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*

## REPLY BRIEF FOR PETITIONER


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## REPLY BRIEF

Smith spends half his brief reciting facts, but he could have saved himself a lot of trouble by focusing on just one—the fact that he scored a 72 on an IQ test. That's what the Eleventh Circuit did. Notwithstanding its lip service to the rest of the record (including Smith's 74, 74, 75, and 78), the court isolated Smith's lowest score of 72, subtracted three, and "moved on" to the next *Atkins* prong.

It's "not precise math," Smith admits. BIO.2. True. It's not math at all. It's a legal maneuver so indefensible that Smith doesn't even try to defend it. Instead, he denies that he "met prong one based on a single IQ score" adjusted downward. BIO.16.

But that's exactly what the Eleventh Circuit said: "Smith had an IQ score of 72, meaning that his IQ could be 'as low as 69 if you take into account the standard error of measurement.'" App.21. And the intellectual prong is satisfied, the court said, "when the *lower* end of the *lowest* IQ score is equal to or less than 70." App.21 (emphasis added).

Thus, "Smith carried his burden" only after the court had transformed it from proof of a likelihood to proof of a mere possibility. App.27. The latter, Smith admits, could be shown by "the lowest score, 'adjusted [downward] for the standard error.'" BIO.17. Smith's halfhearted contention that the lower courts counted all five of his scores can't be squared with their *per se* rule that the lowest end of the lowest score range is dispositive.

Still, Smith denies that's how he won. On his misreading, the courts moved on to consider his "adaptive deficits" *within* prong one. BIO.16-18. But that makes no sense because "an IQ of 70 or below" is prong one,

and "deficits in adaptive behavior" is prong two. BIO.15. If Smith is right, then *Hall* indeed wrought a "sea change" *sub silentio* by conflating "distinct components of intellectual disability." *Hall v. Florida*, 472 U.S. 701, 736-37 (2014) (Alito, J., dissenting). If Smith is wrong, his confusion further illustrates the need for clarification from this Court.

Smith's second argument suggests that the Eleventh Circuit basically abandoned prong one, BIO.18-21, which is a better reading but an even worse legal error. *Atkins* "require[d] not only [1] subaverage intellectual functioning, but also [2] significant limitations in adaptive skills." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Yet Smith says he can fail to prove prong one—*i.e.*, have an IQ "higher than 70"—as long as he succeeds on the more malleable prong two. BIO.18, 20. Such a drastic expansion of *Atkins* is not what the Court said it was doing in *Hall*. But *Hall*'s imprecision left room for lower-court improvisation, undermining the objective core of *Atkins*.

Contrary to Smith's view, several other courts have declined to distort IQ evidence. As a result, there is a split over whether prong one is met whenever an offender's lowest score, adjusted downward, reaches 70 or lower. Unlike the Eleventh Circuit, at least four circuits will weigh scores other than the lowest, and at least another three recognize the bi-directionality of error in testing.

Certiorari is needed to set straight whether the intellectual prong is satisfied whenever "the lower end" of the error range of the "lowest IQ score is equal to or less than 70." App.21. By relaxing the burden and specifying precisely what evidence an offender needs to escape his sentence, the Eleventh Circuit's move obliterated any discretion *Atkins* left to the sovereign

States. Either *Hall* and *Moore* did not do that—and they should be clarified—or they "built [that] framework" (BIO.19) and should be reconsidered.

## I. The Eleventh Circuit held that Smith carried his burden based on a single adjusted score.

**A.** Smith insists that the Eleventh Circuit did not rely on a single IQ score to find that he carried his burden. BIO.1-2, 16-18. He's right that the district court recounted his "*scores*" (plural), and the court of appeals noted that Smith had "scored between 72 and 78 on five IQ tests." BIO.1, 18. But their accurate recitation of the evidence only makes more galling the way they ignored it when determining Smith's intellectual functioning.

Again and again, the courts below explained that Smith's lowest score, adjusted downward, would be the decisive score:

- "[W]hen the lower end of [a score's] range is equal to or less than 70, an offender must be able to present additional evidence of … adaptive deficits." App.19 (cleaned up).
- "[A] district court must move on … when the lower end of [the] lowest IQ score is equal to or less than 70." App.21.
- Precedent "suggesting that 'the [SEM] is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls at the bottom of his IQ range' … is no longer good law." App.26.
- "*Hall* and *Moore* hold that when an offender's lowest IQ score, adjusted for the test's [SEM],

> is equal to or less than 70, a court must move on … [to] adaptive deficits." App.22-23.[1]

Applied to Smith, the Eleventh Circuit's rule meant his 72 alone disposed of the first prong:

- "The district court did not err by turning to … adaptive functioning after finding that [Smith's] IQ score could be as low as 69." App.19.
- "Smith had an IQ score of 72, meaning that his IQ could be 'as low as 69….'" App.21.
- "Heeding *Hall*'s command, the district court relied on Smith's lowest score…." App.24.
- "*Hall* and *Moore* required the district court to turn to evidence of Smith's adaptive deficits because the lower end of his standard-error range was 69." App.26; *see also* App.27.

Smith accuses the petition of "mischaracterizations" (BIO.1), but there is no way to read the decisions below and conclude they "did not find the intellectual functioning prong met by a single IQ score." BIO.16. That's what they did, and they said so repeatedly.

If there was any ambiguity in its merits decision, the Eleventh Circuit's order on motion to stay erased all doubt. The order cited just one finding: Based on "Smith's lowest IQ score," his "'IQ *could be* 'as low as 69.'" App.394-95. According to the Eleventh Circuit's characterization of its own ruling, that score alone ended the inquiry:

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[1] The court of appeals also found support in *Jackson v. Payne*, which it described as "*disregarding* a habeas petitioner's IQ score of 81" "when his lowest score's score range was less than 70." App.23 (citing 9 F.4th 646, 654 (8th Cir. 2021)) (emphasis added).

> [I]f the bottom of a person's range of admissible IQ scores is equal to or less than 70, that individual *could* have significantly subaverage intellectual functioning. When a district court finds that an individual *could* have significantly subaverage intellectual functioning, binding Supreme Court precedent requires the district court to move on….

App.395. In other words, it's possible that despite his scores of 74, 74, 75, and 78, only Smith's lowest score of 72 reflects his true IQ. And it's possible that the 72 was the product of significant measurement error. The sum of these possibilities is the further possibility that Smith's IQ is actually 70 or below. And that possibility, according to the Eleventh Circuit, satisfies the first prong of *Atkins*.

**B.1.** Perhaps sensing the violence inflicted on *Atkins*, Smith theorizes that there was more to the first-prong inquiry than IQ evidence. On his view, when the courts below "moved on" to adaptive deficits, they weren't finished with the first prong; they were just weighing "additional evidence" *within* the first prong. BIO.1, 17.

The main problem with Smith's interpretation is that "adaptive deficits" is the second prong of *Atkins*. *See* 536 U.S. at 308 n.3, 318. For over thirty years, this Court's jurisprudence has separated the inquiry into three distinct components. *See Penry v. Linaugh*, 492 U.S. 302, 308 n.1, 338 (1989). In each case, the Court has cited medical associations and textbooks to define the scope of the protected class.

Smith's brief suggests that the Eleventh Circuit misunderstood the distinct inquiries under *Atkins*. That view is belied not only by the court's language, *see supra*, but also by the structure of its decision. In Part IV, the court addressed "[w]hether Smith has significantly subaverage intellectual functioning," which "turns on whether he has an IQ of equal to or less than 70." App.18. Then in Part V, the court "turn[ed]" "to the adaptive-functioning prong." App.28. At no point in Part IV, App.18-28, did the court of appeals weigh findings about adaptive deficits alongside the evidence about Smith's intellectual functioning.[2]

**B.2.** Alternatively, Smith suggests that he did not meet prong one, but the courts below granted his *Atkins* claim anyway. *See* BIO.18-20 (arguing that "people with IQs somewhat higher than 70" are protected). Because his "actual functioning is lower" than his IQ scores would suggest, Smith argues that the courts were "required" to consider his adaptive deficits. BIO.18-19. Put differently, adaptive deficits are *always* "probative of intellectual disability, including for individuals who have an IQ test score above 70." BIO.20.

But Smith offers no evidence that the Eleventh Circuit followed this approach, which would have jettisoned the first prong as an independently necessary element for an *Atkins* claim. Indeed, the court said

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[2] To be sure, the district court stated in a later order that it "could not determine" by scores alone that Smith had met prong one. App.78. But the Eleventh Circuit clarified that "the district court did make a finding" that Smith "had scores as low as 72," which "result[ed]" in satisfying prong one. App.27-28. Further, the court of appeals described Smith's "only" burden with reference to the IQ evidence, not adaptive deficits. App.27.

just the opposite: "Smith carried his burden under the intellectual prong." App.27.

**C.** If either of Smith's theories for how to read the ruling below were correct, they would only strengthen the case for certiorari. Both moves—merging the first and second prongs or subordinating the first to the second—contradict the basic *Atkins* framework and sound medical science.

The three *Atkins* prongs reflected what the Court "took to be a universal understanding of intellectual disability." *Hall*, 572 U.S. at 736 (Alito, J., dissenting). And Smith has offered no evidence that the definition has dramatically changed since then. Although *Hall* and *Moore* relaxed the required proof for the first prong, they did not state that claimants could use evidence of adaptive deficits to overcome their failings on the first prong. Much more modestly, *Hall* and *Moore* instructed courts to "account for [a] test's 'standard-error of measurement'" and to eschew any "strict IQ cutoff." *Moore v. Texas*, 581 U.S. 1, 13, 15 (2017) (quoting *Hall*, 572 U.S. at 724).

If Smith's views have any purchase, then *Hall* and *Moore* did real damage to the *Atkins* framework and should be corrected. On its face, *Atkins* does not prioritize the second prong over the others. In fact, intellectual functioning "is the prong that most directly relates to the concerns" animating *Atkins—i.e.*, the penological reasons the Court exempted certain offenders from capital punishment. *Hall*, 572 U.S. at 737 (Alito, J., dissenting). To weaken the first prong is to prevent States from imposing lawful sentences on defendants outside those *Atkins* was meant to protect.

Furthermore, while the intellectual-functioning prong is a largely objective inquiry, the adaptive-

behavior prong "is a malleable factor without firm theoretical and empirical roots." *Id.* (cleaned up). Elevating the second prong will force courts to make more and more subjective judgments about "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." BIO.20; *see id.* at 6-15. The rule of law is guarded when punishment is premised on criminal conduct; it is threatened the more that punishment is premised on factors like interviews with the defendant's mother. *See* BIO.10, 11, 12.

## II. The decision below is wrong and irreconcilable with *Atkins*.

Consistent with traditional State power to define and punish crimes, *Atkins* left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317 (cleaned up). Deciding how to weigh multiple IQ test scores and how to apply an IQ test's standard error of measurement falls well within that task. The dissenters in *Hall* and *Moore* thought the Court might have left such matters to State discretion, Pet.12, 16, but Smith and the Eleventh Circuit disagree. Either way, clarity is needed. And this case is an ideal vehicle by which to provide it because the Eleventh Circuit's decision is based on assumptions that cannot be squared with this Court's *Atkins* jurisprudence.

First, *Hall* taught not to deem one score "final and conclusive" but to "consider other evidence." 572 U.S. at 712. The Eleventh Circuit understood that principle when it came to Smith's high score of 78. App.20.

But the court embraced the same error in reverse, focusing only on Smith's 72. It speaks volumes that Smith seems to disavow that arbitrary move. BIO.16-18. Despite benefitting from the court's myopic view of the data, Smith (mistakenly) credits the district court for "consider[ing] the full range of [his] IQ scores." BIO.16.

Second, *Hall* instructed that a test's SEM "reflects the reality" that a "score is best understood as a range of scores *on either side* of the recorded score." 572 U.S. at 712 (emphasis added). But the Eleventh Circuit specifically rejected that the SEM "is a bi-directional concept." App.26. The court then relied on the chance that Smith's lowest score erred *in his favor*, rejecting "the assertion that a district court can consider anything other than the lower end of an offender's standard-error range." App.25. Smith never explains why the SEM should be a downward adjustment only.

Third, the ruling below has no basis in "[t]he medical community's current standards." *Moore*, 581 U.S. at 20. Neither Smith nor the Eleventh Circuit offered any medical evidence that would license the court's twofold distortion of IQ evidence. Smith offers no manual that teaches the diagnosis of intellectual disability based on the lowest test score alone; no clinician who revises every score downward by one SEM. Those two thumbs on the scale for habeas petitioners in capital cases were not "informed by the medical community's diagnostic framework." *Moore*, 581 U.S. at 10.

## III. Courts are split over whether they must ignore all but the lowest score and adjust that score downward.

Smith is wrong to deny the confusion surrounding *Hall* and *Moore*. His own brief offered conflicting

rationales for the ruling below. On the one hand, he claimed the Eleventh Circuit did not rely on a single IQ score, BIO.1, 16; on the other, he said *Hall* and *Moore* required it, BIO.17-18. On the one hand, Smith claimed adaptive deficits were "additional evidence" *under* prong one, BIO.16-18; on the other, he said adaptive deficits could outweigh his poor showing on prong one, BIO.18-21.

The courts of appeals are just as lost. By and large, the Eleventh Circuit is now in agreement with the Eighth and Ninth. *See, e.g.*, *Ochoa v. Davis*, 50 F.4th 865, 903 (9th Cir. 2022); *Jackson*, 9 F.4th at 653; *Sasser v. Payne*, 999 F.3d 609, 616-19 (8th Cir. 2021).

But decisions from the Fifth, Sixth, Seventh, and Tenth Circuits have correctly considered multiple IQ test scores, not just the lowest score presented. *See, e.g.*, *Smith v. Sharp*, 935 F.3d 1064, 1081–82 (10th Cir. 2019); *Black v. Carpenter,* 866 F.3d 734, 747 (6th Cir. 2017); *McManus v. Neal*, 779 F.3d 634, 652 (7th Cir. 2015); *Garcia v. Stephens,* 757 F.3d 220, 226 (5th Cir. 2014).

And decisions from the Fifth, Sixth, and Tenth Circuits have appreciated that the SEM is not a one-way ratchet, but a bi-directional concept reflecting the possibility of error on either side of a test score. *See, e.g.*, *Postelle v. Carpenter*, 901 F.3d 1202, 1219 (10th Cir. 2018) (noting that the SEM "cuts both ways"); *Black*, 866 F.3d 734, 746; *Garcia*, 757 F.3d 220 (noting that a score of 75 ± 5 means "his actual IQ is as likely to be 80 as it is to be 70"); *Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014).

Smith attempts to distinguish two of these cases, but fails. First, Smith says that *Garcia*, 757 F.3d 220, is inapposite because "the petitioner submitted no IQ

scores in his state postconviction petition before attempting to submit new evidence in the federal petition." BIO.22. Even so, the district court offered an "alternative resolution of [the] claim under de novo review." 757 F.3d at 226. Reviewing de novo, the district court found that the lowest score was outweighed by four other scores "ranged from 83 to 100." *Id.* Acknowledging *Hall* and Garcia's low score of 75 ± 5, the Fifth Circuit still concluded that Garcia had no "debatable *Atkins* claim." *Id.*

Second, Smith admits that the Sixth Circuit in *Black v. Carpenter* "refused to consider adaptive functioning deficits" despite the petitioner's low scores of 57, 69, 73, and 76. BIO.23. But Smith focuses on the court's decision to discount those scores, earned as an adult, in favor of *childhood* scores ranging from 83 to 97. *Id.* Smith says the temporal distinction wouldn't matter here. *Id.* at 24. But that's beside the point: The Sixth Circuit weighed among the valid IQ scores, rather than picking the one most favorable to the petitioner. In contrast, the Eleventh Circuit made clear that it would not consider anything but Smith's lowest score regardless of factors like the test date.

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Smith lionizes this Court's "decades of painstakingly crafted *Atkins* precedent." BIO.21. But if that "precedent built the framework followed by the court below," BIO.19, then the precedent must be revised or reconsidered.

## CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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