No. 24-872

In the Supreme Court of the United States

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

JOSEPH CLIFTON SMITH

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

SARAH M. HARRIS
Acting Solicitor General
Counsel of Record
KYLE D. HAWKINS
Counselor to the Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
MATTHEW R. GALEOTTI
ANN O'CONNELL ADAMS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether under *Atkins* v. *Virginia*, 536 U.S. 304 (2002), a State may require a claimant, as a matter of state law, to prove an intelligence quotient (IQ) of 70 or less by a preponderance of the evidence.

2. Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim.

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2

The counsel of record for all parties received timely notice of the United States' intent to file this amicus curiae brief ten days before the due date.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulation:

Miscellaneous:

In the Supreme Court of the United States

No. 24-872

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

JOSEPH CLIFTON SMITH

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the validity of Alabama's evidentiary framework for individuals to establish that they are intellectually disabled and therefore ineligible for a capital sentence under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). The federal government has a direct interest in the proper framework to establish intellectual disability, because *Atkins* and the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, prohibit the execution of federal defendants who are intellectually disabled. See 18 U.S.C. 3596(c). The United States also has a broader interest in ensuring that States are not unduly restricted from pursuing and carrying out capital punishment as "an essential tool for deterring and

punishing those who would commit the most heinous crimes." Exec. Order No. 14,164, 90 Fed. Reg. 8463, 8463 (Jan. 30, 2025). Petitioner has asked (Pet. 15, 24) this Court to clarify or reconsider its decisions in *Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas*, 581 U.S. 1 (2017), to the extent they improperly impose such limitations. The government respectfully submits, in light of its substantial interest in preserving state and federal authority to impose capital punishment, that clarification is warranted.

INTRODUCTION

Over two decades ago, this Court held in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits the execution of individuals who are intellectually disabled. But *Atkins* expressly reserved to States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (brackets and citation omitted). States, this Court has long emphasized, play a "critical role" in defining intellectual disability, *Hall* v. *Florida*, 572 U.S. 701, 719 (2014), and retain "flexibility" in implementing *Atkins*'s core prohibition, *Moore* v. *Texas*, 581 U.S. 1, 20 (2017).

In recent years, however, the federal courts of appeals have drifted from those pronouncements. They have interpreted *Atkins*, *Hall*, and *Moore* to require the jettisoning of state evidentiary frameworks for proving intellectual disability. Instead of requiring *Atkins* claimants to prove *all* the elements of a state definition of intellectual disability, courts have permitted claimants prove *some* elements and to show that the evidence does not rule out the rest. That approach disregards the very types of state policy judgments that *Atkins* promised to respect.

This Court should take the opportunity to clarify those misunderstandings, and this case is a suitable vehicle for doing so. Like other States, Alabama requires *Atkins* claimants to make three showings: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)"; (2) "significant or substantial deficits in adaptive behavior"; and (3) that these problems "manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830 (2003). And like other States, Alabama requires *Atkins* claimants to prove each of those three prongs by a preponderance of the evidence. See *Byrd* v. *State*, 78 So. 3d 445, 450-452 (Ala. Crim. App. 2009), cert. denied, 565 U.S. 1205 (2012).

In the decision below, however, the Eleventh Circuit interpreted this Court's Eighth Amendment precedents to require a rewriting of Alabama's test. Instead of requiring respondent to prove at the first prong that it is more likely than not that his intellectual functioning is consistent with an IQ of 70 or lower, the court asked respondent to establish only that his true IQ *could be* 70 or lower. See Pet. App. 4a-6a. Respondent's five IQ scores of 75, 74, 72, 78, and 74, see *id.* at 5a, do not indicate that it is more likely than not that respondent's true IQ score is 70. But because they do not categorically foreclose that possibility, the court of appeals moved on to the second prong of the test—adaptive deficits—which is more subjective. Respondent's *Atkins* claim ultimately prevailed.

The Eighth Amendment does not require courts to blue-pencil state evidentiary frameworks for *Atkins* claims in that way. *Atkins* itself departed from the Amendment's original meaning. See *Atkins*, 536 U.S.

at 340 (Scalia, J., dissenting) ("The Court makes no pretense that execution of the mildly" intellectually disabled "would have been considered 'cruel and unusual' in 1791."). But *Atkins* at least left States leeway to appropriately enforce its guarantee. See *id.* at 317 (majority opinion). The Eleventh Circuit below went further, displacing state law with a rigid rule that makes it much easier to make out an *Atkins* claim.

The court of appeals believed that its approach was required by this Court's decisions in *Hall* and *Moore*. But the Court in those cases did not hold that it was displacing common state evidentiary frameworks like Alabama's. Nor did it preclude courts from evaluating multiple IQ scores cumulatively. Yet confusion persists among lower courts over how to apply state evidentiary frameworks to multiple IQ tests after *Hall* and *Moore*. That confusion prevents States from implementing lawful capital punishment. The United States respectfully urges this Court to grant the petition and clarify that the Eighth Amendment does not require that result.

STATEMENT

1. a. In November 1997, police found Durk Van Dam's body in his pickup truck in a wooded area in Mobile County, Alabama. 795 So. 2d 788, 796. Van Dam showed signs of brain swelling, rib fractures, and a collapsed lung, and his neck and back had been mutilated by a saw. *Ibid.* He had been robbed of about $140 in cash, his boots, and tools from his truck. *Ibid.*

Two days before the murder, respondent had been released from prison. 795 So. 2d at 820. After first telling officers that he watched someone else kill Van Dam, respondent confessed to participating in the murder. *Id.* at 796. A grand jury charged respondent with capital murder, and a jury found him guilty. *Id.* at 796, 823.

b. During the penalty phase, respondent called several witnesses to establish a case for mitigation. 620 Fed. Appx. 734, 737-739. Dr. James Chudy, a clinical psychologist who evaluated respondent and reviewed his school and jail records, testified that he had administered a Wechsler Adult Intelligence Scale – Revised (WAIS-R) test, which showed that respondent had a full-scale IQ of 72. *Id.* at 738. Based on a standard error of measurement, Dr. Chudy explained that respondent's IQ could be as high as 75 or as low as 69. *Ibid.* Respondent also introduced school records showing that at age 12, he had obtained IQ scores of 74 and 75. *Ibid.* Dr. Chudy diagnosed respondent as having "borderline intellectual functioning." *Id.* at 738-739.

By a vote of 11-1, the jury recommended a sentence of death. 620 Fed. Appx. at 739. After considering respondent's criminal history, the presentence report, and Dr. Chudy's report, the trial court accepted the jury's advisory verdict and sentenced respondent to death. *Id.* at 740-742.

c. The Alabama Court of Criminal Appeals affirmed respondent's conviction and capital sentence. 795 So. 2d at 842. The Supreme Court of Alabama denied a petition for a writ of certiorari. 795 So. 2d 842. This Court did the same. 534 U.S. 872.

2. a. In 2002, this Court held in *Atkins* v. *Virginia*, 536 U.S. 304, that the execution of intellectually disabled individuals violates the Eighth Amendment's bar on "'cruel and unusual punishments.'" *Id.* at 307, 321. Respondent then sought state collateral relief based on *Atkins*. See 71 So. 3d 12, 17. The trial court dismissed respondent's claim, concluding that respondent had not proven an intellectual disability. *Ibid.*

b. The Alabama Court of Criminal Appeals affirmed. 71 So. 3d at 35. The court explained that under Alabama law, an individual is intellectually disabled if he (1) has significantly subaverage intellectual functioning (an IQ of 70 or below); (2) has significant defects in adaptive behavior; and (3) these two deficiencies manifested themselves before age 18. *Id.* at 17 (citing *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830 (2003)). The court concluded that the record supported the trial court's conclusion that respondent did not have significantly subaverage intellectual functioning, in light of his full-scale IQ test scores of 72, 74, and 75. *Id.* at 19-20. The appellate court also reasoned that the record did not demonstrate significant defects in adaptive behavior. *Id.* at 20. The court rejected respondent's argument that the "margin of error" for IQ testing proves that an IQ score of 72 shows intellectual disability. *Id.* at 20-21.

3. a. In 2011, respondent filed an amended petition for post-conviction relief under 28 U.S.C. 2254 in the United States District Court for the Southern District of Alabama. 2013 WL 5446032, at *1. The court denied the petition without conducting an evidentiary hearing. *Id.* at *29. The court determined that the state court was not required to downwardly modify respondent's lowest IQ score to 69 based on the standard error of measurement, and thus the state court did not unreasonably apply federal law in finding that respondent was not exempt from execution under *Atkins*. *Id.* at *28-*29 & n.25. Because respondent had failed to establish that his intellectual functioning was significantly subaverage, the court did not analyze whether respondent suffered from deficits in adaptive learning or

whether any deficits manifested before respondent reached age 18. *Id.* at *29 n.26.

b. The court of appeals granted a certificate of appealability and reversed. 620 Fed. Appx. at 745, 751-752. The court held that the Alabama appellate court's finding that respondent did not have significantly subaverage intellectual functioning was an "unreasonable determination of the facts." *Id.* at 750. In the court's view, "the problem for the State here is that the trial evidence showed that [respondent]'s IQ could be as low as 69 given a standard error of measurement of plus-or-minus three points." *Id.* at 749-750. The court also concluded that the Alabama appellate court's finding that respondent lacked deficits in adaptive behavior was an unreasonable determination of the facts, citing behavioral findings from Dr. Chudy's report. *Id.* at 750-751. The court remanded to the district court with instructions to allow respondent to present an expert witness and to consider his requests for discovery and an evidentiary hearing. *Id.* at 751-752.

4. a. On remand, the district court held an evidentiary hearing. Pet. App. 65a. One of respondent's witnesses, Dr. John Fabian, testified that he had assessed respondent's IQ and that respondent had obtained a full-scale IQ score of 78. *Id.* at 26a. The State's witness, Dr. Glen King, testified that he had assessed respondent's IQ and that respondent had obtained a full-scale IQ score of 74. *Id.* at 26a-27a. Respondent had thus taken five total IQ tests and obtained full-scale IQ scores of 75, 74, 72, 78, and 74. Dr. King testified that the existence of multiple IQ tests over a long period of time "contributes to the construct of validity indicating what a true IQ score is for an individual." *Id.* at 70a.

Following the hearing, the district court determined that respondent is intellectually disabled, granted respondent's Section 2254 petition, and vacated his death sentence. Pet. App. 63a-97a. The court took the view that, accounting for "the standard error inherent in IQ tests," respondent's "IQ test scores as low as 72" "could mean his IQ is actually as low as 69." *Id.* at 68a. The court found that "it is not clear whether [respondent] qualifies as having significantly subaverage intellectual function." *Id.* at 74a. It thus determined that "additional evidence must be considered," including evidence of respondent's adaptive deficits, "to determine whether [respondent] is intellectually disabled." *Ibid.* The court further found that respondent had deficits in his adaptive behavior as he is "incapable" of "living independently outside of prison." *Id.* at 92a; see *id.* at 75a-92a. The court also concluded that respondent's intellectual and adaptive deficits had manifested themselves before age 18. *Id.* at 92a-96a.

b. The court of appeals affirmed. Pet. App. 18a-57a. The court rejected petitioner's argument that the district court had failed to require respondent "to prove by a preponderance of the evidence that he has significantly subaverage intellectual functioning," as Alabama law demands. *Id.* at 43a. The court of appeals reasoned that under *Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas*, 581 U.S. 1 (2017), respondent "needed to prove only that the lower end of his standard-error range is equal to or less than 70." Pet. App. 45a; see *id.* at 43a-45a. Because respondent had an IQ test score as low as 72—which, according to the district court, "*could* mean his IQ is actually as low as 69," *id.* at 68a (emphasis added)—the court of appeals explained that "the dis-

trict court had to move on to assess [respondent's] adaptive deficits." *Id.* at 45a. The court of appeals then affirmed the district court's findings that respondent had significant deficits in adaptive behavior and that his deficits manifested themselves before he turned 18. *Id.* at 45a-55a.

5. This Court granted the State's petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded. Pet. App. 10a-13a. The Court explained that the court of appeals' decision could be read in two ways. The Court observed that the opinion might be read "to afford conclusive weight to the fact that the lower end of the standard-error range for [respondent's] lowest IQ score is 69." *Id.* at 12a. On the other hand, the Court noted that aspects of the court of appeals' decision "would suggest a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." *Id.* at 12a-13a. This Court remanded to the court of appeals to clarify the basis for its decision. *Id.* at 13a. The Court's order noted that Justices Thomas and Gorsuch would have granted the petition. *Ibid.*

6. Ten days later, the court of appeals issued a new opinion. Pet. App. 1a-9a. The court stated that it had applied a "'holistic approach,'" and it "reject[ed] any suggestion" that the first prong of the test for intellectual disability is automatically satisfied whenever "the lower end of the standard-error range for [the] lowest of multiple IQ scores is 69." *Id.* at 2a. Instead, the court held, "if a 'holistic' review of a person's 'multiple IQ scores' does not foreclose the conclusion that [a defendant] has significantly subaverage intellectual functioning," then this Court's decisions in *Hall* and *Moore* re-

quire "'that he have the opportunity to present evidence'" of his adaptive deficits. *Id.* at 4a-5a (citation omitted). The court of appeals held that because the district court permissibly found that respondent's "IQ scores could not rule out the possibility" that respondent is intellectually disabled, the court had to consider "additional evidence of [respondent's] disability, including evidence" of his "adaptive deficiencies." *Id.* at 6a.

DISCUSSION

Alabama law requires *Atkins* claimants to prove by a preponderance of the evidence that their true IQ is 70 or lower. The court of appeals, however, allowed respondent's *Atkins* claim to proceed on the basis that his true IQ score *could be* 70 or lower. The court appeared to believe that the Eighth Amendment required such an approach. That erroneous holding, which is the subject of petitioner's first question presented, contributes to confusion among the lower courts. Across different fact patterns and procedural postures, courts have effectively rewritten evidentiary frameworks like Alabama's. This case presents an opportunity to correct that recurrent error.

If this Court grants certiorari, it should also take up the second question presented, concerning the method of evaluating multiple IQ scores in the *Atkins* inquiry. The first question presented frequently arises in the context of multiple IQ scores, and lower courts need guidance about how to apply this Court's Eighth Amendment cases in that context.

A. The Viability Of State Evidentiary Frameworks For *Atkins* Claims Warrants This Court's Review

1. The court of appeals erred in effectively jettisoning Alabama's evidentiary framework for proving *Atkins* claims. That error deepens confusion among the lower courts on an issue in which the federal government has a significant interest.

a. The Eighth Amendment provides that "cruel and unusual punishments" shall not be "inflicted." U.S. Const. Amend. VIII. In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Amendment prohibits the execution of individuals who are intellectually disabled. *Id.* at 321. The Court explained that a national consensus against the practice had developed, and that the only remaining disagreement "is in determining which offenders are in fact" intellectually disabled. *Id.* at 317. The Court, however, declined to "provide definitive procedural or substantive guides" to answering that question. *Bobby* v. *Bies*, 556 U.S. 825, 831 (2009). Instead, the Court left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Atkins*, 536 U.S. at 317 (brackets and citation omitted).

Since *Atkins*, this Court has continued to recognize the "critical role" that States play in defining intellectual disability, but it has imposed outer limits on their discretion. *Hall* v. *Florida*, 572 U.S. 701, 719 (2014). In *Hall*, this Court rejected a Florida rule that required a defendant, "as a threshold matter," to "show an IQ test score of 70 or below before presenting any additional evidence of his intellectual disability." *Id.* at 707. The Court reasoned that Florida's "strict cutoff" failed to account for an IQ test's "standard error of measurement," and thus "runs counter to the clinical definition"

of intellectual disability "cited throughout *Atkins*." *Id.* at 712-713, 724. And in *Moore* v. *Texas*, 581 U.S. 1, 19 (2017), the Court rejected the Texas Court of Criminal Appeals' reliance on a series of evidentiary factors that the Court believed were outdated and created "an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 17 (citation omitted). Even while imposing a "constraint on States' leeway," however, the Court has continued to recognize States' "flexibility" in "enforcing *Atkins*' holding." *Id.* at 20.

b. The court of appeals erroneously deprived Alabama of that flexibility. Like other States, Alabama requires *Atkins* claimants to make three showings, each by a preponderance of the evidence: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)"; (2) "significant or substantial deficits in adaptive behavior"; and (3) that these problems "manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830 (2003); see *Byrd* v. *State*, 78 So. 3d 445, 450-452 (Ala. Crim. App. 2009), cert. denied, 563 U.S. 1205 (2012).

The court of appeals appeared to believe that the Eighth Amendment required it to rewrite that test. Instead of asking whether respondent had proven that it is more likely than not that his true IQ is 70, the court required respondent to prove only that it is *possible* that his true IQ is 70. See Pet. App. 6a. Relying on this Court's decisions in *Hall* and *Moore*, the court of appeals held that "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

4a (emphasis added; citation and internal quotation marks omitted). The court thus determined that the first prong was satisfied because respondent's IQ scores "could not rule out the possibility that [respondent] is intellectually disabled." *Id.* at 6a-7a.

Rewriting Alabama's evidentiary framework in that way was wrong. There is no basis in the Eighth Amendment's text or history for a rigid rule that all capital defendants whose IQ scores *may* be 70 or lower must be permitted to move on to the second prong of the intellectual-disability inquiry. See *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting) (explaining that at the time of the Framing, "[o]nly the *severely* or *profoundly*" intellectually disabled "enjoyed any special status under the law").

The decision below is also difficult to square with this Court's precedent. *Atkins* assigned to the States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317 (brackets and citation omitted). And in other contexts, this Court has recognized that "when mental illness should absolve someone of 'criminal responsibility'" is a question best left to "each State to decide on its own." *Kahler* v. *Kansas*, 589 U.S. 271, 281 (2020) (citation omitted). The court of appeals below impermissibly intruded on a core state prerogative.

The court of appeals believed that *Hall* compelled its approach. See Pet. App. 5a. *Hall* held that States may not impose a strict IQ cutoff of 70 to establish intellectual disability, in light of IQ tests' standard error of measurement. 572 U.S. at 724. But Alabama does not impose a strict cutoff, and it considers the standard error of measurement. See *Reeves* v. *State*, 226 So. 3d 711, 728 (Ala. Crim. App. 2016), cert. denied, 583 U.S. 979

(2017). Consistent with *Hall*, an Alabama *Atkins* claimant who scores above a 70 on an IQ test could still satisfy the first prong if he shows (perhaps relying on other scores and the standard error of measurement) that it is more likely than not that his true IQ is 70 or lower. See *ibid.* The court of appeals below, however, set the bar much lower, requiring respondent to prove only that his "true IQ score *could be* less than or equal to 70." Pet. App. 7a (emphasis added). *Hall* does not require that approach.

The court of appeals' reliance on other language in *Hall* (and *Moore*) was misplaced. The court focused on *Hall*'s statement that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Hall*, 572 U.S. at 723; see *Moore*, 581 U.S. at 14 (similar language); Pet. App. 4a. The court interpreted that language to mean that as long as a claimant can establish that in light of standard errors of measurement, his true IQ *could be* 70, the court must move on to the second prong of Alabama's test. See Pet. App. 4a-6a. But the Court in *Hall* and *Moore* did not say that it was setting out a rule that would displace state evidentiary frameworks such as Alabama's. The Court did not even address state evidentiary frameworks in either case, despite the *Hall* dissent's warning that the majority's approach could "totally transform[] the allocation and nature of the burden of proof" in many States. 572 U.S. at 741 (Alito, J., dissenting). Absent clearer guidance from the Court, the court of appeals was wrong to read *Hall* and *Moore* to displace Alabama's allocation of the burden of proving intellectual disability. Cf. 28 U.S.C. 2254(d) (providing

for federal habeas relief from state court decisions that were "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or were "based on an unreasonable determination of the facts").

c. Alternatively, if *Hall* and *Moore* preclude States from establishing reasonable evidentiary frameworks for *Atkins* claims, then those decisions should be reconsidered. See Pet. 15, 24. Although this Court exercises caution in revisiting its precedents, *stare decisis* is "'not an inexorable command,'" and it is "at its weakest" in constitutional cases. *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997) (citation omitted). If *Hall* and *Moore* prevent States from requiring *Atkins* claimants to prove significantly subaverage intellectual functioning by a preponderance of the evidence, then several considerations would favor overruling that conclusion.

Most importantly, nothing in the Eighth Amendment or in *Atkins* itself precludes States from establishing reasonable evidentiary frameworks for proving intellectual disability. See p. 13, *supra*. Such a rule would also create serious workability problems. *Hall* and *Moore* relied on contemporary clinical standards, but those standards continue to change. See Pet. 25. Courts attempting to apply *Hall* and *Moore* are thus in the unenviable position of shooting at a moving target. Moreover, requiring courts to lower the bar on the first prong of their intellectual-disability frameworks and move automatically to the adaptive-deficits prong makes it hard to administer the death penalty evenhandedly, because "adaptive behavior is a malleable factor," and "its measurement relies largely on subjective judgments." *Hall*, 572 U.S. at 737 (Alito, J., dissenting); see Pet. 23.

2. This Court's intervention is warranted to resolve confusion among the circuit courts over how to allocate the burden of proof for an *Atkins* claim after *Hall* and *Moore*. See Pet. 16-19. Some courts, like the Eleventh Circuit, have brushed aside state requirements that a defendant prove significantly subaverage intellectual functioning by a preponderance of the evidence. For example, the Eighth Circuit in *Jackson* v. *Payne*, 9 F.4th 646 (2021), cert. denied, 142 S. Ct. 2745 (2022), interpreted *Hall* and *Moore* to require that "when the low end of an individual's IQ score range 'falls at or below 70,' courts must 'move on to consider [the petitioner's] adaptive functioning.'" *Id.* at 652 (quoting *Moore*, 581 U.S. at 14). It did so even though Arkansas, like Alabama, required defendants to prove all three prongs of the standard intellectual-disability test "by a preponderance of the evidence." *Id.* at 651.

By contrast, other courts have respected States' allocations of the burden of proof after *Hall*. For example, in *Black* v. *Carpenter*, 866 F.3d 734 (2017), cert. denied, 584 U.S. 1015 (2018), the Sixth Circuit applied Tennessee's rule for proving intellectual disability, which like Alabama's here, required *Atkins* claimants to prove by a preponderance of the evidence that they had significantly subaverage general intellectual functioning as evidenced by a functional IQ of 70 or lower. *Id.* at 744. Black had several admissible IQ scores, including scores of 73 and 76. *Id.* at 748. The court acknowledged that "there is almost always a *possibility* that a reported IQ score significantly higher than 70 is an inaccurate reflection of a true IQ score of 70 or below." *Ibid.* But the court refused to end its first-prong inquiry there, explaining that this "possibility does not satisfy Black's burden to prove his intellectual disability by a

preponderance of the evidence." *Id.* at 748-749. That approach diverges sharply from the court of appeals below, which concluded that respondent satisfied the first prong because his "IQ scores could not rule out the possibility" of intellectual disability. Pet. App. 6a.

The Fifth Circuit has similarly focused on what an individual's actual IQ "likely" is, rather than what it could be. *Garcia* v. *Stephens*, 757 F.3d 220, 226 (2014), cert. denied, 574 U.S. 1193 (2015). And the Tenth Circuit has suggested that an Oklahoma statute that "provides that a score 76 or higher on *any* IQ test bars a defendant from being found intellectually disabled" survives *Hall*—even though the statute may foreclose relief for an individual whose other scores might indicate that he *could* have a true IQ of 70. *Smith* v. *Duckworth*, 824 F.3d 1233, 1244-1245 (2016), cert. denied, 580 U.S. 1202 (2017). Although those cases arose in different postures and on different factual records, it is unlikely that they would come out the same way in the Eleventh Circuit.

That confusion among the lower courts is likely to persist absent this Court's intervention. Hundreds of capital defendants and death-row inmates have raised *Atkins* claims over the years. See John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 396 (2014) (identifying 371 *Atkins* claimants between 2002 and 2013). And before *Hall*, most States required *Atkins* claimants to prove the elements of intellectual disability by at least a preponderance of the evidence. See Arizona et al. Amici Br. at Appx. B, *Hall*, *supra* (No. 12-10882) (cataloging State burdens of proof as of February 2014).

The viability of those evidentiary frameworks after *Hall* and *Moore* is thus an issue of widespread importance.

3. The issue is particularly important to the federal government. First, the government has a strong interest in preserving capital punishment throughout the United States, including in the States. The United States considers capital punishment "an essential tool" for deterring crime and protecting the safety of the American people. Exec. Order No. 14,164, 90 Fed. Reg. at 8463. The United States therefore has an obligation to "ensure that the laws that authorize capital punishment are respected and faithfully implemented." *Ibid.*; accord Memorandum from the Att'y Gen., *Reviving the Federal Death Penalty and Lifting the Moratorium on Federal Executions* 4 (Feb. 5, 2025), https://www.justice.gov/ag/media/1388561/dl?inline.

Second, the question presented directly affects federal capital prosecutions. In addition to *Atkins*'s constitutional limits, the FDPA bars execution of the intellectually disabled. See 18 U.S.C. 3596(c). Congress has not explicitly prescribed a definition or framework for establishing intellectual disability, so courts evaluating federal defendants' FDPA and *Atkins* claims have looked to clinical definitions and sometimes also to state law. See, *e.g.*, *United States* v. *Cisneros*, 385 F. Supp. 2d 567, 570-571 (E.D. Va. 2005) (examining Virginia law and clinical definitions). Before *Hall*, those courts often imposed a test similar to Alabama's, under which the defendant must prove by a preponderance of the evidence that he has significantly subaverage intellectual functioning, as evidenced by an "IQ score of approximately 70." *United States* v. *Wilson*, 922 F. Supp. 2d 334, 342 (E.D.N.Y. 2013) (explaining that the court

would also account for standard errors of measurement and other statistical effects), vacated on reconsideration, 170 F. Supp. 3d 347 (E.D.N.Y. 2016). But confusion caused by *Hall* and *Moore* has led courts to hold federal defendants to a lower burden, and even to invalidate the federal death sentence of a violent criminal who is not intellectually disabled. See *United States* v. *Wilson*, 170 F. Supp. 3d 347, 350 (E.D.N.Y. 2016).

The case of Ronell Wilson illustrates the problem. Wilson murdered two undercover New York Police Department detectives in 2003, and was unanimously found guilty of capital offenses by a federal jury. See *United States* v. *Whitten*, 610 F.3d 168, 173-175 (2d Cir. 2010) (describing the facts). The district court initially denied Wilson's *Atkins* claim, following an evidentiary hearing. See *Wilson*, 922 F. Supp. 2d at 336. Applying the familiar framework, the court required Wilson to prove "by a preponderance of the evidence": "(1) significantly subaverage intellectual functioning; (2) significant deficits in adaptive behavioral skills; and (3) onset of those limitations before the age of 18." *Id.* at 343. Wilson's full-scale IQ scores were 84, 78, 78, 70, 80, 84, 76, and 80. *Id.* at 358. After carefully analyzing those scores and standard errors of measurement, the court concluded that Wilson's "tests strongly suggest that his true IQ score is more likely than not above 70" and that he failed to satisfy "his burden of proving that he more likely than not suffers from significantly subaverage intellectual functioning." *Id.* at 361, 368. The court thus rejected Wilson's *Atkins* claim without considering the other prongs. *Id.* at 368. A jury unanimously recommended death, and the court sentenced Wilson to death in 2013. *Wilson*, 170 F. Supp. 3d at 350.

Then in 2014, the Second Circuit sua sponte ordered the district court to reconsider, in light of *Hall*, its decision that Wilson is not intellectually disabled. See *Wilson*, 170 F. Supp. 3d at 350. On reconsideration, the district court lamented "the lack of clear guidance on this issue," but ultimately interpreted "the facts in *Hall*" to "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." *Id.* at 366. Even though Wilson's full-scale IQ scores were 70 on one test and between 76 and 84 on the other seven, the court found that Wilson had satisfied the intellectual-functioning prong, and moved on to consider adaptive deficits. *Id.* at 392. The court ultimately concluded that Wilson was intellectually disabled and thus ineligible for the death penalty. *Ibid.* The federal government was not able to bring Wilson to justice for his crimes. The United States has a strong interest in preventing the same outcome in future federal prosecutions. See Exec. Order No. 14,164, 90 Fed. Reg. at 8464 (directing the Attorney General to "pursu[e] the death penalty where possible" going forward).

B. If The Court Grants Certiorari, It Should Also Clarify How To Evaluate Multiple IQ Scores

Petitioner's second question presented asks this Court to clarify how courts should evaluate *Atkins* claims when a claimant has multiple IQ test scores. See Pet. 26-31. If the Court grants review on the first question presented, it should consider the second question as well, in order to provide guidance to the lower courts on this recurring issue.

1. The court of appeals in this case compounded its errors on the burden of proof by declining to give weight to the cumulative effect of respondent's five IQ

scores. The court observed that because of the standard error of measurement, scores in "the 'range of about 65 to 75'" are "consistent with mild intellectual disability." Pet. App. 7a (citation omitted). Because four of respondent's five scores were 75 or lower, the court concluded that "four out of [respondent's] five IQ scores are consistent with an intellectual disability." *Ibid.* The court thus found no clear error in the district court's conclusion that those four scores "trump[]" respondent's fifth score of 78. *Ibid.* (citation omitted).

Rather than tallying up individual scores below 75, the court of appeals should have taken respondents' IQ scores as a whole, asking whether the cumulative body of evidence makes it more likely than not that respondent's true IQ is 70 or lower. See *Byrd*, 78 So. 3d at 450-452. The State's expert, Dr. King, presented compelling testimony that taken together, respondent's five IQ scores make it less likely that his true IQ is 70. See Pet. App. 70a. But the court of appeals (and the district court) disregarded that evidence here, because they erroneously believed that the Eighth Amendment required respondent to prove at the first prong only that his true IQ *could* be 70. See pp. 7-10, *supra*.

The Eighth Amendment does not require courts to blind themselves to the cumulative impact of multiple IQ scores in that way. That is not to say that the Eighth Amendment prescribes a specific approach to analyzing multiple IQ tests, such as averaging or a composite score—it does not. See Pet. 27. But lower courts should account for the multiple scores, including by using those forms of cumulative analysis when appropriate, in applying States' evidentiary frameworks for *Atkins* claims.

2. This Court's review of the second question presented would provide useful guidance for lower courts.

Many cases involving the first question presented arise in the context of multiple IQ scores. See pp. 16-17, *supra*. And as this Court recognized in *Hall*, "the analysis of multiple IQ scores jointly is a complicated endeavor." 572 U.S. at 714. But the Court in *Hall* did not provide detailed guidance about how to conduct that analysis. See *Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) ("*Hall* also reached no holding as to the evaluation of IQ when an *Atkins* claimant presents multiple scores."). And the lower courts remain confused about the correct approach. See *Wilson*, 170 F. Supp. 3d at 366 ("*Hall* does not provide explicit guidance with respect to how courts should treat multiple IQ test results."). If the Court grants certiorari, the United States respectfully submits that the Court should also take up the second question presented to clarify the appropriate method of evaluating multiple IQ scores.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General
KYLE D. HAWKINS
Counselor to the Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
MATTHEW R. GALEOTTI
ANN O'CONNELL ADAMS
Attorneys

MARCH 2025