No. __-____

In the Supreme Court of the United States

THOMAS DALE FERGUSON
Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

This case implicates two persistent conflicts of authority with regard to how courts are to determine whether a person suffers from an intellectual disability and thus, under the Eighth Amendment, may not be put to death. *See Atkins* v. *Virginia*, 536 U.S. 304 (2003); *Moore* v. *Texas*, 581 U.S. 1, 7 (2017). Indeed, Respondent filed a petition for certiorari raising a question nearly identical to the first question presented here, rooted in the same circuit split. *See* Petition for Writ of Certiorari, *Comm'r* v. *Smith*, No. 23-167 (filed Aug. 17, 2023). That petition is presently set for conference on December 8, 2023.

The questions presented here are:

1. Whether a court considering the element of "significantly subaverage intellectual functioning" may disregard a valid IQ test with a range under 70 simply because not all of the tests available show such a range—as the panel below and the Sixth, Seventh, and Tenth Circuits have held—or, rather, whether the court must proceed to evaluate adaptive functioning—as the Fifth, Eighth, and Ninth Circuits have held.
2. Whether the Alabama Supreme Court, which provided the rule adopted below, erred by interpreting the Eighth Amendment to require a capital defendant to prove a *present* adaptive functioning deficit despite his incarceration, in conflict with the Eighth Circuit, Ninth Circuit, and at least seven state courts of last resort to consider the issue.

PARTIES TO THE PROCEEDING

Petitioner is Thomas Dale Ferguson.

Respondent is the Commissioner of the Alabama Department of Corrections. The current commissioner is John Hamm.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and relates to the following proceedings:

- *Ferguson* v. *Commissioner, Alabama Department of Corrections*, No. 20-12727 (11th Cir.), judgment entered June 7, 2023, order denying petition for rehearing en banc issued August 7, 2023 (App. 2a and 205a).
- *Ferguson* v. *Allen*, No. 3:09-cv-0138 (N.D. Ala.), judgment entered May 21, 2020 (App. 42a).
- *Ferguson* v. *Allen*, No. 3:09-cv-0138 (N.D. Ala.), judgment entered July 27, 2017 (App. 105a).
- *Ferguson* v. *Allen*, No. 3:09-cv-0138 (N.D. Ala.), judgment entered July 21, 2014 (ECF 26-3 at 39).
- *Ex parte Ferguson*, No. 1071249 (Ala.), cert. denied January 16, 2009 (ECF 26-1 at 221).
- *Ferguson* v. *State of Alabama,* No. CR-06-0327 (Ala. Crim. App.), judgment entered April 4, 2008 (ECF 26-1 at 191).
- *Ferguson* v. *State of Alabama,* No. CC-97-343.61 (Ala. Colbert Cir. Ct.), judgment entered October 18, 2006 (ECF 26-1 at 125).

- *Ferguson* v. *State of Alabama*, No. 01-7464 (U.S.), cert. denied March 4, 2002 (ECF 26-1 at 120).
- *Ex parte Ferguson,* No. 1992209 (Ala.), judgment entered July 6, 2001 (ECF 26-1 at 110).
- *Ferguson* v. *State of Alabama*, CR-97-2524 (Ala. Crim. App.), judgment entered June 30, 2000 (ECF 26-1 at 72).
- *State of Alabama* v. Ferguson, No. CC-97-3254 (Ala. Mobile Cir. Ct.), judgment entered September 24, 1998 (App. 127a).

No other proceedings in state or federal trial or appellate courts directly relate to this case under this Court's Rule 14.1(b)(iii).

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Petitioner Thomas Dale Ferguson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

The "Constitution restricts the State's power to take the life of *any* intellectually disabled individual." *Moore* v. *Texas* ("*Moore I*"), 581 U.S. 1, 12 (2017) (quotes omitted). Intellectual disability means (a) significantly subaverage intellectual functioning, usually determined by IQ score, (b) deficits in adaptive functioning, and (c) onset of these deficits before adulthood. *Id.* at 7. When "the lower end of [a capital defendant's IQ] score range falls at or below 70," the court *must* also consider adaptive functioning evidence before adjudicating intellectual disability. *Id.* at 14.

Petitioner is an intellectually disabled man who was sentenced to death in 1998. After the Court decided *Atkins*, Petitioner filed a federal habeas petition challenging his capital sentence. The district court denied his petition after holding that Petitioner showed no intellectual disability, and a Panel of the Eleventh Circuit affirmed. This case presents two important questions that merit the Court's attention.

First, the Panel held that the district court need not consider Petitioner's adaptive functioning because only some—and not all—of his IQ scores ranged below 70. The Panel thus aligned itself with the Sixth, Seventh, and Tenth Circuits. The Fifth, Eighth, and Ninth Circuits disagree. They require consideration

of adaptive functioning upon a showing of even one valid IQ score ranging below 70.

Respondent agrees that this question has divided the circuits and that this Court should grant certiorari to resolve that division. In fact, Respondent recently filed a petition raising a nearly identical question presented, premised on the same circuit split. *See* Petition for Writ of Certiorari, *Comm'r* v. *Smith*, No. 23-167 (filed Aug. 17, 2023). There, Respondent asked this Court to decide "[w]hether *Hall* and *Moore* mandate that courts deem the intellectual-functioning prong satisfied when an offender's lowest IQ score, decreased by one standard error of measurement, is 70 or below." *Id.* at i. Respondent urged this Court to grant certiorari because "the lower courts have split over how to handle multiple IQ scores." *Id.* at 13.

Respondent is not alone in recognizing this split. Respondent's petition in *Smith* drew *amici curiae* support from the Attorneys General of fourteen states. Br. of Idaho and 13 Other States as *Amici Curiae* in Supp. of Pet., *Comm'r* v. *Smith*, No. 23-167 (filed Sept. 20, 2023).[1] Each recognized that the "Court should resolve this split and provide States direction going forward." *Id.* at 7.

Thus, Petitioner, Respondent, and fourteen other states all agree: certiorari is necessary to resolve this widely recognized conflict. This case is the better vehicle to do so, because Petitioner faces execution should this Court deny this petition, whereas in *Commissioner* v. *Smith*, the circuit affirmed the district

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[1] The states are Arkansas, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and Utah. *Id.* at 1.

court's judgment vacating the death sentence. In the alternative, the Court should grant both petitions and consolidate the cases or grant review in *Commissioner* v. *Smith* and hold this case pending its decision. Either way, the first question presented warrants review in this Court.

Second, the courts below and the Alabama Supreme Court have imposed an unconstitutional adaptive functioning requirement that at least the Eighth and Ninth Circuits have rejected. Citing *Smith* v. *State*, 213 So. 3d 239 (Ala. 2007), the district court required Petitioner to prove that he was *presently* intellectually disabled at the time of his *Atkins* hearing. Although the Eleventh Circuit did not independently review this issue, the rule of the Alabama Supreme Court—as applied by the district court below—conflicts with this Court's precedent under *Atkins*, *Moore I,* and *Moore* v. *Texas* ("*Moore II*"), 139 S. Ct. 666, 671 (2019).

Atkins and its progeny require that lower courts consider the "consensus" of "the citizenry and its legislators" when construing an Eighth Amendment intellectual disability claim. *Atkins*, 536 U.S. at 313. Yet every state legislature and state court to consider the issue has rejected a present deficit requirement.

The Court should grant certiorari to reverse the Eleventh Circuit, provide direction to the courts, and guarantee the uniformity and efficacy of Eighth Amendment protections.

OPINIONS BELOW

The opinion of the court of appeals (App. 4a) is reported at 69 F.4th 1243. The opinion of the district

court (App. 42a) is unreported but is available at 2020 WL 2572176.

JURISDICTION

The court of appeals entered judgment on June 7, 2023 (App. 2a) and denied a timely petition for rehearing on August 7, 2023 (App. 205a). On October 11, 2023, Justice Thomas extended the time to file this petition for writ of certiorari until December 6, 2023. On December 4, 2023, Justice Thomas granted a second extension to file this petition on January 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT

I. The Court's precedent on intellectual disability

In *Atkins,* the Court "held that the Constitution restricts the State's power to take the life of *any* intellectually disabled individual." *Moore I*, 581 U.S. 1, 12 (2017) (quotes omitted). "Executing intellectually disabled individuals * * * serves no penological purpose, runs up against a national consensus against the practice, and creates a risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (quotes and citations omitted).

In assessing the national consensus, *Atkins* "review[ed] the judgment of legislatures" and then "consider[ed] reasons for agreeing or disagreeing with their judgment." 536 U.S. 304, 313 (2003). The legislative landscape revealed a national consensus prohibiting the death penalty for the intellectually disabled. *See id.* at 314–15. This Court then delegated to the states "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317 (cleaned up). And it required courts to consider the "consensus" of "the citizenry and its legislators" when construing an Eighth Amendment intellectual disability claim. *Id.* at 313. In other words, the "settled approach" requires a court to "canvas [] the legislative policies of various States, as well as the holdings of state courts," to "determin[e] the scope of the constitutional guarantee." *Moore II*, 581 U.S. at 28 (Roberts, C.J., dissenting) (cleaned up).

Before 2014, a court's assessment of intellectual disability often started—and ended—with IQ test scores. But the Court recognized in *Hall* v. *Florida*, 572 U.S. 701, 722 (2014), that "[a]n IQ score is an approximation, not a final and infallible assessment of intellectual functioning." It also held that "[t]he professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." *Id.* at 712.

Relying on this consensus among medical experts, *Hall* held it unconstitutional for a state to establish a bright-line cutoff of 70 IQ for an *Atkins* defense. *Id.* at 724. The Court explained that a state cannot foreclose "all further exploration of intellectual disability" simply because a capital defendant "is deemed to have

an IQ above 70." *Id.* at 704. Instead, the state must allow a defendant "to present additional evidence of intellectual disability, including testimony regarding adaptive deficits," "when [his] IQ test score falls within the test's acknowledged and inherent margin of error." *Id.* at 723.

The Court reinforced this requirement in *Moore I*, holding that "[b]ecause the lower end of Moore's score range [fell] at or below 70, the [state court] *had to* move on to consider Moore's adaptive functioning." 581 U.S. at 14 (emphasis added). Thus, *Hall* and *Moore I* counsel that, because of the imperfect nature of IQ tests, a court must consider evidence of adaptive deficits once a defendant presents an adjusted IQ range falling to 70 or below.

II. Conviction, direct appeal, and state post-conviction proceedings

Petitioner was convicted of capital murder in 1998. At sentencing, Petitioner's jury voted 11–1 that he receive life imprisonment rather than death sentence. *Ferguson* v. *State*, 814 So. 2d 925, 933 (Ala. Crim. App. 2000). Under a since-repealed Alabama statute, however, the trial judge overrode the jury's recommendation and sentenced Petitioner to death. App. 8a.[2]

Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed. *See Ferguson*, 814 So. 2d at 970; *Ex parte Ferguson*, 814 So. 2d 970, 980 (Ala. 2001). This Court denied Petitioner's

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[2] As the Eleventh Circuit explained, "[i]n a capital case, Alabama now requires that the jury's sentencing verdict binds the trial court and is no longer a recommendation to be overridden by the judge." App. 8a n.1 (*citing* Ala. Code § 13A-5-47(a)).

petition for a writ of certiorari. *Ferguson* v. *Alabama*, 535 U.S. 907 (2002).

Petitioner timely petitioned for post-conviction relief under Alabama Rule of Criminal Procedure 32, but the trial court denied relief. *Ferguson* v. *State*, 13 So. 3d 418, 420–21 (Ala. Crim. App. 2008). The Alabama Court of Criminal Appeals affirmed. *Id.* at 445. The Alabama Supreme Court denied certiorari. *Ex parte Ferguson*, No. 1071249 (Ala. Jan. 16, 2009).

III. Habeas petition and *Atkins* hearing

In 2009, Petitioner filed a federal habeas petition in the Northern District of Alabama. App. 16a. The district court thus had jurisdiction under 28 U.S.C. §§ 1331, 2241, and 2254.

Petitioner challenged the state court's failure to give him an *Atkins* hearing on his intellectual disability claim. App. 17a. Although the district court initially denied the petition, it later reconsidered its decision and held an evidentiary hearing. *See* App. 105a.

A. Intellectual functioning evidence

At the *Atkins* hearing, Petitioner presented evidence of seven different IQ tests. The first, administered when he was six years old, resulted in an unadjusted IQ score of 77 on the Stanford-Binet Intelligence Scale ("SBI-3"). App. 51a, 75a.

When Petitioner was 12, his mother noticed a lack of academic progress and had Petitioner evaluated for special education services at his school, which included taking a Wechsler Intelligence Scale for Children–Revised ("WISC-R") test. App. 51a. Petitioner received an unadjusted score of 71 on this test. App.

51a. Based on that score, Petitioner was placed into special education courses and designated as "Educationally Mentally Handicapped." App. 52a.

Petitioner was re-evaluated at age 15 when he was in eighth grade. App. 52a. He received an unadjusted IQ score of 87. App. 52a. Based on this assessment, Petitioner was moved into classes for students classified as "learning disabled" in the ninth grade. App. 53a, 93a.

Before his criminal trial—when Petitioner was 25 years old—the state court *sua sponte* referred him to Dr. C. Van Rosen to determine both his competency to stand trial and his mental state at the time of the offense. App. 53a–54a. Dr. Rosen administered the Wechsler Adult Intelligence Scale–Revised ("WAIS-R") IQ test and Petitioner received an unadjusted score of 69. App. 54a.

Nearly 20 years later, in preparation for his *Atkins* hearing in the district court, Petitioner retained Dr. Robert D. Shaffer to evaluate his intellectual disability. Dr. Shaffer met with Petitioner for nearly fourteen hours over three days and with his mother for over 4 hours. App. 55a–56a. Dr. Shaffer administered the Fourth Edition of the Wechsler Adult Intelligence Scale ("WAIS-IV") as well, and Petitioner scored a 77. App. 56a.

Dr. Shaffer also examined Petitioner's neuropsychological functions, which are "more strongly weighed than single IQ numerical scores" when evaluating intellectual functioning, according to the Fifth Edition of the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders ("DSM-V"). App. 56a. Dr. Shaffer concluded that

Petitioner demonstrated significantly sub-average intellectual ability, which was "most evident in the profile of [his] neuropsychological functions." App. 56a. After administering several neuropsychological tests to assess Petitioner's executive, verbal, visual-processing, organizational, memory, and fine motor functions, Dr. Shaffer concluded that "the totality of all test results were consistent with his opinion that Ferguson has significant limitations in his ability to function intellectually." App. 57a–58a.

Respondent retained its own expert, Dr. Glen David King, to evaluate Petitioner before the *Atkins* hearing. App. 58a. Dr. King's examination included two IQ tests: the WAIS-IV test Petitioner had taken just five months earlier with Dr. Shaffer, and the Stanford Binet Intelligence Scale–Fifth Edition ("SB-5"). App. 58a n.36. Petitioner received unadjusted IQ scores of 85 on the WAIS-IV and 84 on the SB-5, a significant but unsurprising improvement given that Petitioner had taken the WAIS-IV just five months earlier. App. 58a–60a. Dr. King did not conduct any neuropsychological testing. *See* App. 58a–61a.

B. Adaptive functioning evidence

Petitioner also offered evidence of his significantly subaverage adaptive functioning through his school records and the testimony of Dr. Shaffer. Adaptive functioning means the ability "to learn basic skills and adjust behavior to changing circumstances," *Hall* v. *Florida*, 572 U.S. 701, 710 (2014), and includes "the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional

academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3.

Dr. Shaffer administered the Vineland Adaptive Behavior Scales Test to Petitioner's mother, because she had observed Petitioner at the age of 18. App. 20a. Vineland measures an individual's ability to sustain an independent life, assessing three types of adaptive skills: communication, daily living, and socialization. App. 20a n.4. Petitioner's raw Vineland scores were 67 for communication, 67 for daily living skills, and 68 for socialization, resulting in a standardized composite score of 63. App. 20a. That placed Petitioner's adaptive functioning at the first percentile, meaning that he "was exceeded by 99 out of a hundred comparable individuals at age 18." App. 84a.

Dr. Shaffer also examined testimony by Petitioner concerning his employment history and marital relationship. App. 84a–85a. Cross referencing that testimony with the Vineland results and Petitioner's school records, Dr. Shaffer concluded that Petitioner had substantial deficits in adaptive functioning. App. 84a–85a. Dr. Shaffer described this historical evidence as the most accurate way to assess Petitioner's adaptive functioning, given that he had been on death row for over 20 years by the time of his *Atkins* hearing. App. 88a.

Respondent's expert, Dr. King, assessed Petitioner's adaptive functioning by administering the Adaptive Behavior Assessment System—Third Edition ("ABAS-3"). App. 58a n.36. That test asked Petitioner to rate his own current ability to perform tasks commonly required for life outside prison—that is, tasks that he had not performed in more than two decades. App. 86a. These included using electrical

sockets safely; checking bank or other financial statements to make sure they are correct; paying bills on time; planning for fun activities on free days or afternoons; and inviting others to join him in playing games and other fun activities. App. 96a. As the district court noted, some questions asked Petitioner to rate his ability to perform tasks such as using a mobile telephone, internet, or digital map, which "were technological innovations that either had not been perfected, or were not in widespread use, on the date Ferguson was arrested and incarcerated for the underlying criminal offenses." App. 95a–96a. Even though Petitioner had been on death row for two decades by then, he gave himself the highest possible rating on his ability to perform each task. App. 96a. Dr. King interpreted these results as demonstrating that Petitioner was non-impaired. App. 88a.

Dr. King also administered the "Independent Living Scales ("ILS"). App. 58a n.36, 86a. Dr. King administered that test even though he had earlier: (1) testified that ABAS-3 is the "only" test that is "appropriate" for assessing adaptive functioning, (*see Smith* v. *Comm'r, Ala. Dep't of Corr.*, 67 F.4th 1335, 1342 (11th Cir. 2023)); (2) testified that ILS is unreliable, (App. 98a–99a) and; (3) admitted that ILS is not recommended for assessing adaptive functioning by the American Association for Intellectual and Developmental Disabilities (App. 98a–99a). The ILS purported to measure Petitioner's ability to manage money, a home and transportation, and health and safety. App. 99a. It also purported to gauge his social adjustment and problem-solving abilities. App. 99a. It did so by having Petitioner perform tasks such as transcribing a number from one piece of paper to another, filling out a check, and doing elementary

arithmetic. App. 100a n.149. Dr. King opined that Petitioner performed within the "average, or non-impaired range" on this test. App. 88a.

C. District court analysis

After the *Atkins* hearing, the district court denied Petitioner's habeas petition, concluding that he failed to establish an intellectual disability by a preponderance of the evidence.

As for intellectual functioning, the district court concluded that Petitioner had not established that he has significantly subaverage intellectual functioning based on his IQ scores and the two experts' opinions. App. 104a. As part of its determination, the district court adjusted Petitioner's scores in three ways. App. 69a, 73a, 75a.

First, it adjusted each of Petitioner's IQ scores to account for the "Flynn Effect," which refers to the 0.3-point increase in IQ scores over the past several decades.[3]

Second, the district court provided a standard error of management ("SEM") range for each IQ score. App. 75a. The court explained that the SEM "accounts for a margin of error of five points, both below and above the test-taker's IQ score." App. 88a n.95 (citing *Ledford* v. *Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016)); *see also Moore I*, 581 U.S. at 13 ("[C]ourts must account for the test's standard error of measurement [because] an individual's score is best understood as a range of scores

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[3] The district court initially calculated this adjustment incorrectly, but later corrected it, as the Eleventh Circuit pointed out. App. 19a–20a n.2.

on either side of the recorded score within which one may say an individual's true IQ score lies" (cleaned up)).

Third, the district court adjusted Petitioner's 2018 score on the WAIS-IV administered by Dr. King for the "Practice Effect." App. 73a. The court explained that the Practice Effect assumes that test takers will "remember some of the items and perhaps have an increased performance" when taking the same test multiple times during a short period. App. 72a–73a. Because Petitioner had taken the same IQ test five months earlier, the district court adjusted his 2018 IQ score down by 5 points. App. 50a.

Petitioner's IQ scores—with the adjustments made by the district court for the Flynn Effect, the SEM, and the Practice Effect—are displayed in the chart below.

Test Date	**IQ Test Given**	**Adjusted Range**
1979	SB-3	70.2–80.2
1985	WISC-R	62.7–72.7
1988	WISC-R	77.2–87.2
1997	WAIS-R	59.2–69.2
2017	WAIS-IV	68.9–78.9
2018	WAIS-IV	70.15–80.15
2018	SB-5	74.6–84.6

The district court also "discounted" two of Petitioner's IQ scores. First, it discounted the 1985 IQ score because the administrator noted that he "gave up easily" on some questions. App. 26a. Second, it discounted the 1997 IQ score "based on Dr. Rosen's opinion that the low scores were the result of [Petitioner's] malingering." *Id.* Although Dr. Rosen testified that Petitioner "would have probably scored in the middle 70's * * * perhaps a little higher" if he had tried his hardest on the 1997 test, a mid-70s score would *still* be among his *lowest* scores, once adjusted for the Flynn Effect and SEM. App. 54a. For example, a score of 77 on that 1997 test would have resulted in a Flynn-adjusted SEM range of 67.2 to 77.2.

After the district court applied these adjustments and discounts, Petitioner had at least one IQ score below 70: his adjusted 2017 WAIS-IV score. Yet the district court still held that Petitioner "failed to establish by a preponderance of the evidence that he suffers from significantly subaverage intellectual functioning [i.e., has an IQ below 70]." App. 104a. The district court evaluated no other evidence of Petitioner's intellectual functioning. App. 103a–104a.

As for adaptive functioning, the district court held that Petitioner failed to show by a preponderance of the evidence that he "*presently* suffers from substantial deficits in any area of adaptive functioning." App. 103a–104a. The district court derived this present deficit requirement from *Smith*, 213 So. 3d 239, a decision by the Alabama Supreme Court. App. 46a. The district court did not address whether Petitioner had exhibited significant deficits in adaptive functioning at any time before his *Atkins* hearing. App. 23a, 103a–104a.

IV. Eleventh Circuit appeal

Petitioner timely appealed the district court's denial of his *Atkins* defense. App. 5a, 23a. The Eleventh Circuit had jurisdiction under 28 U.S.C. §§ 1291, 2253, and 2254. Petitioner argued that the district court violated the Eight Amendment by requiring him to show *present* substantial deficits in adaptive functioning at the time of his *Atkins* hearing, which occurred over 20 years after his incarceration. App. 24a–26a. He also argued that, regardless of the standard employed, the district court clearly erred in finding him not intellectually disabled. App. 26a.

The Eleventh Circuit affirmed. The court noted that Petitioner's 2017 IQ score had an adjusted range of 69.3 to 79.3. App. 27a–28a. Yet it found no clear error in the district court's conclusion that Petitioner did not suffer significantly subaverage intellectual functioning based on his other scores. App. 28a–29a.

As for adaptive functioning, the Eleventh Circuit declined to consider whether the district court's present deficit requirement violated the Constitution. The court held that "[b]ecause the district court found [Petitioner] at no point had subaverage intellectual functioning," it "need not address whether requiring present significant deficits in adaptive functioning runs afoul of *Atkins*." App. 25a–26a.

After the Eleventh Circuit affirmed the district court's decision, it denied Petitioner's timely request for panel rehearing and rehearing en banc. App. 205a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. Certiorari is necessary to resolve the disagreement between the circuits over the role of adaptive functioning when a capital defendant has multiple IQ tests.

A. The circuit courts have adopted competing approaches when a defendant presents evidence of multiple IQ scores.

The circuit courts have split on whether the Eighth Amendment requires courts to examine evidence of adaptive deficits when some but not all of a capital defendant's IQ scores range below 70. The view adopted by the Fifth, Eighth, and Ninth Circuits holds that a capital defendant asserting an *Atkins* defense must be allowed to present evidence of his adaptive functioning if he has at least one valid IQ score that suggests intellectual deficit. The Sixth, Seventh, and Tenth Circuits—and the Panel below—apply a contrary rule.

In *Jackson* v. *Payne*, for example, the Eighth Circuit held that because "the lower end of [the] petitioner's IQ score range [fell] at or below 70, the district court had to move on to consider [the petitioner's] adaptive functioning." 9 F.4th 646, 655 (8th Cir. 2021) (cleaned up); *see also Sasser* v. *Payne*, 999 F.3d 609, 619 (8th Cir. 2021) (holding that the "district court did not err by considering additional indicia of intellectual disability" when "[t]he lowest end of Sasser's lower IQ score range was 70").

The Ninth and Fifth Circuits agree. In *Ochoa* v. *Davis*, the Ninth Circuit court reviewed an *Atkins* claim of a capital defendant with IQ scores of 74, 78, and 79. 50 F.4th 865, 902 (9th Cir. 2022). Although

the court noted that the defendant's higher scores and expert testimony suggested no intellectual disability, it nonetheless considered evidence of adaptive deficits because his lowest score of 74 "could have qualified as falling into the intellectually disabled range." *See id.* at 903. The Ninth Circuit explained that "[c]onsidering the IQ score of 74 alone, * * * Ochoa might still be classified as intellectually disabled, depending upon the level of [adaptive] deficits at prong two." *Id.*; *see also Garcia* v. *Stephens*, 757 F.3d 220, 226 (5th Cir. 2014) ("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.").

District courts in the Second and Third Circuits have joined the Fifth, Eighth, and Ninth Circuits in adopting this approach. *See United States* v. *Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) ("[T]he facts in *Hall* require lower courts to consider evidence of adaptive functioning if even one valid IQ test score generates a range that falls to 70 or below."); *United States* v. *Roland*, 281 F. Supp. 3d 470, 503 (D.N.J. 2017) (quoting *Wilson*).

In contrast, three circuits do not automatically require inquiry into adaptive functioning when a defendant presents IQ scores on either side of 70. Courts in these circuits instead may determine that a defendant is not intellectually disabled without considering *any* evidence of his adaptive functioning, even with IQ scores ranging below 70. For example, the Seventh Circuit held in *McManus* v. *Neal* that the Indiana Supreme Court did not err when it refused to consider evidence of adaptive deficits, even though the

defendant had multiple scores ranging below 70. *See* 779 F.3d 634, 652 (7th Cir. 2015).

Similarly, in *Smith* v. *Duckworth*, the Tenth Circuit approved an Oklahoma statute providing that "a score 76 or higher on *any* IQ test bars a defendant from being found intellectually disabled." 824 F.3d 1233, 1244–45 (10th Cir. 2016). Applying that law, the state court had determined that the defendant was not intellectually disabled based on his IQ scores alone, even though one test score ranged below 70. *Id.*

Lastly, the Sixth Circuit in *Black* v. *Carpenter* considered ten IQ scores ranging from 57 to 97. 866 F.3d 734, 738 (6th Cir. 2017). Despite several scores falling at or below 75, the court held that it "need not analyze whether Black has the requisite deficits in adaptive behavior" because some of his scores did not fall into the intellectual disability range. *See id.* at 750.

Respondent agreed that the circuits are split on this question when it sought certiorari on a nearly identical question in another Eleventh Circuit case. *See* Petition for Writ of Certiorari, *Comm'r* v. *Smith*, No. 23-167 (filed Aug. 17, 2023). There, another Eleventh Circuit panel analyzed the question differently than the panel here: it held that the district court "must move on to consider an offender's' adaptive functioning when the lower end of his lowest IQ score is equal to or less than 70." *Smith* v. *Comm'r, Ala. Dep't of Corr.*, 67 F.4th 1335, 1346 (11th Cir. 2023). The petition argues that "courts have struggled to assess intellectual functioning when presented with multiple IQ scores in the same case * * * [e]specially when an offender's IQ scores straddle the line for significantly subaverage intellectual functioning [*i.e.*, a score of 70]." *Comm'r* v. *Smith* Pet. at 11–12.

Respondent outlined the same circuit split advanced here, with *Black* and *McManus* arrayed on one side and *Ochoa* and *Sasser* on the other. *Id.* at 13.

The Attorneys General of fourteen states acknowledged this division in their *amici curiae* brief in support of Respondent in *Commissioner* v. *Smith*. Br. of Idaho and 13 Other States as *Amici Curiae* in Supp. of Pet. at 6–7. The *amici* states noted that *Ochoa* and *Sasser* hold "that a criminal defendant necessarily meets his burden if the bottom range of a single score's standard error of measurement is at or below 70," while other courts have taken the opposite view. *Id.* The circuits' differing approaches create "greater uncertainty for States," which are "left guessing" how to apply the law, according to these Attorneys General. *Id.*

Thus, Petitioner, Respondent, and fourteen other states all agree: "lower courts are deeply confused about the application of *Hall*, *Moore*, and medical expertise when offenders present multiple IQ scores." *Comm'r* v. *Smith* Pet. at 15. Petitioner thus joins this chorus in requesting that the Court grant review to "provide much-needed instruction amid a burgeoning split on this vital issue" and "provide States direction going forward." *Comm'r* v. *Smith* Pet. at 15; *Amici* Br. at 7.

B. The decision below violates precedent and prevailing clinical standards.

The Panel's decision also warrants review because it contravenes *Hall* and *Moore I* and disregards the medical consensus.

Like Petitioner here, the petitioners in both *Hall* and *Moore I* presented multiple IQ scores, with some

ranging below 70 and some above. In *Hall,* the Supreme Court looked at the petitioner's lowest score of 71, with an adjusted range below 70, to find that he demonstrated significantly subaverage intellectual functioning. 572 U.S. at 707, 724. Similarly, the petitioner in *Moore I* had valid IQ scores of 74 and 78. *See* 581 U.S. at 10. Notwithstanding the higher score, the Supreme Court held that "the [state court] had to move on to consider Moore's adaptive functioning" because the score of 74, after accounting for the SEM, had a bottom range at or under 70. *Id.* at 14.

Hall and *Moore I* thus require lower courts to consider evidence of adaptive functioning if even a single valid IQ test score ranges below 70. In other words, Petitioner's adjusted scores—at least one of which ranged below 70—should have compelled the Eleventh Circuit here to "move on to consider [his] adaptive functioning." *See Moore I*, 581 U.S. at 14. The Eleventh Circuit broke with binding precedent when it refused to do so.

The decisions below also violated prevailing clinical standards. As explained in *Moore I*, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Id.* at 20. Accordingly, an *Atkins* analysis must be "informed by the medical community's diagnostic framework." *Hall*, 572 U.S. at 721.

At the time of Petitioner's *Atkins* hearing in 2019, the current medical diagnostic standards were the 11th edition of the American Association on Intellectual and Developmental Disabilities clinical manual ("AAIDD-11") and the DSM-V. Both publications emphasize that an IQ score is an approximate measurement. *See* DSM-V at 37 ("IQ test scores are

approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks."); AAIDD-11 at 31 (describing IQ scores as "far from perfect"). Because IQ scores are inherently imprecise, the standards direct medical professionals to consider IQ scores alongside other evidence of intellectual deficits. *See* DSM-V at 33 (redefining significantly subaverage intellectual function as "[d]eficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, *confirmed by both* clinical assessment *and* individualized, standardized intelligence testing") (emphasis added); AAIDD-11 at 100 ("A valid diagnosis of [intellectual disability] is based on multiple sources of information that include a thorough history (social, medical, educational), standardized assessments of intellectual functioning and adaptive behavior, and possibly additional assessments or data relevant to the diagnosis.").

The consensus in the medical community also recognizes that an individual can be intellectually disabled despite receiving one or more valid IQ scores above the recognized range for intellectual deficit. As the DSM-V confirms, "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." DSM-V at 37.

Both precedent and prevailing medical standards require courts evaluating an *Atkins* claim to consider evidence of adaptive functioning when a defendant has even one valid IQ score ranging below 70. The

Eleventh Circuit's departure from this standard implicates the existing circuit split and violates the Eighth Amendment by "creat[ing] an unacceptable risk that persons with intellectual disability will be executed." *See Hall*, 572 U.S. at 704. The Court should grant certiorari to address this critical issue.

II. Certiorari is also necessary to resolve the disagreement over the need for a capital defendant to establish *present* deficits in adaptive functioning.

Although the Panel did not address adaptive functioning, the district court did—and its decision implicates another persistent split of authority that separates the Alabama Supreme Court from all other courts to address the issue. This issue independently warrants this Court's review.

A. No court outside Alabama has adopted the present deficit requirement imposed here, and many have rejected it.

The district court applied a precedent of the Alabama Supreme Court, holding that capital defendants must demonstrate a *present* deficit in adaptive functioning to prevail under *Atkins*. *Smith* v. *State*, 213 So. 3d 239 (Ala. 2007). But the Alabama Supreme Court's decision on that issue departs from decisions in the Eighth and Ninth Circuits. The Ninth Circuit has held that intellectual disability under *Atkins* should be measured at time of the crime and trial. *Smith* v. *Ryan*, 813 F.3d 1175, 1201–02 (9th Cir. 2016) ("Because the rationales underlying the right announced in *Atkins* concentrate on the time the crime was committed and the ensuing trial, we hold that a defendant comes within the protection of *Atkins* if he

can demonstrate that he was intellectually disabled during either of these periods."). And the Eighth Circuit has held that proof of adaptive deficits during childhood alone is enough to establish intellectual disability under *Atkins*. *See Jackson*, 9 F.4th at 658–60.

The Alabama Supreme Court's approach also conflicts with the decisions of every other state court of last resort to address the issue. These courts hold either that intellectual disability must be measured at the time of the offense, not at the time of the *Atkins* hearing, or they *permit*—but do not require—evidence of present deficits to establish an *Atkins* defense. *See Chase* v. *State*, 171 So. 3d 463, 468 (Miss. 2015) ("*Atkins* is concerned with whether an individual was intellectually disabled at the time of the crime and whether the intellectual disability manifested prior to age eighteen[.]"); *Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014) ("The point of an *Atkins* hearing is to determine whether a person was mentally retarded during his developmental period and at the time of the crime."); *Hall* v. *State*, 201 So. 3d 628, 636 (Fla. 2016) ("The prohibition against executing the intellectually disabled is based, in part, on their culpability at the time the crimes were committed."); *State* v. *McManus*, 868 N.E.2d 778, 787 (Ind. 2007) (considering adaptive functioning at multiple stages of life, but not requiring present deficits); *State* v. *Vela*, 777777 N.W.2d 266, 308 (Neb. 2010) (same); *State* v. *Rodriguez*, 814 S.E.2d 11, 32 (N.C. 2018) (same); *Commonwealth* v. *DeJesus*, 5858 A.3d 62, 72 (Pa. 2012) (same).

Only one state supreme court—Arkansas—reads *Atkins* to require intellectual disability at the time of execution. *See Miller* v. *State*, 362 S.W.3d 264, 276

(Ark. 2010). But Arkansas separately prohibits a death sentence for anyone who suffers from an intellectual disability at the time of an offense. *Id.* So even under Arkansas law, a capital defendant cannot be executed if they are intellectually disabled at the time of the crime, regardless of their condition at the time of the *Atkins* hearing. *Id.*; *see also Jackson*, 9 F.4th at 660.

At bottom, every federal court (outside the Eleventh Circuit) and state court to consider the question has either tacitly or explicitly rejected the Alabama Supreme Court's present deficit requirement. This rogue precedent demands review by the Court.

B. The present deficit requirement conflicts with *Moore I* and *Moore II*.

Setting aside the conflict with other states and two circuits, the Alabama Supreme Court's minority-of-one rule—adopted by the district court in this case—flouts this Court's precedent in two ways.

First, the *Smith* rule departs from the national consensus—a departure that is itself a violation *of Atkins*. Central to *Atkins*'s holding was this Court's charge that the states take up "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." 536 U.S. at 317 (cleaned up). The Eighth Amendment inquiry under *Atkins* requires courts to consider the "consensus" of "the citizenry and its legislators" when construing an Eighth Amendment intellectual disability claim. *Id.* at 313 ("[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or

disagreeing with their judgment."). State legislative consensus provides "the clearest and most reliable" "objective indicia of society's standards in the context of the Eighth Amendment." *See id.* at 312 (cleaned up); *Hall*, 572 U.S. at 714 (cleaned up). "For these reasons, we have described state legislative judgments as providing 'essential instruction' in conducting the Eighth Amendment inquiry." *Moore I*, 581 U.S. at 27 (Roberts, C.J., dissenting) (quoting *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005)).

No state legislature has required capital defendants to show present adaptive functioning deficits at the time of their *Atkins* hearing. Instead, nine states have passed laws explicitly rejecting a present deficit requirement.[4] And state high courts have consistently interpreted less explicit statutes to require an adaptive functioning deficit at the time of the offense, not later. *Pizzuto* v. *State*, 202 P.3d 642, 655 (Idaho 2008) (interpreting Idaho code as requiring proof of intellectual disability "at the time of the murders and prior to his eighteenth birthday"); *Bowling* v. *Commonwealth*, 163 S.W.3d 361, 376 (Ky. 2005) (interpreting state code as requiring proof at the time of the offense), *abrogated on other grounds by Woodall* v. *Commonwealth*, 563 S.W.3d 1 (Ky. 2018); *State ex rel. Clayton* v. *Griffith*, 457 S.W.3d 735, 753 (Mo. 2015) (en banc) (interpreting state statute to require consideration of intellectual disability "at or shortly following

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[4] *See* Ark. Code Ann. § 5-4-618; Ga. Code Ann. § 17-7-131; La. Code Crim. Proc. Ann. art. 905.5(e), art. 905.5.1(H)(1); Ohio Rev. Code Ann. § 2929.04(B)(3); Or. Rev. Stat. § 163.150; S.C. Code Ann. §§ 16-3-20(B), (C)(b)(10); S.D. Codified Laws § 23A-27A-26.1; Tenn. Code Ann. § 39-13-203(c); Utah Code Ann. § 76-3-207(4)(d).

birth" through "the time the defendant committed the crime").

Second, this Court's precedents require a court evaluating intellectual disability to find "(1) deficits in intellectual functioning—primarily a test-related criterion; (2) adaptive deficits, assessed using both clinical evaluation and individualized measures; and (3) the onset of these deficits while the defendant was still a minor." *Moore II*, 139 S. Ct. at 668 (cleaned up). Nothing in this constitutional standard allows courts to impose a fourth requirement: the existence of adaptive functioning deficits at the time of the *Atkins* hearing itself.

Indeed, *Moore II* rejected that mode of analysis. There, the Texas "court of appeals relied heavily upon adaptive improvements made in prison." *Id. at* 671 (quotations omitted). Yet the Court vacated the Texas court's judgment, finding it contrary to *Moore I*'s "caution against relying on prison-based development," in light of the medical consensus. *Id.* at 671 (quotations omitted); *see also Moore I*, 581 U.S. at 15.

Moore I's caution was well founded. An intellectual disability determination must be "informed by the medical community's diagnostic framework." *Moore II*, 139 S. Ct. at 669 (quote omitted). As Dr. Shaffer explained in the district court, historical evidence—not more testing—is the most accurate way to assess Petitioner's adaptive functioning given that he had been on death row for over 20 years by the time of his *Atkins* hearing. App. 88a. That is because the very nature of adaptive functioning—one's ability to independently function in a community setting—is impossible to square with life in prison on death row. Adaptive functioning deficits "limit functioning in one or

more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work and community." DSM-V at 33; *see also* App. 20a n.4. But prisoners—especially prisoners on death row—have no means or opportunity to exercise these skills, because they live in a highly structured segregated confinement and thus have no opportunity "to demonstrate the presence or absence of adaptive skills typical in day-to-day life. Inmates do not cook, choose clothing, or make independent choices about their day-to-day existence." Caroline Everington et al., *Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated*, *in* The Death Penalty and Intellectual Disability 202 (Edward A. Polloway ed., 2015).

The medical consensus agrees that behavior in prison cannot be a valid measure of adaptive functioning. For example:

- Amicus Br. for the Am. Assoc. on Intell. and Dev. Disabilities & the Arc of the U.S. at 16, *Moore I*, 581 U.S. 1 (2017) (No. 15-797) ("Clinicians agree that prison behavior is not a valid measure of an individual's real-life functioning * * * [I]t is not relevant to an *Atkins* case on the issue of whether the defendant had deficits in adaptive behavior at the time of the offense.");
- Everington, *supra*, at 202 (explaining that assessing adaptive behavior "is not possible in a prison context");
- Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology

114, 119 (2009) (explaining that prison "is an artificial environment" and "[a] retrospective assessment of adaptive behavior is often considered as the only viable option when the assessed individual is incarcerated");

- Richard J. Bonnie & Katherine Gustafson, The Challenge of Implementing Atkins v. Virginia: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 848–49 (2007) (explaining that an intellectually disabled person "is likely to show stronger adaptive behavior in the structured environment of a correctional facility than in society, thus possibly inflating scores that would have been indicative of [intellectual disability] in the community environment");
- J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 1*, 32 Psych. in Mental Retardation & Dev. Disabilities 2 (2006) ("[P]rison life offers no opportunity to demonstrate most areas of adaptive functioning.");
- John Matthew Fabian et al., Life, Death, and IQ: It's Much More Than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases, 59 Clev. St. L. Rev. 399, 425 (2011) (noting the failure to measure adaptive functioning in prison because "the offender has less opportunity to display evidence of social, conceptual and practical skills on a regular basis in a correctional setting").

The Court relied on this medical consensus when it twice reversed the Texas courts in *Moore I* and *Moore II*. *See Moore I*, 581 U.S. at 15; *Moore II*, 139 S. Ct. at 671. Yet the district court below—applying the Alabama Supreme Court's outlier decision in *Smith* v. *State*—determined that Petitioner was not intellectually disabled at the time of his offense based on the adaptive improvements he supposedly made in prison 20 years later. This is contrary to the consensus of the federal courts, state courts, and state legislatures—and conflicts with the Court's existing precedents.

CONCLUSION

This petition for a writ of certiorari should be granted, either on its own or alongside the petition in *Commissioner* v. *Smith*, No. 23-167. In the alternative, the Court should grant review in *Commissioner* v. *Smith* and hold this case pending its decision.

Respectfully submitted.

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