No. __-__

In the Supreme Court of the United States

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Applicant,
v.
JOSEPH CLIFTON SMITH,
Respondent.

EMERGENCY APPLICATION TO RECALL AND STAY THE MANDATE PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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June 20, 2023

PARTIES TO THE PROCEEDING

Applicant is the Commissioner of the Alabama Department of Corrections. Applicant was the Appellant before the U.S. Court of Appeals for the Eleventh Circuit.

Respondent is Joseph Clifton Smith, who was the Appellee before the Eleventh Circuit.

RELATED PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit, No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered June 9, 2023 (denying stay).

United States Court of Appeals for the Eleventh Circuit, No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered May 19, 2023 (affirming merits determination).

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

United States District Court for the Southern District of Alabama, No. 1:05-cv-00474-CG-M, *Smith v. Dunn*, judgment entered Aug. 17, 2021 (granting petition for writ of habeas corpus).

United States Court of Appeals for the Eleventh Circuit, No. 14-10721, *Smith v. Campbell*, judgment entered Aug. 3, 2015 (reversing denial of petition for writ of habeas corpus).

United States District Court for the Southern District of Alabama, No. 05-0474-CG-M, *Smith v. Thomas*, judgment entered Sept. 30, 2013 (denying petition for writ of habeas corpus).

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

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

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

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

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

Court of Criminal Appeals of Alabama, No. CR-04-1491, *Smith v. State*, judgment entered June 29, 2005 (dismissing appeal as untimely).

Circuit Court of Mobile, No. CC-98-2064.60, *Smith v. State*, judgment entered Mar. 18, 2005 (granting State's motion to dismiss amended petition for writ of habeas corpus).

Court of Criminal Appeals of Alabama, No. CR-02-0319, *Smith v. State*, judgment entered May 28, 2004 (reversing dismissal and remanding).

Supreme Court of Alabama, No. 1030608, *Ex parte Smith*, judgment entered Mar. 5, 2004 (reversing dismissal of petition for writ of habeas corpus as untimely).

Court of Criminal Appeals of Alabama, No. CR-02-0319, *Smith v. State*, judgment entered Dec. 19, 2003 (affirming dismissal of petition for writ of habeas corpus as untimely), rehearing denied Jan. 16, 2004.

Circuit Court of Mobile, No. CC-98-2064.60, *Smith v. State*, judgment entered Oct. 9, 2002 (dismissing petition for writ of habeas corpus as untimely).

Supreme Court of the United States, No. 00-10675, *Smith v. Alabama*, judgment entered Oct. 1, 2001 (denying petition for writ of certiorari).

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

Court of Criminal Appeals of Alabama, CR-98-0206, *Smith v. State*, judgment entered Aug. 25, 2000 (denying rehearing).

Court of Criminal Appeals of Alabama, CR-98-0206, *Smith v. State*, judgment entered May 26, 2000 (affirming conviction and death sentence).

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

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

The Commissioner of the Alabama Department of Corrections respectfully applies to recall and stay the mandate of the U.S. Court of Appeals for the Eleventh Circuit. Joseph Smith was convicted and sentenced to death for a brutal murder in 1997. In 2023, the panel below erroneously affirmed vacatur of that sentence on the ground that Smith is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2003). Smith is not intellectually disabled—his IQ scores are 75, 74, 72, 78, and 74—but the Eleventh Circuit bent law and logic to find that his IQ was likely 70 or below. First, the panel decided it must consider only Smith's lowest score and ignore the others. Second, the panel created an irrebuttable presumption that Smith's true IQ likely fell at the bottom of the lowest score's error range. Combining these two moves, the panel held that Smith had satisfied his *preponderance* burden with a single test score, a 72 (± 3)—despite all the other evidence of his higher intellectual functioning.

The Eleventh Circuit's decision was not required by the Eighth Amendment to the Constitution nor this Court's precedents. The State will argue as much in its forthcoming petition for a writ of certiorari. But the State needs a stay of the mandate to preserve the status quo and avoid the prospect of resentencing Smith in the interim. A stay will not prejudice Smith, who will be imprisoned for life regardless. But resentencing him now would waste State resources, and if this Court reverses,

Smith may need to be sentenced a third time for the State to reimpose the death penalty. More concerning, vacatur of Smith's death sentence could, according to some courts, moot the case since Smith already received full relief and reversal would not reinstate his death sentence. Thus, a stay is warranted to ensure this Court has an opportunity to review the errant judgments below. The Eleventh Circuit unfortunately compounded its error by denying the State's unopposed stay request and insisting on the rightness of its *Atkins* ruling. App.40-43. Consequently, the mandate in this case will return to the matter to the District Court to grant federal habeas relief.

Because the Eleventh Circuit refused to stay its mandate, the State moves this Court to recall and stay the mandate of the lower court's decision of May 19, 2023, reproduced at App.2-39, pending the filing and disposition of a petition for writ of certiorari. The State will not delay in seeking this Court's review and intends to file its petition on or before August 17, 2023.

JURISDICTION

The Circuit Justice may consider an application for a stay of the mandate under Supreme Court Rules 22 and 23, and this Court has jurisdiction over such an application under 28 U.S.C. § 2101(f) and 28 U.S.C. § 1651(a). Moreover, because this Court has ultimate jurisdiction over the issues raised on appeal, it also has the

authority to protect its appellate jurisdiction by staying a judgment that might otherwise moot the case.

STATEMENT OF THE CASE

In 1997, Appellee Joseph Clifton Smith brutally beat Durk Van Dam to death with a hammer and saw—inflicting thirty-five blunt-force injuries including brain bleeding, rib fractures, and a collapsed lung—in order to steal $140, the man's boots, and some tools. He was convicted of capital murder during a robbery.

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

Smith raised an *Atkins* claim in postconviction relief proceedings in the state courts. To succeed, Smith had the burden "[1] to show significant subaverage

intellectual functioning at the time the crime was committed, [2] to show significant deficits in adaptive behavior at the time the crime was committed, and [3] to show that these problems manifested themselves before the defendant reached the age of 18." *Smith v. State*, 213 So. 3d 239, 249 (Ala. 2007) (citing *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)).

Because Smith could not show an intellectual disability by a preponderance of the evidence, the circuit court denied his petition, the ACCA affirmed, *Smith I*, 71 So. 3d 12, and the Alabama Supreme Court declined to hear the case. Smith then filed an amended habeas petition, including an *Atkins* claim, in federal district court. The district court initially denied his petition, *Smith v. Thomas* ("*Smith II*"), No. 05-0474-CG-M, 2013 WL 5446032, at *29 (S.D. Ala. 2013), but the Eleventh Circuit reversed and remanded, *Smith v. Campbell* ("*Smith III*"), 620 F. App'x 734, 736 (11th Cir. 2015). Without mentioning Smith's scores of 74 and 75 in its merits review, the court held it was unreasonable for the ACCA to find "that Smith conclusively did not possess significantly subaverage intellectual functioning." *Id.* at 749–50 (citing Smith's score of 72 and "other trial evidence of deficits in intellectual functioning").

Evidence taken on remand *worsened* Smith's case. The district court held an evidentiary hearing that produced even higher IQ scores for Smith than the 72 on which *Smith III* relied. On a test administered by the State's witness Dr. King, Smith

scored a 74. *Smith v. Dunn* ("*Smith IV*"), No. 05-00474-CG, 2021 WL 3666808, at *3 (S.D. Ala. Aug. 17, 2021). That score, the district court found, was "above what is considered significant subaverage intellectual functioning." *Id.* And on a test administered by his witness Dr. Fabian, Smith scored a 78. *Smith v. Comm'r, Ala. Dep't of Corrs.* ("*Smith V*"), 67 F.4th 1335, 1341 (11th Cir. 2023). In all, Smith has obtained five valid IQ scores in his lifetime—75, 74, 72, 78, and 74. *Id*.

But according to the district court, the new IQ evidence counted for nothing: Because Smith had scored a 72 in 1998, that score (taken alone) "could mean his IQ is actually as low as 69." *Smith IV*, 2021 WL 3666808, at *2. Based on that one test, which the court presumed was inaccurate in Smith's favor, Smith carried his burden to show an IQ of 70 or below by a preponderance of the evidence.

The State had repeatedly urged the district court to consider the totality of the evidence, including all five of Smith's IQ test scores. Dr. King testified that "multiple sources of IQ over a long period of time contributes to the construct of validity indicating what a true IQ score is for an individual." *Smith IV*, 2021 WL 36666808, at *2. He explained that the "five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions … are all in the borderline range of intellectual functioning." *Id.* at *3. While the district court admitted that Dr. King's assessment "lean[ed] in favor of finding that Smith does not have significant subaverage intellectual functioning," it was not "strong enough

to conclude that Smith is not intellectually disabled." *Id.* The district court concluded its findings regarding Smith's intellectual functioning as follows:

> [T]he Court finds *it is not clear whether Smith qualifies as having significantly subaverage intellectual function*. … [A]dditional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled. *This is a close case.*… 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.

Id. at *4 (emphasis added). Analyzing the second prong, the court again characterized this as "a close case" but found "significant deficits in [Smith's] adaptive behavior." *Id.* at *11. The third prong was deemed satisfied based on expert testimony and Smith's school records. *Id.* at *11–12. The court granted Smith's petition and declared that he "cannot constitutionally be executed." *Id.* at *13.

The State appealed, and on May 19, 2023, the Eleventh Circuit affirmed. *Smith V*, 67 F.4th 1335. Although the first prong "turn[ed] on whether he has an IQ equal to or less than 70," *id.* at 1345 (citing *Perkins*, 851 So. 2d at 456), the court held that it was proper to "move on"—*i.e.*, deem the requirement satisfied—without a showing that the Smith's IQ is likely 70 or lower. *Id.* at 1345–49. Instead, according to the panel, "Smith needed to prove only that the lower end of his [lowest IQ score's] standard-error range ["SEM"] is equal to or less than 70." *Id.* at 1349. On this view, the intellectual-functioning prong is satisfied "if even one valid IQ test score generates a range that falls to 70 or below." *Id.* at 1348. The court also held

that it would be improper to "consider *anything* other than the lower end of an offender's standard-error range." *Id.* at 1348 (emphasis added). In the Eleventh Circuit, there is now a "presumption that an individual's IQ falls at the bottom of his IQ range." *Id.* "Smith carried his burden" under the first prong because "the lower end of the [error] range was 69" for Smith's lowest score. *Id.* at 1349.

The State moved for a stay of the mandate pending the filing and disposition of a writ of certiorari in this Court. The Eleventh Circuit denied the stay in a short order, App.40-43, and the mandate issued on June 20, 2023, App.44-45.

REASONS TO GRANT THE APPLICATION

The State intends to seek this Court's review of the case and respectfully moves this Court to recall and stay the mandate pending this Court's disposition of a petition for a writ of certiorari. To warrant a stay, Alabama must show "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). "In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). Alabama makes the necessary showing here.

I. There is a Reasonable Probability That the Court Will Grant Certiorari and Reverse the Eleventh Circuit Decision.

The Eleventh Circuit committed two egregious errors that must be reversed: (1) the court exclusively relied on Smith's lowest IQ score, and (2) the court presumed that Smith's true IQ lies at the bottom of that score's error range. Both errors wrongly distort the *Atkins* inquiry by placing a thumb on the scale in favor of capital offenders. Both errors trample over the State's definition of intellectual disability in capital punishment cases. And both errors must be reversed because "federal habeas review overrides the States' core power to enforce criminal law [and] intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quotation marks omitted)). For similar reasons, the Supreme Court often reverses errant awards of habeas relief. *See, e.g.*, *Cash v. Maxwell*, 132 S. Ct. 611, 616–17 (2012) (Scalia, J., dissenting from the denial of certiorari) (collecting cases).

Purporting to clarify *Atkins*, this Court's decisions in *Hall v. Florida*, 572 U.S. 701, 722 (2014), and *Moore v. Texas*, 581 U.S. 1, 13 (2017), have only sown confusion and circuit splits over the proper role of IQ test scores in determining intellectual disability. While the Eleventh Circuit held that *Hall* and *Moore* require exclusive reliance on (1) the offender's lowest IQ score and (2) the lowest end of that score's error range, the Fifth and Sixth Circuits have rejected both moves.

Accordingly, *Hall* and *Moore* must be reconsidered or at least clarified, and this case is a perfect vehicle for doing so.

A. The Court will likely reverse because the Eighth Amendment does not require a court assessing intellectual functioning to rely exclusively on an offender's lowest IQ score.

The evaluation of IQ test scores has "considerable significance," *Hall*, 572 U.S. at 723, and can be dispositive of an *Atkins* claim. *See, e.g.*, *Busby v. Davis*, 925 F.3d 699, 717–18 (5th Cir. 2019). But courts have struggled to assess intellectual functioning when presented with multiple IQ scores in the same case. Especially when an offender's IQ scores straddle the line for significantly subaverage intellectual functioning, the court's computation method—the way it weighs multiple scores—may make all the difference.

The State maintains that the weighing of IQ scores should be left to state discretion, but *Hall* and *Moore* muddied the waters. In *Hall*, the Court simply remarked that "the analysis of multiple IQ scores jointly is a complicated endeavor." 572 U.S. at 714. While it rebuked Florida for relying on a single IQ score "as final and conclusive," *id.* at 712, "[t]he Court never explain[ed] why its criticisms … apply when a defendant consistently scores above 70 on *multiple* tests," *id.* at 742 (Alito, J., dissenting); *see also Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) ("*Hall* also reached no holding as to the evaluation of IQ when an *Atkins* claimant presents multiple scores…."); *United States v. Wilson*, 170 F. Supp. 3d 347, 366

(E.D.N.Y. 2016) ("*Hall* does not provide explicit guidance with respect to how courts should treat multiple IQ test results…."). In *Brumfield v. Cain*, the Court hypothesized that "evidence of a higher IQ test score … could [have] render[ed] the state court's determination reasonable." 576 U.S. 305, 316 (2015). But there was no higher score and thus no opportunity to pass on the question. And while *Moore* did note the average of six scores, 581 U.S. at 8, the Court ultimately focused on Moore's lowest IQ score. *Id.* at 14; *but see id.* at 34 n.1 (Roberts, C.J., dissenting) (describing *Moore*'s emphasis on one score as "dicta [that] cannot be read to call into question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores").

Predictably, the lower courts have split over how to handle multiple IQ scores. In *Garcia v. Stephens*, the Fifth Circuit considered a petitioner with five IQ test scores. 757 F.3d 220 (5th Cir. 2014). Rather than adopt the offender's lowest score of 75 as his true IQ, the court noted "the fact that his four other, pre-conviction IQ scores ranged from 83 to 100 indicated that his actual IQ is likely higher than 75." *Id.* at 226. Similarly, in *Black v. Carpenter*, the Sixth Circuit did not ignore all but the lowest of ten IQ scores ranging from 57 to 92. 866 F.3d 734 (6th Cir. 2017). Instead, the court found a metric implicit in "the requirement that mental retardation manifest itself before age 18." *Id.* at 747. For the purpose of satisfying that element,

the court said, the petitioner's two scores obtained at age 45 (despite being his lowest) had "far less probative value." *Id.*

In contrast, the Eleventh Circuit panel here relied solely on Smith's score of 72, not because his other scores were less reliable or less probative, but simply because 72 was the lowest. To the extent that Eighth Amendment jurisprudence should be "informed by the views of medical experts," *Hall*, 572 U.S. at 721, the panel's arbitrary winnowing of the evidence failed the test. It flouted *Hall*'s express teaching not to deem one score "final and conclusive … when experts in the field would consider other evidence." 572 U.S. at 712. In this case, experts in the field *did* consider evidence other than Smith's score of 72; indeed, they considered all five of his scores in tandem. Dr. King testified that having "multiple sources of IQ over a long period of time" enhances "construct [] validity"—*i.e.*, the strength of the inference from Smith's scores to a conclusion about his true IQ. *Smith IV*, 2021 WL 36666808, at *3; *accord Ledford v. Warden*, 818 F.3d 600, 641 (11th Cir. 2016). No expert furnished the contrary opinion that intellectual functioning is wholly determined by one's lowest IQ score.

As is its prerogative, Alabama permits courts to count every valid IQ score. "[T]he Alabama Supreme Court's post-*Atkins* opinions make clear that a court should look at *all relevant evidence* in assessing an intellectual-disability claim and that no one piece of evidence, such as an IQ test score, is conclusive as to intellectual

disability." *Reeves v. State*, 226 So. 3d 711, 729 (Ala. Crim. App. 2016) (emphasis added). Alabama thereby avoids Florida's error in *Hall*: "There is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an *Atkins* claim…." *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010). Instead, Alabama courts contemplate whether "the totality of the evidence (scores) indicates … subaverage intellectual functioning." *Id.* No court has ever suggested that Alabama's holistic approach to IQ test scores runs afoul of the Eighth Amendment. But that is the implied holding of *Smith V*. Needless to say, the Eleventh Circuit's new rule castigating Alabama's enforcement of its criminal laws can find no support in the text, history, or tradition of the Eighth Amendment.

This Court should recall and stay the mandate to allow Alabama to defend the constitutionality of its *Atkins* scheme and to facilitate the reversal of the Eleventh Circuit's reliance on one IQ score to dispose of the intellectual-functioning prong. Given the "considerable debate" among the lower courts about the application of *Hall*, *Moore*, and medical expertise when offenders present multiple IQ scores, "the prospects of reversal can be characterized as 'fair.'" *Rostker v. Goldberg*, 448 U.S. 1306, 1309 (1980) (Brennan, J., in chambers).

B. The Court will likely reverse because the Eighth Amendment does not require a court assessing intellectual functioning to presume that an offender's IQ falls at the bottom of an IQ score's error range.

Like any other test of human ability, an IQ test "is, on its own terms, imprecise." *Hall*, 572 U.S. at 712. A given IQ test score may not reflect an individual's true IQ "for a variety of reasons." *Id.* Accounting for errors in measurement, the SEM for a given test provides a confidence interval, a range of possible scores in which the true IQ score falls with a certain probability. Typically, the test score ± one SEM creates a 68% confidence interval; the test score ± two SEMs creates a 95% confidence interval. For example, in this case, the test on which Smith scored a 72 has an SEM of ± 3, so that test score (taken alone) generates a 68% probability that Smith's IQ lies between 69 and 75. *See Smith IV*, 2021 WL 36666808, at *1 n.1.

Hall and *Moore* made clear that courts must "account for [a] test's 'standard-error of measurement.'" *Moore*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 724). But they made very unclear how to do that. *See Hall* at 739 (Alito, J., dissenting) (predicting that *Hall* would "surely confuse [those] attempting to comply"); *accord United States v. Roland*, 281 F. Supp. 3d 470, 501 (D.N.J. 2017); *Wilson*, 170 F. Supp. 3d at 364 (describing *Hall*'s "apparent contradictions" leaving "vexing" questions for the lower courts).

In *Hall*'s wake, habeas petitioners have pressed courts to accept that their test scores overestimated their true IQs and should be "adjusted" downward. Accepting the invitation, the Eleventh Circuit held that *Hall* and *Moore* narrow the inquiry to the very bottom of the SEM range: "Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70." *Smith V*, 67 F.4th at 1349. In other words, the court accounted for the SEM of ± 3 by simply subtracting three from Smith's score. To be sure, the score of 72 (± 3) represents the *possibility* that his true IQ is 69, but Smith's burden was to prove that it is *likely*, not merely possible, that his IQ is 70 or below.

Ruling on the State's stay motion, the panel below disputed the State's characterization of its holding as a "presumption that an individual's IQ score falls at the bottom of his IQ range." App.42. Instead, the panel repeated, the fact that "Smith's IQ *could* be as low as 69 … require[d] the district court to move on." App.43 (quotation marks omitted). Of course, that *is* a presumption. *Presumption*, *Black's Law Dictionary* 1376 (10th ed. 2014) ("A legal inference or assumption that a fact exists because of … some other fact."). The panel held that "Smith carried his burden under the intellectual prong," which "requires an IQ of 70 or below," because

he scored a 72. *Smith V*, 67 F.4th at 1340, 1349. By reiterating that a court must "move on," the panel doubled down, making its new presumption irrebuttable.[1]

Regardless of its label, the Eleventh Circuit's maneuver deepened a split among the circuits. In the Fifth Circuit, "[t]he consideration of SEM … is not a one-way ratchet" in the offender's favor. *Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014). According to the Sixth Circuit, "the [Supreme] Court's decisions in no way *require* a reviewing court to *make a downward* variation based on the SEM in *every* IQ score." *Black*, 866 F.3d at 746. Prior to this case, the Eleventh Circuit also understood that the SEM "may benefit or hurt [an] individual's *Atkins* claim" because it "is a bi-directional concept." *Ledford*, 818 F.3d at 640–41; *accord Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019); *Reeves*, 226 So. 3d at 740; *but see, e.g.*, *Jackson v. Payne*, 9 F.4th 646, 653 (8th Cir. 2021); *Pizzuto v. Yordy*, 947 F.3d 510, 520 n.8, 528 (9th Cir. 2019); *McManus v. Neal*, 779 F.3d 634, 650 (7th Cir. 2015) ("Accounting for the [SEM] … a full-scale IQ score of 70–75 or lower ordinarily will satisfy the first requirement."); *Roland*, 281 F. Supp. 3d at 499–

[1] The Eleventh Circuit plainly adopted a presumption when it disavowed its prior holding that there is no presumption:

> 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.

Smith V, 67 F.4th at 1348.

502, 528; *Wilson*, 170 F. Supp. 3d at 366 (applying two SEMs to find intellectual functioning deficits based on IQ scores of 71 and 75).

The presumption that every IQ score errs upward by one or two SEMs is not scientific. It contradicts the very notion of SEM as a range that is distributed on either side of a measurement. It contradicts common sense because the test-taker's environment, luck, or breakfast might *help or hurt* his score on any given day. And it contradicts the basic *Atkins* framework, which has permitted Alabama and "most States" "to require defendants to prove each prong separately by a preponderance of the evidence." *Hall*, 572 U.S. at 736 n.12 (Alito, J., dissenting).

The court below acknowledged that Smith's burden meant "proving by a preponderance of the evidence that he … [had] significant subaverage intellectual functioning." *Smith V*, 67 F.4th at 1345. Indisputably, the "widespread and longstanding" preponderance standard requires "proof that persuades the trier of fact that a proposition 'is more likely true than not true.'" *United States v. Watkins*, 10 F.4th 1179, 1184–85 (11th Cir. 2021) (en banc) (quoting *United States v. Deleveaux*, 205 F.3d 1292, 1296 n.3 (11th Cir. 2000)). But the Eleventh Circuit let Smith off the hook. Rather than showing a 51% likelihood of an IQ 70 or below, it was enough for Smith that his true IQ "*could be*" as low as 69, *Smith V*, 2023 WL 3555565, at *2, 3, 7, 8 (emphasis added); App.43. "This totally transforms the allocation and nature of the burden of proof." *Hall*, 572 U.S. at 741 (Alito, J., dissenting).

Not only did the Eleventh Circuit lighten Smith's burden; it also spared him the need to grapple with any opposing evidence. Under a preponderance standard, Smith was required to show "evidence which is more convincing than the evidence offered in opposition." *Watkins*, 10 F.4th at 1184. He was required to demonstrate the likelihood an IQ 70 or below "in light of *all* the evidence." *Id.* at 1185 (emphasis added). But on the court's view, Smith's IQ score of 72 ± 3 automatically trumped every other piece of evidence of his intellectual functioning. *See Smith V*, 67 F.4th at 1349 ("[Smith's 72] could mean his IQ is actually as low as 69" despite "that all of Smith's IQ scores are higher than 70" and "that the consistency with which Smith scored above 70 makes it more likely that his true IQ is higher than 70"). Consequently, Smith did not satisfy the first prong by a preponderance of the evidence, but by a thumb on the scale "unhinged from legal logic" that "override[s] valid state laws." *Hall*, 752 U.S. at 741–42 (Alito, J., dissenting).

State courts should be permitted to treat SEM as a bi-directional concept, not a one-way ratchet. But *Hall* and *Moore* have sown doubt, allowing federal courts to manipulate the evidence while claiming their hands are tied. Only the Fifth and Sixth Circuits have explicitly rejected the presumption applied here. *See Mays*, 757 F.3d at 218 n.17; *Black*, 866 F.3d at 746, 748–49. Because the other circuits' use of the SEM has strayed from sound Eighth Amendment jurisprudence (and, if it matters,

sound science), this Court will likely grant the State's petition in order to clarify or reconsider *Hall* and *Moore*.

* * *

The Eleventh Circuit's constricting distortion of IQ evidence is particularly egregious because it commits the same errors of *Hall* in reverse. The court "bar[red] consideration of evidence that must be considered" (by excluding Smith's other IQ scores) and "misuse[d] IQ score on its own terms" (by ignoring at least half the SEM). *Hall*, 572 U.S. at 723. This Court plainly rejected a "rigid rule" that the absence of a score 70 or below defeats an *Atkins* claim at prong one. In its place, the Eleventh Circuit crafted a rule, no less rigid, that a single score of 75 (± 5) or 73 (± 3) automatically satisfies prong one. That evidentiary *per se* rule flies in the face of the offender's burden to prove by a preponderance of the evidence—not *some* evidence artificially weighted in his favor—that he has significant subaverage intellectual functioning.

If *Hall* and *Moore* require the two moves by which the Eleventh Circuit extracted an IQ of 69 from Smith's scores of 75, 74, 72, 78, and 74, they should be reconsidered. At a minimum, the State's certiorari petition is likely to be granted because it gives the Court an opportunity to clarify the application of *Hall* and *Moore*, which implicate every state's sovereign power to enforce its criminal laws. *See Autry v. Estelle*, 464 U.S. 1301, 1302 (1983) (White, J., in chambers) (entering

stay, despite "not know[ing] how the Court will rule," because "I cannot say that the issue lacks substance").

II. Denial of a Stay Would Likely Cause Irreparable Harm to the State.

Absent a stay, the mandate will ultimately require resentencing Smith in Alabama state court. To comply with the Eleventh Circuit's ruling, the state court would need to vacate a lawful sentence and resentence Smith to life without parole while the State seeks certiorari. That would cause multiple irreparable harms to the State of Alabama.

First, vacatur of Smith's death sentence could moot the case. The claim under review is a habeas petition challenging Smith's death sentence. If the underlying sentence is vacated, Smith's habeas petition would no longer provide effective relief. And the State's appeal might not be able to reinstate the sentence. *See, e.g.*, *St. Pierre v. United States*, 319 U.S. 41, 42–43 (1943) ("The sentence cannot be enlarged by this Court's judgment…."). The Eleventh Circuit panel dismissed the possibility of mootness, stating that "even if Smith's death sentence is vacated ... the Supreme Court could still 'undo what the *habeas corpus* court did.'" App.42 (quoting *Kernan v. Cuero,* 138 S. Ct. 4, 7 (2017)). But it is unclear whether undoing the grant of habeas relief would have bearing on the new state sentence. *Cf. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (finding no mootness where reversal would "release [the State] from the burden of [conducting a] new trial"). Accordingly, there is a risk of

mootness in these circumstances. *See, e.g.*, *Adair v. Dretke*, 150 F. App'x 329, 332 (5th Cir. 2005) (dismissing as moot where petitioner had since been released); *Cumbo v. Eyman*, 409 F.2d 400, 400 (9th Cir. 1969) (dismissing as moot where state court reversed conviction during habeas proceedings).

Even the possibility of mootness warrants a stay. When "the normal course of appellate review might otherwise cause the case to become moot … issuance of a stay is warranted [because] … foreclosure of certiorari review by this Court would impose irreparable harm upon applicants." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (quotation marks omitted); *see also California v. Harris*, 468 U.S. 1303, 1304 (1984) (Rehnquist, J., in chambers); *Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers) (justifying a stay by the hypothetical chance that respondents might take a course of action that might possibly moot the case).

Second, even if there is no risk of mootness, resentencing Smith to life without parole would require the irreparable expenditure of limited executive and judicial resources. And if the State succeeds in this Court, it might need to sentence Smith yet a third time in order to reimpose the death penalty. That would mean *two* extra sentencing hearings about a murder Smith committed over twenty-five years ago. Because the passage of time greatly complicates sentencing, which is a fact-intensive endeavor, such hearings would involve much more than "minimal" State resources

(as the Eleventh Circuit wrongly suggested, App.41). The State cannot recoup these public resources even if this Court reverses. Plus, evidentiary decay over decades primarily prejudices the State, which bears the burden of proof. Resentencing thus impedes the State's ability to achieve justice for the victims and the public.

For these reasons, the public interest also weighs in favor of the application. If the Supreme Court reverses without having recalled and stayed the mandate, the State's efforts to resentence Smith—conducting a new hearing and multiplying these proceedings for a murder that took place a quarter century ago—would have been a massive waste of public resources. *See Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989) ("The public interest is ill-served" by a "waste [of] resources that could be put to any number of more productive uses.").

III. Smith Would Not Be Harmed By A Stay.

Smith would not be harmed or prejudiced by a stay, and he did not oppose the State's stay motion below. Smith has been sentenced to death, but the execution has not been scheduled, nor will the State request an execution date from the Alabama Supreme Court while this case is pending. Because Smith's conviction of a capital crime is not disputed, the only sentence he could receive would be life without parole. Thus, whether he receives that sentence now or after Supreme Court review, a stay by this Court would not prolong his incarceration or prejudice him in any way.

Here, where the State would likely need to resentence absent a stay, but a stay poses no harm to Smith, "the balance of the equities … weighs heavily in favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quotation marks omitted).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court recall and stay the mandate pending disposition of a petition for a writ of certiorari.

Respectfully submitted,

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