No. 23-167

IN THE

Supreme Court of the United States

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JOSEPH CLIFTON SMITH

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

CHRISTINE FREEMAN, EXECUTIVE DIRECTOR
KACEY L. KEETON *
Counsel for Respondent
Assistant Federal Defender
Federal Defenders for the
Middle District of Alabama
817 S. Court St.
Montgomery, AL 36106
Kacey_Keeton@fd.org

*Counsel of Record

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QUESTION PRESENTED

During an extensive *Atkins v. Virginia*, 536 U.S. 304 (2002), hearing in District Court, Mr. Smith presented pre-18 IQ scores of 74 and 75, and post-18 scores of 72, 74, and 78. Consistent with this Court's precedent, the District Court then considered additional evidence of Mr. Smith's intellectual disability and other adaptive deficits. After doing so, the District Court concluded Mr. Smith was entitled to habeas relief under *Atkins*. The Eleventh Circuit affirmed.

The question presented is:

> Whether, under *Atkins* and its progeny, a court is precluded from considering "additional evidence of intellectual disability, including adaptive deficits" when a petitioner presents valid IQ scores within the 70 to 75 range.

LIST OF PARTIES

The Respondent is Joseph Smith. The Petitioner is the Commissioner of the Alabama Department of Corrections, who oversees the prison in which Mr. Smith is incarcerated. The current commissioner is John Hamm. Because no party is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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INTRODUCTION

The question ultimately posed by the Commissioner is whether a court may consider prong two under *Atkins* when an individual's IQ scores fall in the 70 to 75 range. This Court has already answered that question. *Moore v. Texas*, 581 U.S. 1, 14 (2017); *Hall v. Florida*, 572 U.S. 701, 723 (2014). Just as he did below, the Commissioner mischaracterizes the facts and law attempting to get a third bite at the apple. The District Court, acting as the factfinder, took live testimony, made credibility determinations, and after a thorough review of the evidence, concluded that Mr. Smith was intellectually disabled under *Atkins*. Given the fact-specific nature of the issue before the District Court and the clearly erroneous standard of review, this case does not merit certiorari.

First, contrary to the Commissioner's mischaracterizations, neither the District nor Circuit Court deemed prong one satisfied solely because of a single IQ score. The District Court considered the IQ scores, Pet. App. 78 ("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.") (emphasis added), and initially acknowledged that whether Mr. Smith had significant intellectual deficits was a "close case." *Id.* at 52, 69, 74. And, following the requirements of *Hall*, the court found "that whether [Mr.] Smith is

intellectually disabled will fall largely on whether [Mr.] Smith suffers from significant or substantial deficits in adaptive behavior, as well as whether his problems occurred during [Mr.] Smith's developmental years." *Id.* at 52. The Eleventh Circuit found no clear error in the District Court's fact-finding or credibility determinations, and that it had applied the law under *Atkins* correctly.

Second, this Court's precedent is clear. What the Commissioner seeks is a precise math equation to determine an *Atkins* case: IQ measure + adaptive functioning + developmental period = *Atkins* relief. While that is the general formula, *Hall*, *Moore*, and other *Atkins* precedent, as well as mental health professionals, have taught us that the determination of whether an individual is intellectually disabled is not precise math. In *Hall*, this Court held, "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Hall*, 572 U.S. at 723. Here, as Florida did in *Hall*, the Commissioner seeks license to use Mr. Smith's IQ scores "on its own terms; and …, in turn, [force the Courts to ignore] evidence that must be considered in determining whether a defendant in a capital case has intellectual disability," *id.*, in violation of this Court's recent precedent.

Third, there is no circuit split. While the Commissioner claims the decision broadens a circuit split in how the lower courts interpret *Hall* and *Moore*, a full reading of the cases cited shows otherwise. Each circuit appears to follow *Hall* and *Moore* in similar fashion. Of course, *Atkins* decisions are fact-intensive and turn on

credibility determinations (especially in those rare instances, like here, where AEDPA deference does not apply), so reasonable courts will differ with those facts.

In *Hall*, this Court noted, "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724. The Commissioner's argument to overrule *Hall* and *Moore* would foreclose an intellectually disabled individual from having that "fair opportunity."

This case is simply not what the Commissioner presents in his petition. It is neither an instance where the lower courts failed to follow the law nor an issue on which the circuits are split. Rather, this case involves a factual dispute about a factfinder's credibility determinations the lower courts resolved in Mr. Smith's favor, and the Commissioner wishes to relitigate.

STATEMENT OF THE CASE

Procedural History

Joseph Clifton Smith was indicted in Mobile County on May 22, 1998, on one count of capital murder for the death of Durk Van Dam, in violation of Ala. Code §13A-5-40(2) (1975) (intentional murder during a robbery). Four months later, a jury convicted him of capital murder, and the next day, recommended a death sentence. Pet. App. 123. The next month, the trial court imposed a death sentence. *Id.*

Following state court appeals, this Court denied certiorari on October 1, 2001. *Id.* Mr. Smith pursued state post-conviction relief, Pet. App. 127, raising an

Atkins claim, for which the Court failed to allow discovery or an evidentiary hearing. *Id.* at 98-99, 128. All state post-conviction claims were summarily dismissed, and the state appellate courts affirmed. *Id.* at 128, 222.

Mr. Smith filed at timely § 2254 petition on August 15, 2005. *Id.* at 128. The District Court stayed the proceedings on January 2, 2006, for the duration of state proceedings. *Id.* On May 18, 2011, after state proceedings concluded, the District Court lifted the stay. *Id.* at 129. The District Court granted Mr. Smith's Motion to Amend on May 18, 2011, and an amended § 2254 petition was filed. *Id.* On September 30, 2013, the District Court simultaneously denied relief and a Certificate of Appealability ("COA"). *Id.* at 121-221.

On October 28, 2013, Mr. Smith moved for reconsideration under Rule 59(e), Fed. R. Civ. P., and a stay pending this Court's decision in *Hall*. *Id.* at 397. The District Court denied both motions on January 21, 2014, *id.* at 396-406, and Mr. Smith timely appealed on February 20, 2014.

The Eleventh Circuit granted a COA on three issues about the denial of the *Atkins* claim. *Id.* at 81. That court then reversed and remanded to allow Mr. Smith to present an expert, while leaving it to the District Court's discretion whether to permit discovery and hold an evidentiary hearing. *Id.* at 119.20. Opining on Mr. Smith's intellectual functioning, the Eleventh Circuit held:

> Despite [the] trial evidence pointing to significant deficits in Mr. Smith's intellectual functioning, and even though the state trial court had not conducted an evidentiary hearing, the Alabama Court of Criminal Appeals held that the record conclusively established Mr. Smith was not [intellectually disabled] and could never meet *Perkins*'s intellectual functioning requirement. Considering the record evidence before the

> Alabama Court of Criminal Appeals and the fact that Alabama does not employ a strict IQ cut-off score of 70, the factual determination that [Mr.] Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts.

Id. at 115-16.

As for adaptive functioning, the Court held:

> [T]he Alabama Court of Criminal Appeals' finding that there was "no indication that [Mr.] Smith had significant defects in adaptive behavior" is unsupported (and, in fact, contradicted) by the record and therefore unreasonable. Accordingly, its merits determination (at the early dismissal stage) as to [Mr.] Smith's adaptive behavior functioning was based on an unreasonable determination of the facts.

Id. at 118.

The District Court held an evidentiary hearing on May 16-17, 2017, at which both parties presented witnesses and evidence related to Mr. Smith's intellectual disability status under *Atkins*. On August 17, 2021, following post-hearing briefing, the District Court entered an Order finding Mr. Smith intellectually disabled, granting his Petition on his *Atkins* claim, and vacating his death sentence. *Id.* at 41-75. The District Court found Mr. Smith had shown by a preponderance of the evidence that, during the developmental period, he possessed significant intellectual deficits and significant deficits in several areas of adaptive functioning—social/interpersonal skills, self-direction, independent home living, and functional academics. *Id.* at 69, 70, 74-75. Following an unsuccessful Rule 59 Motion, the Commissioner timely appealed.

The Eleventh Circuit heard oral argument on the Commissioner's claims, which differed from the claims he raises in his petition. It upheld the District

Court's decision, concluding it correctly considered evidence of Mr. Smith's adaptive functioning deficits based on his IQ scores, and "the record supports the district court's conclusion that [Mr.] Smith's deficits in intellectual and adaptive functioning 'were present at an early age.'" *Id.* at 39. Ultimately, the court held the District Court's fact-finding was not clearly erroneous and upheld the judgment vacating Mr. Smith's death sentence. *Id.* at 40. The State sought neither panel nor *en banc* re-hearing.

Factual Background

Joseph Smith attended school through the eighth grade. The District Court observed Dr. Dan Reschly testify that Mr. Smith's earliest available school records reflect he did "okay in first grade but made no progress in reading in second or third grade. That prompted the referral by the school district to special services which led to evaluation of his intellectual abilities as well as other areas of functioning." Appellee's App., *Smith v. Comm'r*, No. 21-14519 (11th Cir. May 23, 2022), Vol. 1 at 80, ECF No. 21 (hereinafter "Doc. 21, Vol. ___ at ___"). It was during the testing related to this referral that Mr. Smith scored a full-scale IQ of 75 on the WISC-R. Appellant's App., *Smith v. Comm'r*, No. 21-14519 (11th Cir. May 23, 2022), Vol. 3 at 147, ECF No. 14 (hereinafter "Doc. 14, Vol. ___ at ___"). Following that testing, the school psychometrist recommended additional testing to determine whether "LD [Learning Disabled] class placement" was appropriate. *Id.* at 148. Because of the referral and testing, the ultimate recommendation placed Mr. Smith in "EC

[Emotionally Conflicted[1]] Resource classes," requiring 10 to 20 hours in classes for emotional conflict issues and special education. Pet. App. 70-71.

In 1982, at age 12, Mr. Smith's teacher referred him for testing "because it was time for a reevaluation." Doc. 14, Vol. 3 at 173. This reevaluation resulted in a full-scale IQ score of 74 on the WISC-R. *Id.* At the age of 12 and in the sixth grade rather than seventh, having been held back, Mr. Smith's testing on the Wide Range Achievement Test ("WRAT") established he was functioning at "fourth grade in reading — fourth grade, fifth month, in reading. Third grade, sixth month, in spelling. And third grade, ninth month, in arithmetic." Pet. App. 71. The recommendation following these tests indicates regular classes, but records show some special education documentation stating goals and objectives set for Mr. Smith during his repeated sixth grade year. Doc. 14, Vol. 3 at 178-182. A document prepared while Mr. Smith was in seventh grade indicates he remained in the EC resource classes during his second sixth grade year. Pet. App. 71.

Mr. Smith was enrolled in "educable mentally retarded" ("EMR") classes in the seventh and eighth grades. *Id.* During the late 1970s and early 1980s in Alabama, the term EMR was assigned to students during the developmental period with IQ scores below 75, accompanied by documented deficits in adaptive behavior. *Id.* Thus, an EMR diagnosis equates to a mild intellectual disability diagnosis now.

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[1] According to Dr. Reschly's testimony, "[In] the later years that he attended school, [the diagnosis] was called or identified as emotionally conflicted, but that disability identification evolved over time and he was clearly identified as a person with educable mental retardation." Doc. 21, Vol. 1 at 102.

Id. During his seventh grade year, Mr. Smith struggled in low-level classes, Doc. 21, Vol. 2 at 146, and transferred from resource classes to self-contained EMR classes. Doc. 21, Vol. 2 at 146.

Mr. Smith's school performance, which paralleled his low IQ scores, corroborates their accuracy as to his intellectual functioning. The District Court observed Dr. Reschly's testimony that the school records suggest a diagnosis of mild intellectual disability:

> [T]he school records show the kinds of behaviors that are associated with and denote mild intellectual disability, or what was then called educable mental retardation. [The records] indicated toward the later years that he attended school, [the diagnosis] was called or identified as emotionally conflicted, but that disability identification evolved over time and he was clearly identified as a person with educable mental retardation and placed in a special class, typically with other children who had similar achievement deficits and disability designations.

Doc. 21, Vol. 1 at 102.

The District Court found that Mr. Smith's earliest school records indicate he made little progress between the first and third grades. Pet. App. 70. In the third grade, Mr. Smith took the California Achievement Test and scored at or below first grade levels in reading and language and at the second grade level in math. Doc. 14, Vol. 3 at 143. Also during the third grade, Mr. Smith was administered the WRAT on which he again demonstrated first grade level skills in reading and spelling and third grade skills in math. Pet. App. 71. Based on contemporaneous IQ testing, the tester concluded that Mr. Smith demonstrated below average ability in the areas of general information, arithmetic reasoning, language development, social insight and practical ideas, visual observation, the ability to comprehend a total situation

in relation to its parts, visual-motor coordination, and psychomotor speed. Doc. 14, Vol. 3 at 148.

Mr. Smith's scores on the Walker Problem Behavior Identification Checklist ("Walker Checklist"), which covered social functioning, and notations in his school file, reflect significant behavioral problems with acting out, peer relations, and maturity. Pet. App. 72; Doc. 21, Vol. 1 at 87-88. Elsewhere in the school records, Mr. Smith's "peer relations were rated as being very low, very poor, and some of the descriptions of his behavior—of not complying and making in this one case a very inappropriate comment about a teacher that was observing him, reflect social domain deficits in adaptive behavior." Doc. 21, Vol. 1 at 101.

In discussing examples of social domain deficits, the District Court cited the testimony of Dr. John Fabian, a neuropsychologist who evaluated Mr. Smith:

> 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.

Pet. App. 73.

Mr. Smith, tried before *Atkins*, was evaluated by Dr. James Chudy. Dr. Chudy testified that Mr. Smith "was found to have a full scale IQ of 72, which placed him at the third percentile in comparison to the general population," explaining "[i]f you had normally distributed a hundred people in this room, ninety-seven would function higher than [Mr. Smith] would." Doc. 21, Vol. 5 at 229. On the standard error of measure, Dr. Chudy testified:

> [T]here actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could — on the one hand he could be as high as maybe a 75. On the other hand he could be as low as a 69. 69 is considered clearly [intellectually disabled].

Id.

While Dr. Chudy did not complete an intellectual disability evaluation, his observations are relevant to whether adaptive functioning deficits were present. In particular, Dr. Chudy's report and testimony support the findings within the school records showing deficits in adaptive functioning in both the conceptual and social domains.

Dr. Chudy's testing, records review, and interview with Mr. Smith's mother, constitute evidence Mr. Smith struggled with social interactions from elementary school forward. *See* Doc. 14, Vol. 4 at 8-17 (Dr. Chudy notes specifically that Mr. Smith "scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations[;]" that "he has never learned how to incorporate successfully into societies norms[;]" and that he displayed "a major deficiency in his ability to predict social sequences of action."). Supported by school records and testing, Dr. Chudy also found significant deficits in functional academics–testing at age 28 showed Mr. Smith reading at a fourth grade level, spelling at a third grade level, and performing math at the level of a kindergarten-aged child. *Id.* at 14. Dr. Chudy reported that Mr. Smith's relationships were "typically troublesome," he was "socially ill-suited to sustain a relationship," and his emotional and personality functioning were significantly dysfunctional. *Id.* at 8-17.

In fact, the trial record showed Mr. Smith's "girlfriend" at the time of the crime was a 15-year-old girl while Mr. Smith was 27. Doc. 14, Vol. 4 at 152.

Dr. Chudy observed that Mr. Smith "does not seem to learn from experience," and his "thinking is vague, easily confused and he is often overwhelmed with incomprehensible feelings or impulses that he does not understand." *Id.* at 14. He found Mr. Smith's deficiencies affected his ability to reason abstractly and minimized his ability to appreciate consequences. *Id.* at 8-17. Further, the presentence investigation report noted those who knew Mr. Smith reported he had mental problems.

Current testing by Dr. Fabian resulted in a full-scale IQ score of 78 on the Stanford-Binet Intelligence Scale, Fifth Edition. *Id.* at 155. Current testing by the State's expert, Dr. Glen King, resulted in a full-scale IQ score of 74 on the Wechsler Adult Intelligence Scale, Fourth Edition. *Id.* at 83.

The District Court referenced Dr. Fabian's interviews with Mr. Smith's mother and Melissa and Melanie Espinal, teenage friends Mr. Smith knew in his mid-20s, about his pre-incarceration behavior. It noted that these interviews "indicated that Smith had deficits in communication, reading, writing, functional academics, self-direction, and social skills." Pet. App. 65. Further, the District Court observed

> 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.

Id.

Mrs. Smith indicated Mr. Smith "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." *Id.* at 65. The District Court observed that Mr. Smith's "social security records do not show regular or consistent employment or income." Pet. App. 60. It also noted that other facts supported this, including information from Mr. Smith's mother and Melissa Espinal. *Id.* Further, Mr. Smith was incarcerated for much of his young adult life and had few employment opportunities. *Id.* at 61; *see also* Doc. 21, Vol. 1 at 167 (Mr. Smith testifying that he was incarcerated from 19 to 26, re-incarcerated at 27, and released only 3 days before being arrested for his current offense). Dr. Fabian found that the jobs Mr. Smith could work were consistent with those that can be held by individuals who are intellectually disabled. Pet App. 64.

Dr. Fabian administered multiple tests from which he gleaned information for the adaptive functioning prong of the intellectual disability diagnosis. The Independent Living Scales ("ILS") test is a practical test in which the tester observes an individual attempt to demonstrate multiple adaptive skills. The District Court cited to Dr. Fabian's testimony noting that

> 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.

Id. at 66. In contrast, Dr. King testified that the ILS was "not a recommended device for assessing adaptive behavior." *Id.* 30. The District Court questioned the "veracity" of Dr. King's testimony and noted that he had used the ILS for assessing adaptive behavior in other cases. *Id.*

Mr. Smith's score of 59 was consistent with the average scores for those in the mildly intellectually disabled category. *Id.* at 67. Dr. Fabian testified that Mr. Smith's results indicated significant deficits:

> [Mr. Smith] 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, that home and transportation would be related to, you know, how he gets things fixed in his home versus using a map, you know, to drive from point A to point B. . . . 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.

Id. at 66-67.

Other tests, while not specifically geared toward adaptive functioning, demonstrated adaptive functioning deficits, including the Neuropsychological Assessment Battery, which showed Mr. Smith's "verbal abstract reasoning skills 'were mildly to moderately impaired . . . that he had a difficulty with abstract reasoning when given information about different people and he had put them

together in different groups." *Id.* at 68. The Expressive and Receptive One-Word Picture Vocabulary Test assesses "intelligence but also relate to functional academics or conceptual areas of adaptive functioning and academic achievement." *Id.* at 68-69. Mr. Smith's scores indicate his "ability to express and receive language is significantly impaired, on the first percentile for expressive and the third percentile for receptive [and] those scores are consistent with someone who is intellectually disabled." *Id.* at 69.

While the Green Emotional Perception Test correlates more to intelligence levels, the District Court noted:

> [T]here 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 this person saying?' According to Dr. Fabian, [Mr.] Smith had some significant impairments on that test regarding 'emotional perception, which is very adaptive as well.

Id. at 68.

Like the Green Perception Test, Mr. Smith's results on the Social Cognition Test showed areas of severe impairment relevant to the social functioning prong of intellectual disability. *Id.* at 69.

Drs. Fabian and Reschly both testified that Mr. Smith's scores are consistent across the years and with the other evidence of his intellectual ability based on other academic skills testing. Having reviewed the records and observed the testimony of Mr. Smith, Drs. Fabian, Reschly, and King, and other witnesses, the District Court found that Mr. Smith's scores, combined with additional evidence, supported a finding he possessed significant intellectual deficits. *Id.* at 74. The

District Court also adopted the conclusions of Drs. Reschly and Fabian that Mr. Smith met the requirements for the adaptive functioning prong of intellectual disability during his developmental period. *Id*. The District Court accepted the testimony of the experts it observed and found Mr. Smith had deficits in "social/interpersonal skills, self-direction, independent home living, and functional academics." Pet. App. 69-70.

REASONS FOR DENYING THE PETITION

Atkins categorically bars intellectually disabled individuals from being executed, while leaving it to States to enforce its holding. 536 U.S. at 317. This Court has since provided significant guidance, including clarifying that States do not have unfettered discretion and any determination of intellectual disability "must be 'informed by the medical community's diagnostic framework.'" *Moore*, 581 U.S. at 10 (citing *Hall*, 572 U.S. at 721). Under Alabama law, an individual is entitled to *Atkins* relief when they establish three criteria: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)"; (2) "significant or substantial deficits in adaptive behavior"; and (3) "these problems . . . must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

In *Hall*, this Court rejected a bright line cutoff IQ score of 70, ruling States must consider IQ scores as a range rather than a fixed number. *Hall*, 572 U.S. at 712. In doing so, this Court concluded, in accord with medical experts, 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 adaptive deficits." *Id.* at 723.

I. The lower courts did not find the intellectual functioning prong met by a single IQ score.

The Commissioner's first Question Presented asks whether case law *requires* courts to consider the intellectual functioning prong satisfied when an individual has only one IQ score at 70 or below. Pet. at i. This question has no application here because neither the District nor the Circuit Court found Mr. Smith met prong one based on a single IQ score.

In its Order, the District Court considered testimony and records related to prong one of *Atkins*, declaring it a "close case" as to whether Mr. Smith possessed significant intellectual deficits. Pet. App. 52. The court observed, "[A]t best [Mr. Smith's] 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." *Id.* Based on this finding, which considered the full range of Mr. Smith's IQ scores, the court found it necessary to consider evidence of his adaptive functioning. *Id.* Following that review, the District Court held that Mr. Smith's "intelligence and adaptive functioning has been deficient throughout his life." *Id.* at 74. The District Court specifically noted that "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." *Id.* at 79.

In summarizing its decision-making related to the first prong, the District Court described,

> 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.

Pet. App. 78.

On appeal, the Eleventh Circuit noted that the District Court followed *Hall* and *Moore* by "'conclud[ing] that additional evidence must be considered, including testimony' concerning [Mr.] Smith's 'adaptive deficits.'" *Id.* at 23.

The Commissioner misstates the Eleventh Circuit's holding in arguing that "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." Pet. at 17 (citing Pet. App. 7, 27). In fact, the Eleventh Circuit held this Court's precedent required "the district court []move on to assess Smith's adaptive deficits." Pet. App. 28 (citing *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" about his "adaptive functioning" when his lowest score was a 71)).

The very reason the Commissioner seeks certiorari relies on a non-occurring event. Neither court below found intellectual functioning deficits solely because of a single IQ score. Even quickly reading the opinions below demonstrates that the IQ scores were not the sole basis for the courts' resolution of prong one. The Eleventh Circuit found similarities between this case and *Hall*, noting, "Just as [Mr.] Smith scored between 72 and 78 on five IQ tests, Freddie Lee Hall scored between 71 and 80 on seven IQ tests." Pet. App. 24. The court also noted that *Moore* featured IQ scores of 74 and 78. *Id.* at 22. In full accord with *Hall* and *Moore*, the courts below found that because Mr. Smith's IQ scores placed him in the standard-error range that would allow for a finding of intellectual deficits, they had to consider adaptive functioning evidence. The clinical community and this Court's precedent require this because "intellectual disability is a condition, not a number." *Hall*, 572 U.S. at 723 (citation omitted).

II. This Court's *Atkins* precedent requires courts to consider additional evidence related to intellectual disability when IQ scores fall within the range of 70 to 75.

"The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." *Id.* at 720. This holding acknowledges that "treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior." *Id.* (citation omitted). And this is precisely what occurred below. The District Court found that whether Mr. Smith was intellectually disabled required consideration of

his adaptive functioning, before ultimately ruling Mr. Smith fell "in the upper end of the required significantly subaverage intellectual functioning and that he has significant deficits in adaptive behavior." Pet. App. 74.

While recognizing Mr. Smith's IQ scores were all above 70 (without accounting for the margin of error), the District Court concluded it:

> [C]ould not determine solely by Petitioner's scores whether he had significantly subaverage intellectual functioning [because] "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."

Id. at 78-79.

Further, the District Court "found Petitioner had significant deficits in at least four areas: social/interpersonal skills, self-direction, independent home living, and functional academics." *Id.* at 79. The "evidence regarding [Mr. Smith]'s adaptive deficits persuaded th[e District] Court that [his] actual functioning is comparable to that of an individual with significantly subaverage intellectual functioning." *Id.* The District Court also found that, although Mr. Smith "has scored above 70 on many of his IQ tests, his adaptive behavior problems are severe enough that his actual functioning is lower." *Id.*

This Court's precedent built the framework followed by the courts below. In *Atkins*, this Court "acknowledged the inherent error in IQ testing." *Hall*, 572 U.S. at 718-19. Further, *Atkins* referenced clinical standards and "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 719. Following the spirit of *Atkins*, this Court in *Hall* agreed

with "medical experts 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." *Id.* at 723. Specifically, this Court noted that enforcing a strict IQ cutoff of 70 disallowed courts from considering "even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Id*. at 712. *Hall* acknowledged that "the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70." *Id*. (citing APA Br. at 15–16 ("[T]he 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"); DSM–5 at 37 ("[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")).

In *Brumfield v. Cain*, 576 U.S. 305 (2015), this Court again recognized that "an IQ test result cannot be assessed in a vacuum." *Brumfield*, 576 U.S. at 314. This Court in *Moore* noted, "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical

standards." *Moore*, 581 U.S. at 13. Following precedent, *Moore* held, "[W]e do not end the intellectual-disability inquiry, one way or the other, based on [] IQ score." *Id*. at 15. *Hall* "require[s] that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id*.

This Court's precedent from *Atkins* forward mandates the procedures followed by the courts below. The Commissioner's contention otherwise misapprehends the decisions of the courts and precedent.

III. Certiorari is not necessary to resolve a circuit split because none exists.

The Commissioner claims a circuit split in the lower federal courts' application of *Hall* and *Moore*. He argues the cases are so confusing that this Court must intervene. A review of the cases cited, however, belies the Commissioner's assertion. The petition is a Trojan Horse—in which is hidden an attempt to overturn this Court's decades of painstakingly crafted *Atkins* precedent—which does not emerge until the final sentence of its petition. However, this horse has no legs, as the Commissioner makes no argument and provides no support to jettison the status quo and *stare decisis*.

The Commissioner proclaims that the Eleventh Circuit has aligned itself with the Eighth and Ninth Circuits in how they apply *Hall* and *Moore*, thereby deepening a circuit split with the Fifth and Sixth Circuits. In support, he cites

Garcia v. Stephens, 757 F.3d 220 (5th Cir. 2014), and *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017). The Commissioner argues that, in *Garcia*:

> [T]he 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.

Pet. at 13.

The Commissioner's reliance on *Garcia* completely ignores two important facts. First, it ignores the procedural posture. *Garcia* involved denial of a COA. The Fifth Circuit denied the COA because the petitioner submitted no IQ scores in his state postconviction petition before attempting to submit new evidence in the federal petition. *Garcia*, 757 F.3d at 226. By contrast, Mr. Smith's case involved a full evidentiary hearing in the federal court.

Second, the Commissioner ignores what the Fifth Circuit actually said. In *Garcia*, the court announced, "Texas does not preclude individuals with an IQ score between 70 and 75 from presenting additional evidence of difficulties in adaptive functioning in support of an intellectual disability claim." *Id*. This clearly establishes the Fifth Circuit follows *Hall* like the Eleventh Circuit. The Fifth Circuit's decision hinged on the fact that "Garcia simply failed to produce any evidence at all in the state court proceedings, and the evidence he presented for the first time in federal court fails to present a debatable *Atkins* claim of intellectual disability." *Id*. This does not a circuit split make.

As to the Sixth Circuit, the Commissioner argues that, in *Black*, the court:

> [D]id 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*.

Pet. at 13.

Once again, the Commissioner ignores the full context of the *Black* decision. The Sixth Circuit was reviewing a denial of *Atkins* relief by the district court following a State court hearing. As a fact question, a finding of clear error was necessary to reverse the decision. *Black*, 86 F.3d at 743-44. The Sixth Circuit refused to consider adaptive functioning deficits after concluding that the district court did not err by "relying strongly" on childhood group tests [with scores ranging from 83 to 97] as "most probative" of Black's intellectual functioning. *Id.* at 745, 750. As to actual scores, Black had pre-18 scores ranging from 83 to 97 when Black was age seven to thirteen. *Id.* at 744-45. At the time of his trial, Black scored 76 on an IQ test. *Id*. During his first state post-conviction, Black scored 73 and 76 on the WAIS–R. *Id*. Only during federal habeas proceedings in which he did not receive a hearing, did Black score 69 on the WAIS–III and 57 on the Stanford-Binet-IV. *Id.* The court noted that *Hall* instructed "that an individual's score is best understood as a range of scores on either side of the recorded score," but found it does not require sentencing courts "to make a downward variation based on the SEM of every IQ score." *Id*. at 746. This determination does not differ from the process employed by the courts here. In *Black*, the Sixth Circuit found the IQ scores in the developmental period more persuasive—none of which was within the clinical range

for intellectual disability determination. Here, Mr. Smith's pre-18 scores, assessed by the District Court as factfinder, were within the clinical range, with only one falling outside that range.

Other decisions also show the Sixth Circuit follows *Hall* and *Moore* in the same manner as the Eleventh Circuit. In *Williams v. Mitchell*, 792 F.3d 606 (6th Cir. 2015), the Sixth Circuit reversed and remanded for further inquiry because the lower court failed to follow *Hall*. The court noted that *Hall* "addressed 'how intellectual disability must be defined'" in order to implement *Atkins* and recognized the importance of "'consult[ing] the medical community's opinions'" as to who qualifies as intellectually disabled. *Id.* at 619-21. The court found that *Hall* "requires courts to consider all relevant evidence bearing on an individual's intellectual functioning and to apply clinical principles of intellectual disability adopted by federal precedent." *Id.* at 624. The Sixth Circuit also remanded for further inquiry in *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014), noting that *Hall* held "the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability." *Id.* at 612. In *Van Tran*, the lower court had failed to properly consider expert testimony. *Id.* at 615-18. Here, the District Court, sitting as the factfinder, appropriately considered expert testimony it observed and found the Commissioner's expert less credible.[2]

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[2] As the District Court noted,

> 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

The Commissioner warns this Court should grant certiorari to "clarify, []guide the courts below, and [] protect whatever discretion and flexibility the States have left." Pet. at 22. But review of the cases he cites demonstrates neither a circuit split nor any indication of non-uniformity or difficulty in applying this Court's precedent. As the Eleventh Circuit noted, the Commissioner seeks to "change [the] ruling because the evidence shows [Mr. Smith's] IQ is above 70." Pet. App. 78. Such a ruling would not comply with *Atkins* or any of this Court's precedent following that decision.

The Commissioner seeks to fabricate confusion where there is none—just as he tries to paint a picture of a circuit split that does not exist. Mr. Smith put on significant testimony and evidence below that support the credibility determinations of the district court and the Eleventh Circuit's affirmance of the finding he is intellectually disabled.

CONCLUSION

The State's petition for a writ of certiorari should be denied.

> manage themselves" is at the very core of adaptive functioning. 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.

Pet. App. 30 (citations omitted).

Respectfully submitted,

/s/ Kacey L. Keeton
Kacey L. Keeton
ASSISTANT FEDERAL DEFENDERS
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099
Counsel of Record

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