the three requirements for intellectual disability under *Perkins* and was also unreasonable in its determination of the merits – that Smith was not mentally retarded and could never meet the *Perkins* requirements. (Doc. 72, PageID.955, 957-958). There was trial evidence that Smith's IQ could be as low as 69, given a standard error of measurement of plus-or-minus three points, and that Smith had deficits in intellectual functioning. (Doc. 72, PageID.957).

[2] As this Court will discuss herein, there was evidence "that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction." (Doc. 72, PageID.959).

express no opinion as to whether Smith is intellectually disabled." (Doc. 72, PageID.962).

Upon remand, this Court ordered discovery (Doc. 78), and held an evidentiary hearing. The parties filed post hearing briefs. (Docs. 126, 129, 130).

DISCUSSION

A. Standard of Review

Since the Eleventh Circuit has found the Alabama Court of Criminal Appeals unreasonably determined the facts, this Court must conduct an independent review of the merits of the petitioner's claim – without deferring to the state court's factual findings. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007). "Petitioner has the burden of proof by a preponderance of the evidence not only with regard to IQ (intellectual functioning) and onset age, but also as to related limitations in the adaptive skill areas." *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1341 n.21 (N.D. Ala. 2006), aff'd sub nom. *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009).

B. Intellectual Disability

As the Eleventh Circuit explained, "the United States Supreme Court held in *Atkins* that the execution of 'mentally retarded' individuals violates the Eighth Amendment of the Constitution." (Doc. 72, PageID.951, citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). "The *Atkins* Court, however, left 'to the States the task of developing appropriate ways to enforce the

constitutional restriction upon their execution of sentences.'" (Doc. 72, PageID.951). In Alabama, there are three requirements to establish intellectual disability: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) manifestation of "these problems . . . during the developmental period (i.e., before the defendant reached age 18)." (Doc. 72, PageID.951-952, quoting *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)). Though there has been some overlap in the evidence and arguments regarding these three requirements the Court will attempt to separate and discuss each below.

1. Significantly Subaverage Intellectual Functioning

Petitioner contends that the Court should take into account the Flynn Effect[3] and the standard margin of error when considering Petitioner's IQ exam scores. Petitioner points to two Supreme Court cases to support his Atkins claim – *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017). Respondent denies that these cases entitle Petitioner to relief in this case.

In *Hall*, the Supreme Court ruled that Florida could not maintain a strict adherence to a cutoff IQ score of 70. *Id.* at 1994. The Court concluded "that a

[3] The "Flynn Effect" is a theory that IQ scores have been increasing over time and should be recalibrated in order to reflect this increase.

State cannot execute a person whose IQ test score falls within the test's margin of error unless he has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *In re Henry*, 757 F.3d 1151, 1154 (11th Cir. 2014) (citing *Hall*, 572 U.S. at 723). Respondent argues that *Hall* does not apply because Alabama courts have not interpreted Alabama's intellectual disability law to preclude consideration of other evidence of intellectual disability, including testimony regarding adaptive deficits when a person has an IQ over 70. However, *Hall* also made clear that courts should be "informed by the medical community's diagnostic framework" which means "courts must consider the standard error inherent in IQ tests when a defendant's test scores put him 'within the clinically established range for intellectual-functioning deficits.'" *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019) (quoting *Hall* and *Moore*).

In *Moore*, the Supreme Court reiterated that "where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.'" *Moore*, 137 S.Ct. at 1049 (citing *Hall*). The Supreme Court in *Moore* vacated the determination by the Texas Court of Criminal Appeals, which utilized court-created factors (set forth in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)) in lieu of considering clinical definitions of adaptive functioning. 137 S.Ct. at 1044. The Supreme Court found that by rejecting the medical guidance and clinging to the *Briseno* factors the Texas court had "failed adequately to inform itself

of the 'medical community's diagnostic framework'." *Id.* at 1053.

It remains clear that the Court should consider the standard error inherent in IQ tests and in cases where a defendant's test scores fall "within the clinically established range for intellectual-functioning deficits", "defendants must be allowed to present additional evidence of intellectual disability, including testimony on adaptive deficits." *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019).[4] In the instant case, the Defendant had IQ test scores as low as 72, which according to testimony could mean his IQ is actually as low as 69 if you take into account the standard error of measurement.

There is expert testimony that Smith's intelligence is higher than his previous scores indicated. Dr. Glen King, testified at the May 2017 hearing before this Court. Dr. King had reviewed some of Smith's history and met with Smith to evaluate him. Dr. King met with Smith for approximately three hours and spent about 20 minutes interviewing and giving Smith a

[4] The Court notes that in *Smith*, the Eleventh Circuit refused to apply *Moore* because *Moore* was decided after the state court made its determination. However, in the case at hand the state court's decision has been found to be unreasonable. As such, this Court is no longer constrained to consider only the reasonableness of the state court's determination given the record before the state court but is instead tasked with conducting an independent determination of Petitioner's intellectual functioning. Additionally, neither party has argued that *Moore, Hall*, or other cases decided after Petitioner's state court proceedings should not apply for that reason.

mental status examination. (Doc. 125-1, PageID.2029-31). King administered the WAIS-IV IQ test to Smith and testified that Smith's full-scale score on the test was 74. (Doc. 125-1, PageID.1983-84). The composite of Smith's verbal comprehension and perceptual reasoning indexes (or GAI) on the WAIS-IV was 77. (Doc. 125-1, PageID.1984). Dr. King said Smith's scores "can be an indication of a learning disability" rather than an intellectual disability. (Doc. 125-1, PageID.1985). Dr. King found Smith did not have significantly subaverage intellectual functioning and diagnosed Smith "as having likely a learning disability." (Doc. 125-1, PageID.1988). Smith's perceptual reasoning score was 86 but his verbal score was lower. (Doc. 125-1, PageID.1985). "[W]here a person has some average abilities and then is not functioning up to academic achievement expectations, that can indicate that that's the reason for that." "They will typically have lower verbal scores." (Doc. 125-1, PageID.1985-86). Dr. King's testimony only indicates that a learning disability *might* be the cause of Smith's poor performance. Dr. King said his disability is "not otherwise specified," because "I think there would have to have been additional assessment to determine the presence of that or to rule out the possibility that he really is functioning in the borderline range of ability." (Doc. 125-1, PageID.1988). Petitioner points out that Smith's school records do not indicate that there was ever a finding that Smith had a learning disability. (Doc. 130 PageID.4449, Doc. 126, PageID.2087-90). Even if Smith's scores do not result from a learning disability, Smith's overall score of 74 on the test administered by King

was still above what is considered significant subaverage intellectual functioning. Dr. King testified that the WAIS-IV test indicated a 95 percent confidence level that Smith's IQ was between 70-79. (Doc. 125-1, PageID.1985).

Dr. King also testified that if there are multiple sources of IQ over a long period of time it contributes to the construct of validity indicating what a true IQ score is for an individual. (Doc. 125-1, PageID.1987). In Smith's case, multiple IQ scores (in fact, all of Smith's scores if you do not consider the standard error) taken over a long period of time place him in the borderline range, functioning just above intellectual disability. (Doc. 125-1, PageID.1987-1988). Dr. King testified that there "are five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions and they are all in the borderline range of intellectual functioning." (Doc. 125-1, PageID.2020). While this leans in favor of finding that Smith does not have significant subaverage intellectual functioning, the Court does not find it strong enough to conclude that Smith is not intellectually disabled without considering evidence of his adaptive deficits. Smith did not consistently score so high that the Court is confident that the lowest score can be thrown out as an outlier or that the standard error for the tests can be disregarded. Although some tests indicate Smith does not have significant subaverage intellectual functioning, this Court concludes that additional evidence must be considered, including testimony on the Defendant's adaptive deficits.

The Court declines to apply the Flynn Effect. "While [the Eleventh Circuit has] previously said that the Flynn Effect may be considered in determining a defendant's IQ, *see Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010), neither [the Eleventh Circuit] nor the Supreme Court has required courts to do so." *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1342 (11th Cir. 2019). There was expert testimony at the hearing before this Court that there are conflicts within the research about whether to apply the Flynn effect. (Doc. 125-1, PageID.1991). The Flynn effect is a "theory" and there are problems with the research supporting it. (Doc. 125-1, PageID.1990-1991). According to testimony before this Court, neither the American Psychological Association nor the Division of Developmental Disabilities of the Alabama Department of Mental Health and Mental Retardation apply the Flynn effect. (Doc. 125-1, PageID.1964-1965, 1968-1969). The Flynn effect is reportedly not applied in social security cases, in vocational rehabilitation cases or in school admission testing. (Doc. 125-1, PageID.1992). Moreover, the utility of applying it here is questionable since there is already expert evidence to demonstrate that Defendant's IQ, after considering the standard error of measurement, may be as low as 69. The Court merely notes that if the Flynn Effect were taken into consideration, Smith's scores would likely be adjusted lower.

At the time of his criminal trial, Smith was examined by Dr. James F. Chudy who produced a Psychological Evaluation report dated Sept. 6, 1998. (TR

Transcript VOL. 6, pp. 912-21). The Court notes that prior to *Atkins*, evidence of intellectual disability (then termed "mental retardation") was considered "a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Burgess v. Comm'r, Alabama Dep't of Corr.*, 723 F.3d 1308, 1318 (11th Cir. 2013) (citation omitted). "Because evidence of mental retardation was a 'two-edged sword' a defendant could reasonably decide not to highlight his mental retardation." *Id.* (citations omitted). Thus, at the time of his trial, Smith had no real incentive to present testimony to support a finding that he was intellectually disabled. At trial, Dr. Chudy found that Smith "was mentally competent and capable in assisting his attorney in his defense and that Smith knew right from wrong. (TR Transcript VOL. 6, p. 916). Dr. Chudy also found that:

> Mr. Smith's thinking was coherent and for the most part logical but that at times it was necessary to re-state questions in more elementary forms so that he could understand them. His comprehension is limited and it is clear that he lacks much insight or awareness into his behavior. During the course of the interview and test administrations there were no signs of psychotic behavior or deviations from reality. When he did not understand a question, he was not reluctant in asking for clarification. He even went so far as to ask for clarification several times so that he could answer questions to the best of his ability.

> During the administration of the tests, Mr. Smith maintained a fairly good attitude and seemed to put forth his best effort, showing fairly good persistence. However, he struggled at times in understanding some of the tasks which required repeating the instructions on several occasions.

(*Id.* at p. 917). Dr. Chudy reported that Smith was administered the WAIS-R and that he scored a Verbal IQ of 73, a Performance IQ of 72 and a Full-Scale IQ of 72 which places him at the 3rd percentile in comparison to the general population. (*Id.*). Dr. Chudy further found the following:

> These scores place him in the Borderline range of intelligence which means that he operates between the Low Average and Mentally Retarded range. Actually these scores place him at a level closer to those individuals who would be considered mentally retarded.
>
> Analysis of the specific subtests of the WAIS-R showed that Mr. Smith displayed major deficiencies in areas related to academic skills. He functioned well below average in his recall of learned and acquired information. (Information). He was also quite weak in word knowledge and usage (Vocabulary) and mental mathematical computation (Arithmetic). Other areas of noted weakness had to do with his social skills. He scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations (Comprehension). He also showed a major deficiency in his ability to

> predict social sequences of action (Picture Arrangement).

(*Id.*). Dr. Chudy found that Smith did not seem to learn from his experiences because he "does not think through things" and "his mind-set provides little basis for acting in a consistently sensible manner or learning from experience." According to Dr. Chudy, Smith's thinking was "vague, easily confused and he is often overwhelmed with incomprehensible feelings or impulses that he does not understand." (*Id.* at p 919).

After considering the above, the Court finds it is not clear whether Smith qualifies as having significantly subaverage intellectual function. The only thing clear is that Smith strives to answer questions to the best of his ability and is not malingering. As stated above, additional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled. This is a close case, and the Court concludes that at best Smith intelligence falls at the low end of the Borderline range of intelligence and at worst at the high end of the required significantly subaverage intellectual functioning. As such, the Court finds that whether Smith is intellectually disabled will fall largely on whether Smith suffers from significant or substantial deficits in adaptive behavior, as well as whether his problems occurred during Smith's developmental years.

2. Deficits in Adaptive Behavior

Because IQ test scores are approximations of conceptual functioning, IQ scores alone "may be insufficient to assess reasoning in real life situations and mastery of practical tasks." *See Freeman v. Dunn*, 2018 WL 3235794, at *70 (M.D. Ala. July 2, 2018) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37-38 (5th ed.) ("DSM-V")).

> For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Id. (quoting DSM-V at p. 37). "[T]he Diagnostic Statistical Manual of Mental Disorders states that adaptive functioning refers 'to how well a person meets standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." *Schrader v. Acting Com'r of the Soc. Sec. Admin.*, 632 F. App'x 572, 576 n.3 (11th Cir. 2015) (quoting DSM-V at p. 37).

The Eleventh Circuit explained the general standard for determining whether Smith has significant or substantial deficits in adaptive behavior as follows:

> Neither the Alabama legislature nor the Alabama Supreme Court has defined what

constitutes "significant or substantial deficits in adaptive behavior." *See id.* But the Alabama Supreme Court has applied generally the "most common" or "broadest" definition of mental retardation, which reflects "the clinical definitions considered in *Atkins.*" *In re Jerry Jerome Smith v. State*, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007). And "significant or substantial deficits in adaptive behavior" means, under the clinical definitions considered in *Atkins*, a petitioner must show limitations in two or more of the following applicable adaptive-skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3 (citing the American Association on Mental Retardation and American Psychiatric Association's definitions of mental retardation). Thus, we use that common clinical definition in considering this case. *Cf. Lane v. State*, ___ So.3d ___, ___ No. CR-10-1343, 2013 WL 5966905, at *5 (Ala. Crim. App. Nov. 8, 2013) ("In order for an individual to have significant or substantial deficits in adaptive behavior, he must have concurrent deficits or impairments in . . . at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." (quotation marks omitted)).

(Doc. 72, PageID.952-953, footnote omitted). The Eleventh Circuit found there was evidence "that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction." (Doc. 72. PageID.959).

According to Dr. King, Smith's prison records indicate Smith functioned normally in prison. (Doc. 125-1, PageID.2016). At the May 2017 hearing in this case, Sergeant Christopher Earl, a correctional sergeant over the segregation and death row units at Holman prison, testified that Smith functions as a "tier runner" on his tier which has 20-24 inmates. (Doc. 125, PageID.1818-19). As a tier runner, Smith passes out juice and trays, microwaves things for inmates, "get lists up when we're putting out walks or church lists, things like that." (Doc. 125, PageID.1819). Earl testified that the way tier runners are chosen is as follows:

> We talk to the other inmates on the tiers and make sure that they all get along with them. Typically you want somebody that's clean, takes care of theirself. You know, somebody that can get along with everybody on a tier.

(Doc. 125, PageID.1819). According to Earl, Smith does a good job as a tier runner and does not need much supervision. (Doc. 125, PageID.1819). Earl also testified that he has conversations with Smith about things going on inside the prison, things going on in the news and current events. (Doc. 125, PageID.1819-20). Earl testified that Smith seems to understand what they talk about and Smith responds appropriately when

Earl asks him questions. (Doc. 125, PageID.1820). Earl also said Smith seems to have no problem making the "walk list" which consists of going down the tier and writing down the cell numbers of prisoners that want to go on a walk each day. (Doc. 125, PageID.1820-21).

Earl's testimony indicates Smith possesses or has developed some functional skills that have enabled him to perform certain tasks well in prison. However, the Eleventh Circuit has made clear that "the focus of the adaptive functioning inquiry should be an individual's adaptive deficits – not adaptive strengths. *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019) (citing *Moore*). "After *Moore*, states cannot 'weigh' an individual's adaptive strengths against his adaptive deficits." *Id.* Additionally, there can be little reliance on Smith's behavior in prison because "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore v. Texas*, 139 S. Ct. 666, 669 (2019)("Moore II"). As Dr. Fabian noted, Smith's prison records do not mean a lot because it is such a controlled and structured setting there and a lot is provided for him. (Doc. 125, PageID.1903-04). Smith "doesn't need to go get health insurance, buy a car, pay for a cell-phone bill, pay for rent, get a job, fill out applications, see a doctor, pay for medical insurance" or perform many other normal independent living requirements. (Doc. 125, PageID.1903). The Court also notes that while Earl believed Smith understood their conversations, it has not been suggested that Earl has

any expertise in assessing a person's intellectual functioning.

Dr King believes the only standardized instrument available to assess Smith's adaptive functioning is the ABAS-3, on which Smith has no score of three or below. Based on those scores as well as Dr. King's interview with Smith, the history Smith gave and other records, Dr King opined that Smith has no significant deficiencies in adaptive functioning. (Doc. 125-1, PageID.2023). Dr. King testified that Smith had a pretty good memory of his life events and family history and that he recalled educational placements from early childhood which were quite cogent and coherent and more detailed that Dr. King expected. (Doc. 125-1, PageID.1980). Dr. King testified that Smith provided the following information:

> He was able to tell me that his mother was deceased recently at age 69 and he was able to tell me that she had apparently had a fall or an accident and that she had high blood pressure, back problems, indicated that – spontaneously with me – that she loved him and all of the brothers and sisters. He was able to report that his parents divorced when he was approximately age nine, that his father deceased at approximately age 70, when he had complications from hip surgery, with a resultant cerebral vascular accident, which he referred to, I think, as a stroke.
>
> It was also reported that his father may have lingered to some extent in terms of his stroke

> and that he also added spontaneously that he and his father never got along very well.
>
> He reported that when he was approximately age nine his parents divorced and he was back and forth between the two parents, but his mother remarried when he was approximately age 11 to Hollis Luker and that his mother eventually divorced Mr. Luker after Mr. Smith was incarcerated.
>
> He reported his father had remarried when he was approximately age 11 or 12 and that he was able to identify his stepmother as Connie Dickinson; reported that they eventually divorced as well.

(Doc. 125-1, PageID.1980-81). Petitioner argues that these supposed strengths should not be relied upon because they come solely from Smith's self-reports. Dr. King stated that he had no records to check that these facts were correct but that he interviewed one of Smith's sisters who supported some of the information. The sister indicated that Smith "did in fact get moved back and forth between the two families on a fairly consistent basis" but she "was somewhat young by the time that he first left the family." (Doc. 125-1, PageID.1981).

There was expert testimony at the hearing before this Court that the American Association of Intellectual and Developmental Disabilities (AAIDD) cautions against reliance on self-reporting. Self-reports are often inaccurate "because persons with mild ID tend to try to mask or hide their intellectual disability" and

"often claim capabilities they don't have." (Doc. 125, PageID.1720). Dr. John Fabian testified that he concluded from his interviews with Smith that Smith "has not wanted to be found intellectually disabled" and "is embarrassed/offended by this." (Doc. 125-1, PageID1914). Dr. Fabian opined that Smith is at risk for exaggerating his skills and abilities because he does not have insight and he does not want to look deficient. (Doc. 125-1, PageID.1914). Self-reports are used as "the last resort when there are, you know, no other collateral informants or the individual cannot be assessed one-on-one with other means." (Doc. 125, PageID.1913). Petitioner points out that some of the details reported by Smith to Dr. King were wrong. For instance, Smith's mother was 63 (not 69) when she died, and Smith's father was 64 (not 70) when he died. Dr. King also acknowledged that Smith told him he had not attended school beyond the sixth grade, but records show he did not leave school until he was in the eighth grade. (Doc. 125-1, PageID.2026). Smith also reported to Dr. King that he was drinking on a daily basis from the age of 20 until age 27 when he was arrested. But Smith was actually incarcerated from age 19 to 26 and then again at 27. (Doc. 125-1, PageID.2027-28).

Dr. King also relied on Smith's self-report that Smith never had a driver's license or permit but that he drove anyway, and he indicated that he had possession of his own vehicles and that he had quite a few of them. Smith reported that the last vehicle he had was an 84 Ford pickup that he bought himself. (Doc. 116-6, PageID.4160). However, Smith's mother had

previously reported to Dr. Fabian that Smith had never owned a vehicle and Melissa Espinal reported that she never saw Smith drive a vehicle. (Doc. 116-1, PageID.2317).

Smith reported to Dr. King that he had a significant work history. Smith reported that he first started mowing grass and doing light lawn maintenance between the ages of 13 and 14 and that he made $400 or $500 per week and that was more than his father was making. Smith reported that he did roofing, painting, and he worked offshore on rigs and supply boats and would also install swimming pools and do landscaping. Smith's last job was landscaping which he reports he did for two years. According to Smith, he always had money in his pocket and he always worked full time and got along well with fellow employees and his employers. (Doc. 116-6, PageID.4160).

Smith's social security records do not show regular or consistent employment or income. (Doc. 116-1, PageID.2111-15). However, at the hearing before this Court Smith reported that he did whatever he could do "as long as I didn't have to pay no taxes." (Doc. 125, PageID.1847). Thus, Smith could have had income that did not show up in his social security records. But other facts indicate Smith had little income. Smith's mother and Melissa Espinal both reported to Dr. Fabian that Smith never consistently held a job. Smith's mother reported that Smith did not work full time and did not have a bank account. (Doc.125-1, PageID.1913). Dr. King testified that he did not believe Smith had much money, he never saved any money and would spend

any money he got. (Doc.125-1, PageID.1912). And Smith was incarcerated from the age of 19 until present, except for approximately one year from the age of 26 until the age of 27 when he went back in prison. (Doc. 125, PageID.1846-47). Smith was released from prison at the age of 27 and was out for three days before the incident for which he is now incarcerated.

Smith was able to tell Dr. King about some current events (specifically that the President of the United States had fired the Attorney General) and that he knew who the current and past president was. Smith could reportedly identify his Social Security number, his AIS number, his address at Holman Prison, and was oriented as to person, place, and time. (Doc. 125-1, PageID.1989). Dr. King testified that although an intellectually disabled person might know some of these facts it is not likely that an intellectually disabled person would know all of these facts. (Doc. 125-1, PageID.1990).

However, Dr. Reschly disagreed with Dr. King. Dr. Reschly testified that he had "evaluated a number of persons who clearly meet the criteria for intellectual disability who have known those things generally because they are used over and over and they are memorized over time." Dr. Reschly also noted that Smith was not able to give his full Social Security number – he was not able to give the first five digits and could only remember and give the last four digits of his social security number. (Doc. 125-1, PageID.2074).

Dr. King administered "the assessment for adaptive functioning, the ABAS-3," and Smith "generated scores that were well above the cutoff that we use typically for consideration of intellectual disability in terms of adaptive functioning." (Doc. 125-1, PageID.2017). Dr. King testified that he read the questions to Smith because he was concerned about Smith's reading capability – the ABAS allows the reports to be read when somebody does not have the ability to read or there is a question about vision. (Doc. 125-1, PageID.2032-34). The ABAS-3 measures eight different areas and usually, a score of three or below in any area would be considered a significantly deficient score. (Doc. 125-1, PageID.2017). Smith's lowest score was a six and ranged from six to ten, ten being average. (Doc. 125-1, PageID.2017-18).

As to records from Smith's youth, Dr. King testified that Smith "may have had some problems with adaptive functioning when he was in school, but I don't think that that was the result of intellectual deficiency." Dr. King explained that he thought "it was just as easily or more easily explained by what was going on at home" that Smith had "[s]ome lower, perhaps, intellectual ability" and also that he started to use alcohol at a fairly young age. (Doc. 125-1, PageID.2018). Dr. Reschly admitted that if Smith continued to consume alcohol at a high level around the ages of 11, 12 and 13 as reported it would have affected both his intellectual performance, his academic skill acquisition and possibly his social relations. (Doc. 125, PageID.1812). Dr Reschly also admitted that the fact that Smith was

physically abused and that his parents divorced and shifted him back and forth between them and between schools might have also affect his development of adaptive functioning and his acquisition of social skills. (Doc. 125, PageID.1812-13). Dr. King noted that Smith was placed in EC classes, which are for emotionally conflicted students – "children who are determined to be having a lot of behavioral problems, psychological adjustment problems." (Doc. 125-1, PageID.2005). Dr. King testified that emotional handicaps do not mean a person has limitations in adaptive functioning. (Doc. 125-1, PageID.2005). Dr. King stated that there was only one or two pages out of Smith's entire school record that designated Smith as EMR. (Doc. 125-1, PageID.2005-06). According to Dr. King, Smith's poor behavior at school is an indication "of what was happening with this child at that time overall in his life." (Doc 125-1, PageID.2007). However, the Supreme Court has found that a detrimental home life – such as one that involves traumatic experiences like childhood abuse and suffering – is considered a risk factor for intellectual disability. *Moore v. Texas*, 139 S. Ct. 666, 669 (2019)("*Moore II*") (citing *Moore*). "Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Moore*, 137 S. Ct. at 1051 (citation omitted). Additionally, evidence of a personality disorder or of mental-health issues is "not evidence that a person does not also have intellectual disability." *Moore II*, 139 S. Ct. at 671 (quoting *Moore*). Mental-health professionals recognize that "many intellectually disabled people also have other mental or physical

impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism." *Moore*, 137 S. Ct. at 1051 (citation omitted).

Dr. Fabian points to Dr. Chudy's findings at the time of trial which indicated Smith had emotional problems. Dr. Fabian found that Smith has difficulties coping with his emotional problems. Dr. Fabian pointed to Dr. Chudy's opinion and stated that he agreed completely with the following points made by Dr. Chudy:

> [Smith] takes little notice of things around him unless it's intended to protect him from potential harm. Does not think through things. This mindset provides little basis for acting in a consistently sensible manner or learning from experience. He did not seem to learn from experience even when it involves bringing pain to himself or those closest to him. In essence, his thinking is vague, he's easily confused . . . , he's often overwhelmed with incomprehensible feelings or impulses that he does not understand.

(Doc. 125, PageID.1899). Dr. Fabian went on to say that Dr. Chudy talks about Smith's emotional personality functioning as being equally dysfunctional. Dr. Fabian testified that "these points" "can be related to other disorders potentially, but also would be consistent with intellectual disability." (Doc. 125, PageID.1899).

Dr. Fabian found that looking at Smith's employment history, the jobs were not complicated and were consistent with his intellectual disability and adaptive deficits. (Doc 125, PageID.1893-94).

According to Dr. Fabian his interviews with Smith's mother and Melissa Espinal and her sister Melanie Espinal indicated that Smith had deficits in communication, reading, writing, functional academics, self-direction, and social skills. (Doc. 125, PageID.1989-1901). Melanie and Melissa were mid-teenagers when they knew Smith, who was about 10 years older. They reported that Smith, though much older, was easily led and wanted to fit in. They indicated that Smith did not think about what he wanted to do in the future and was more impulsive, living day by day in a hotel without a lot of goals. He was really "gullible, naïve, wasn't really self sufficient or independent in living. Didn't seem to cook food, buy groceries, was often hanging around them." Smith "was a grown man trying to impress me, as a kid" and had difficulties understanding things. (Doc. 124, PageID.1900-01).

Smith's mother also indicated he was a follower, he did not work consistently, had difficulties in school, was in special education classes, did not have insurance or a bank account and had problems with frustration tolerance and attention. (Doc. 125, PageID.1901).

Dr. Fabian also pointed out that Smith had difficulties with following laws and with reckless behaviors that were impulsive and not thought out well. (Doc. 125, PageID.1902). Smith was not in the community very long to demonstrate, but he was not able to maintain independent living skills from a practical or adaptive domain perspective. Dr. Fabian opined that Smith falls in the "mild intellectually disabled range." (Doc. 125, PageID.1902).

Dr. Fabian administered the Independent Living Scales test or ILS on Smith. The ILS assesses "one-on-one functional adaptive function":

> So basically I bring in a phone book, I'm bringing in a watch, or I'm asking him what the purpose of a will is, what would he do if he had a pain in his chest, things like that. How he feels about himself relative to his self-esteem, how many friends he has. So it gets at a number of areas of adaptive functioning – memory, managing money, health/safety needs – where I assessed him one on one.

(Doc. 125, Page ID.1879). According to Dr. Fabian the ILS test indicated Smith had deficits in most areas.

> [H]e had difficulties with memory orientation, giving him some different information that he had to recall over time. His ability to use money, to understand how money works was impaired. I mean, he had, I mean deficits in every area. So we look at the areas of memory orientation, money management, managing home transportation, those questions, you know, how he gets things fixed in his home versus using a map, you know, to drive from point A to point B.
>
> Health and Safety really gets into taking care of his hygiene and communicating with doctors, for example. Now he scored well on that. And I think, by my experience interviewing him, he's been knocking out his hygiene pretty well in prison.

> He also had significant difficulties or deficits with social adjustment. This is more how he feels about himself, his emotional perception of himself. Granted he's on death row and his relationships and interpersonal functioning is, you know altered. But some of these questions had to do with values of self/others, for example.

(Doc. 125, PageID.1889-90). Smith scored a standard score of 59 on the ILS, which Dr. Fabian testified was consistent with those in the mild intellectually disabled group which ranges from 57.4 to 78.4. (Doc. 125, PageID.1890).

Dr. King criticized Dr. Fabian's use of the ILS to assess Smith's adaptive functioning. According to King, the ILS is not recommended for assessing adaptive behavior. Dr. King testified that he uses the ILS "quite frequently," for other situations, typically when he is asked to "evaluate individuals who are in need of a conservatorship or guardianship, as an older adult, to determine whether they can manage their financial affairs and to determine whether they can manage themselves personally." (Doc. 125-1, PageID.2013).

Dr. Fabian on the other hand testified that "the ILS is probably the most readily used adaptive functioning one-on-one test used nationally in forensic psychology, [and] forensic neuropsychology." (Doc. 125-1, PageID.1959). Additionally, the Court questions the veracity of Dr. King's criticism since Dr. King utilized the ILS test in a prior Atkins case and testified that "the ILS measures a person's 'ability to live independently,

and it measures adaptive functioning in a number of different domains,' including health and safety, money management, social adjustment, and problem solving." *Tarver v. State*, 940 So. 2d 312, 324 (Ala. Crim. App. 2004).

Dr. Fabian administered other tests that were not specifically geared toward adaptive functioning deficits but that he found indicated such deficits. According to Dr. Fabian, Smith's results on the Neuropsychological Assessment Battery showed that Smith's verbal abstract reasoning skills "were mildly to moderately impaired which . . . showed me that he had a difficulty with abstract reasoning when given information about different people and he had put them together in different groups." (Doc. 125, PageID.1876-77).

Also, the Green Emotional Perception Test is correlated with intelligence, but there is also "an emotional, intellectual, and a perception and an adaptive component to it essentially assessing his ability to not really focus on what is said but how it's said for emotional tones: angry, sad, happy, what tone is the person saying." According to Dr. Fabian, Smith had some significant impairments on that test regarding "emotional perception, which is very adaptive as well." (Doc. 125, PageID.1878).

The Expressive One-Word Picture Vocabulary Test is a test of language. Smith showed significant impairments on that test, as well as on the Receptive One-Word Picture Vocabulary test. These tests correlate to intelligence, but also relate to functional academics or

conceptual areas of adaptive functioning and academic achievement. Smith's scores on these tests indicate his ability to express and receive language is significantly impaired on the first percentile for expressive and the third percentile for receptive. Dr. Fabian testified that those scores are consistent with someone who is intellectually disabled. (Doc. 125, PageID.1880-81).

Additionally, Dr. Fabian administered the Social Cognition Test, which focuses on social perception and being able to process "not only affect and emotion to pictures and faces, but it gets more difficult, where they have to select a photograph, then interacting pairs of people, they listen to a statement made by a person and they have to decide which person or which couple, group of people, that statement went to." Dr Fabian found that Smith's results were similar to his results on the Emotional Perception Test and indicated significant impairments to the social functioning prong of intellectual disability. (Doc. 125, PageID.1882-83).

According to Dr. Fabian, Smith meets the adaptive functioning prong and the intellectual functioning prong of intellectual disability. (Doc. 125, PageID.1903). Dr. King clearly disagrees. As mentioned above, the Court finds this to be a close case and whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed. After reviewing the testimony of the experts and Smith's own testimony, the Court concludes that Smith has significant deficits in adaptive behavior. The Court finds Smith has significant deficits in social/interpersonal skills, self-direction, independent home living,

and functional academics[5]. Although Smith has been able to function sufficiently in a controlled prison setting, he appears incapable of behaving as a socially responsible adult or of living independently outside of prison. The Court finds Smith has shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior.

3. Manifestation During the Developmental Period

The "sub-average intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18." *Smith v. State*, 213 So. 3d 239, 248 (Ala. 2007). Smith's earliest records indicate that he seemed to do okay in first grade but made no progress in reading in second or third grade, and that prompted his referral by the school district to special services for evaluation. (Doc. 125, PageID.1759). The ultimate recommendation placed Smith in EC

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[5] Functional academics has been defined as: "cognitive abilities and skills related to learning at school that also have direct application in one's life (e.g., writing; reading; using basic practical math concepts . . .)." *Tharpe v. Humphrey*, 2014 WL 897412, at *23 (M.D. Ga. Mar. 6, 2014), aff'd sub nom. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). "It is important to note that the focus of this skill area is not on grade-level academic achievement, but, rather, on the acquisition of academic skills that are functional in terms of independent living." *Id.*

Resource classes,[6] requiring 10-20 hours in classes for emotional conflict issues and special education. (Doc. 125 PageID.1765). When Smith was in third grade his reading level was at the first grade, third month level, his math was at the second grade, first month level, and his language was at the zero (or kindergarten) grade, first month level. (Doc. 125, PageID.1760). At the age of 12 when Smith was repeating the sixth grade, he was tested again on the WISC-R and received a full-scale score of 74 and was found to be reading at the fourth-grade level, fifth month, he was spelling at the third grade, sixth month level and he performed in math at the third grade, ninth month level. (Doc. 125, PageID.1767-1771). There are records that indicate Smith was enrolled in EC resource classes during his 6th grade year and records that indicate Smith was enrolled in EMR classes in the 7th and 8th grades. (Doc. 116-1, PageID.2116-2208). "EMR" referred to "educable mentally retarded," which was a term used in Alabama in the late 70s and early 80s for a person with an IQ score below 75 who also had deficits in adaptive behavior and was "largely parallel to the criteria used to identify mild intellectual disability today." (Doc. 125, PageID.1754-55).

Dr. Reschly[7] testified that Smith's school records show the kinds of behaviors that are associated with

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[6] "EC" stood for "emotionally conflicted" which was the term Alabama used at that time for what was called elsewhere "emotional behavior." (Doc. 125 PageID.1765).

[7] The Court notes that Respondent contends that the undersigned should refuse to credit Dr. Reschly's testimony because he

and denote mild intellectual disability or what was called EMR. (Doc. 125, PageID.1781). A Walker Problem Behavior Checklist was administered on Smith in the fourth grade that indicated Smith had problems acting out, he was withdrawn, he had issues with distractibility and problems with peer relations. (Doc. 125, PageID.1766-67). In 1982 Smith was reevaluated because regulations required that a child's disability status be reevaluated every three years. (Doc. 125, PageID.1767). Smith scored a full-scale IQ of 74 or 75 which would be adjusted to 72 and which fell within the State of Alabama's requirements for diagnosis as EMR. (Doc. 125, PageID.1768-69). Much of the Walker Problem Behavior Checklist relates to social functioning or the social domain of adaptive behavior. (Doc. 125, PageID1779-80). Reschly testified that Smith's peer

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did not personally evaluate Smith. Most of Dr. Reschly's testimony consisted of an overview of intellectual disability and a review of Smith's school records. Dr. Reschly opined that Smith met the requirements for intellectual disability before the age of eighteen. Obviously, Reschly could not go back and interview Smith at an early age. The school records and family accounts of Smith's childhood are the best information available now on Smith's intellect prior to the age of eighteen. The Court agrees that the reliability and validity of opinions based merely on past records is limited but also recognizes that Dr. Reschly has specialized knowledge on special education and the assessment of intellectual disability in school age children. Respondent also points to cases where Dr. Reschly's testimony has been discredited. However, as Smith argues, disagreements and different opinions are the very heart of litigation and the fact that a court disagreed with one expert in favor of another does not mean the expert's testimony should henceforth be disbelieved. The expert's testimony was simply not enough to overcome the opposing testimony in these prior cases.

relations were rated as being very low or poor and some of the descriptions of Smith's behavior, such as not complying and making an inappropriate comment about a teacher, "reflect social domain deficits in adaptive behavior." (Doc. 125, PageID.1780).

Dr. Fabian also found Smith's school records indicated social domain problems. Dr. Fabian noted that during the developmental years, Smith had not been given a formal adaptive functioning test such as the ABAS or Vineland, but Fabian testified that Smith's records indicate adaptive functioning problems:

> . . . we're starting to see global impairment, where he's academically behind two years, he's acting out, low frustration tolerance, aggression, behavioral problems, and that's often consistent when someone has those adaptive behavioral deficits and the intellectual functioning deficits so that would be consistent with intellectual disability.

(Doc. 125, PageID.1894-95). According to Dr. Fabian, Smith's adaptive functioning fell in the mild intellectually disabled range before the age of 18. (Doc. 1225, PageID.1902).

Dr. King, on the other hand, found that there was no evidence of intellectual disability before the age of 18. (Doc. 125-1, PageID.2021). According to Dr. King, there was only one page in Smiths records that said EMR – indicating he was educably mentally retarded, but the "overwhelming evidence" indicated "he was not functioning highly, but he was not functioning

as an intellectually disabled individual." (Doc. 125-1, PageID.2021-22). Dr. King testified that Smith's IQ scores "were all in the borderline range of ability from childhood to adulthood." (Doc. 125-1, PageID.2022). It is Dr. King's opinion that Smith has never been intellectually disabled. (Doc. 125-1, PageID.2022). Smith "has no testing that indicates that he functions with an IQ of 70 or below in consistent fashion." (Doc. 125-1, PageID.2022).

After reviewing the testimony concerning Smith's early years, the Court finds that Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age. As the Court stated previously, this is a close case, but the evidence indicates that Smith's intelligence and adaptive functioning has been deficient throughout his life. The Court found above that Smith falls in the upper end of the required significantly subaverage intellectual functioning and that he has significant deficits in adaptive behavior. The evidence indicates these deficits did not begin during Smith's adult years but were present at an early age. The Court finds Smith's intellectual and adaptive functioning issues manifested during his developmental period.

CONCLUSION

For the reasons explained above, the Court finds that Petitioner Joseph Clifton Smith is intellectually disabled. Accordingly, Smith's petition for writ of habeas corpus is **GRANTED** with respect to his *Atkins*

claim, and his death sentence is **VACATED**. Smith is intellectually disabled and cannot constitutionally be executed.

DONE and **ORDERED** this 17th day of August, 2021.

/s/ Callie V. S. Granade
SENIOR UNITED STATES
DISTRICT JUDGE