No. 23-639

In the
Supreme Court of the United States

THOMAS DALE FERGUSON,

Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS

Respondent.

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

BRIEF IN OPPOSITION

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January 12, 2024

CAPITAL CASE
QUESTIONS PRESENTED

According to *Atkins v. Virginia*, 536 U.S. 304 (2003), the Eighth Amendment exempts intellectually disabled offenders from capital punishment. To qualify for relief under *Atkins*, Thomas Ferguson needed to show that his IQ is likely 70 or below, but his IQ test scores were 87, 84, 78, 77, and 77. Pet.App.22a-23a. Only by reducing his scores to account for the (controversial) Flynn effect and by assuming a margin of error of ± 5 for each test could *one* of his five scores produce a range at or below 70—in this case, 69.3–79.3. *Id.* Ferguson asks this Court to deem that single adjusted score sufficient for prong one of *Atkins*. Pet.14. The first question is:

1. Whether it was clear error to find that Ferguson failed to prove by a preponderance of the evidence that his IQ is 70 or below.

The district court also rejected Ferguson's claim on *Atkin*'s second prong—deficits in adaptive functioning. Ferguson's grades in school gave "more support for the State's position," and Ferguson could "read and spell" at levels "not consistent" with intellectual disability. Pet.App.95a. Plus, there was "little evidence" that he "*presently* suffers from substantial deficits in any area of adaptive functioning." *Id.* at 103a-104a. On appeal, Ferguson argued that he need not show that he currently has an intellectual disability. The Eleventh Circuit did not address prong two. *Id.* at 25a. Still, the second question is:

2. Whether the Eighth Amendment exempts from execution an offender who fails to show he is currently intellectually disabled.

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INTRODUCTION

Thomas Ferguson did not prove that his IQ is 70 or below. As he admits, Pet.14, only one of his five valid scores even arguably produces a range that dips below 70. The courts below reduced his scores to account for the Flynn effect *and* assumed a large standard error of measurement (SEM), generating these scores and ranges:

Test Date	Test Given	IQ Score	Flynn-Adjusted	Adjusted Score ± 5
1979	SB-3	77	75.2	70.2–80.2
1988	WISC-R	87	82.2	77.2–87.2
2017	WAIS-IV	77	74.3	69.3–79.3
2018	WAIS-IV	78	75.15	70.15–80.15
2018	SB-5	84	79.6	74.6–84.6

Pet.App.22a.[1] Even with generous adjustments, Ferguson plainly did not show his IQ to be 70 or below by a preponderance of the evidence. *See id.* at 27a-29a. Yet he asks this Court to declare that his Flynn-adjusted 74.3 (± 5) is "automatically" enough. Pet.17.

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[1] The table on Pet.App.22a includes two other test scores that the court below did "not address" because they were "properly discredited … based on malingering," a finding Ferguson does not challenge in his certiorari petition. *Id.* at 26a-27a & n.9.

The Court should decline. Ferguson's exception to the default burden would upend the law of most States and eviscerate their discretion to "develop[] appropriate ways to enforce" the evolving standard of *Atkins v. Virginia*, 536 U.S. 304, 317 (2003). On Ferguson's view, one single score can trump *any number* of test scores well above 70. That is not the law or the science. If a State cannot treat a single "IQ score as final and conclusive evidence," neither can a claimant. *Moore v. Texas*, 581 U.S. 1, 15 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 712 (2014)).

This Court has not said that *Atkins*'s first prong is satisfied whenever a claimant's lowest IQ score, minus five, reaches 70. But if that is what *Hall* and *Moore* require, then the Court should grant the petition for certiorari in *Hamm v. Smith*, No. 23-167 (filed Aug. 17, 2023), to clarify that courts may consider multiple scores and need not presume that an offender's true IQ lies at the bottom of a score's error range. *Smith* is a better vehicle because the facts are largely undisputed, leaving a purely legal question. To decide Ferguson's claim would mean resolving or ignoring difficulties with the Flynn effect, the SEM of ± 5, and the age when his deficits manifested. If the Court does not grant certiorari in *Smith*, then *a fortiori* it ought not review this more complex case with multiple alternative grounds for affirmance.

Because Ferguson lost on prongs one and two, relief on his second question alone would be futile. And even if the Court were to grant certiorari on the first question, it should not grant the second because the Eleventh Circuit never addressed the issue. Finally, the district court was right to require a showing that Ferguson *is* intellectually disabled.

STATEMENT

A. Ferguson Murders Harold and Joey Pugh and Receives a Sentence of Death.

Harold Pugh and his 11-year-old son Joey were "avid fishermen." *Ferguson v. State*, 814 So. 2d 925, 934 (Ala. Crim. App. 2000). On July 21, 1997, they went out on their boat, and Harold left his truck back at the boat ramp. *Id.* at 935. Meanwhile, Ferguson and his friends had been planning to rob a bank, and they needed a getaway car. Pet.App.6a. Armed with pistols, the five robbers spotted Harold's truck and waited as Harold and Joey returned to shore. *Id.* Pointing his gun at the Pughs, Ferguson and his co-defendant Craig Maxwell got in the boat and forced them back out onto the water. *Ferguson*, 814 So. 2d at 934-37. There, Ferguson and Maxwell shot the man in the head, shot the boy in the head, and left their bodies in the creek. *Id.* The robbers took the victim's truck and used it to steal $40,000 from a bank. *Id.* A jury found Ferguson guilty on four counts of capital murder. Pet.App.5a-6a.

At sentencing, Ferguson raised his low IQ as a mitigating circumstance. In support, Ferguson introduced the testimony of clinical psychologist Dr. James Chudy. Pet.App.6a. Ferguson's expert concluded that although "Ferguson's IQ was likely in the borderline range," he "was not intellectually disabled." *Id.* Ferguson's wife testified as well, opining that Ferguson was "slow" but that he maintained employment during most of their marriage. *Id.* The State called its own clinical psychologist, who had examined Ferguson and agreed that he was not intellectually disabled. *Id.* at 7a-8a.

Finding that Ferguson could "appreciate the criminality of his conduct," yet refused "to reflect and withdraw from his actions," the court sentenced him to death. Pet.App.203a. Ferguson appealed to the Alabama Court of Criminal Appeals, arguing, among other things, that the court erred by not "finding as a nonstatutory mitigation circumstance that Ferguson was mentally retarded." *Ferguson*, 814 So. 2d at 965. The Alabama Court of Criminal Appeals rejected that argument because "no evidence in the record" supported the claim that he was "mentally retarded." *Id.* The Alabama Supreme Court affirmed, *Ex parte Ferguson*, 814 So. 2d 970 (Ala. 2001), and this Court denied Ferguson's petition for a writ of certiorari, *Ferguson v. Alabama*, 535 U.S. 907 (2002).

B. Ferguson Fails to Prove His *Atkins* Claim in State Postconviction Proceedings.

In 2003, Ferguson filed a postconviction petition in state court arguing that under *Atkins* the State could not execute him because he was intellectually disabled. Pet.App.10a. To try to prove the first prong of his *Atkins* claim, Ferguson relied on two (of his four) IQ scores; he had scored a 71 in middle school and a 69 while awaiting trial for the murders, *Id.* at 10a-11a. But the court stressed that Ferguson "often gave up easily on those tests" and that "the expert opinions both concluded that Ferguson was not intellectually disabled." Pet.App.12a. Thus, the state court found that his IQ was "best classified as borderline to low average." *Id.* As to the second prong, the court found that Ferguson had "a high level of adaptive functioning," evidenced by his "work history," "relationships," and conduct "during and after"

the murders. *Id.* The state trial court rejected Ferguson's *Atkins* claim and denied his petition.

On appeal, the Alabama Court of Criminal Appeals affirmed after concluding that it was "clear" that Ferguson did not satisfy "the most liberal definition" of being intellectually disabled. *Ferguson v. State*, 13 So. 3d 418, 436 (Ala. Crim. App. 2008). The Supreme Court of Alabama denied Ferguson's petition for certiorari. Pet.App.16a.

C. Ferguson Receives an Evidentiary Hearing in Federal District Court But Still Fails to Prove His *Atkins* Claim.

Ferguson filed a federal habeas petition in 2009. Pet.App.16a. He again raised an *Atkins* claim, and the district court held an evidentiary hearing in 2019. *Id.* at 17a. Both sides presented experts to analyze whether Ferguson was intellectually disabled. The court "also heard about Ferguson's prior IQ scores, received prior expert reports about [his] intellectual disability, and reviewed Ferguson's school reports, which included prior IQ testing." *Id.*

1. Ferguson presented seven IQ scores, but the district court discredited two of them for malingering. First, Ferguson scored a 71 on the WISC-R when he was about 12 years old. Pet.App.51a-52a. But the examiner had noted that while Ferguson did not seem "challenged by the more difficult items on the test," he "gave up easily on both the verbal and nonverbal items." *Id.* (Three years later, Ferguson would score an 87 on the very same test. *Id.* at 52a-53a.) Second, Ferguson scored a 69 on the WAIS-R in the lead up to his murder trial. *Id.* at 53a-54a. But the examiner was "certain" that Ferguson "did not at-

tempt to make a good effort" and thought that Ferguson's functioning was in "the higher portion of the borderline range." *Id.* at 54a.

Excluding the two tests on which he malingered, Pet.App.76a-80a, Ferguson presented five valid IQ scores: 77, 87, 77, 85, and 84. But the district court made a variety of downward adjustments.

First, the district court applied the Flynn effect, the "controversial theory involving the inflation of IQ scores over time." *Dunn v. Reeves*, 141 S. Ct. 2405, 2408 (2021). Named after New Zealand-based political theorist James Flynn, the theory posits that IQ test scores have steadily increased over time.

If true, the Flynn effect is problematic for IQ measurement because IQ tests are "relative" by design; they compare the test-taker's performance to an earlier "standardization sample." Pet.App.68a-69a. But the theory expects, for example, that someone taking a 2014 IQ test today would score 3 points higher than if he had taken the same test in 2014. According to the theory, that 3-point gain would reflect only the relative weakness of the 2014 population; it would say nothing about the test-taker's ability relative to the population today. *Id.* By analogy, "while a runner's time may have won a track meet twenty years ago, the same time may not even qualify for a meet today." *Id.*

To compare a test-taker against the general population at the time of testing, adherents of the Flynn effect suggest that an IQ score must be adjusted downward 0.3 points per year from the date the test was administered to the date it was normed. Pet.App.67a-71a & n.63. Having previously adjusted

another habeas petitioner's scores, the district court reduced Ferguson's too. *Id.* at 69a.[2]

Second, the district court reduced Ferguson's second-highest score, an 85 on the WAIS-IV, due to a "practice effect." Pet.App.72a-73a. According to the court, if the same IQ test is taken twice within a short period, the second score "can be inflated." *Id.* at 72a. In a study of 54 test-takers, a second administration of WAIS-IV within three-to-six months resulted in an average IQ score increase of 7 points. *Id.* at 73a. Ferguson had taken the WAIS-IV five months prior, so the district court reduced his score of 85 to 78. *Id.*[3] Notably, the State's expert administered the SB-5 around the same time, and Ferguson scored an 84 on that test (despite the absence of a practice effect). Pet.App.72a-73a.[4]

Third, the district court applied the standard error of measurement (SEM). Each test has an average or overall SEM across test-takers, which reflects the

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[2] According to the court below, the district court miscalculated the Flynn effect, but Ferguson did not raise the errors, which made no "difference [to the] ultimate decision." *Id.* at 21a n.5.

[3] The petition incorrectly states that the district court adjusted his 2018 score on the WAIS-IV "down by 5 points." Pet.13.

[4] In its order, the district court also reduced Ferguson's SB-5 score, but that court and the Eleventh Circuit later acknowledged that the adjustment was mistaken. *Id.* at 21a n.5.

test's reliability. Generally, adding and subtracting one SEM from a score yields a 68% confidence interval (CI), and using 1.96 SEMs yields a 95% CI. *See* Pet.App.50. Citing *Hall*, the court stated that the SEM "accounts for a margin of error of five points," *id.*, and converted Ferguson's scores accordingly.

In sum, the district court considered the following IQ scores, adjustments, and ranges:

Test Date	**Test Given**	**IQ Score**	**Flynn-Adjusted**	**Adjusted Score ± 5**
1979	SB-3	77	75.2	70.2–80.2
1985	*WISC-R*	*71**	*67.7*	*62.7–72.7*
1988	WISC-R	87	82.2	77.2–87.2
1997	*WAIS-R*	*69**	*64.2*	*59.2–69.2*
2017	WAIS-IV	77	74.3	69.3–79.3**
2018	WAIS-IV	78†	75.15	70.15–80.15
2018	SB-5	84	79.6	74.6–84.6

See Pet.App.75a-76a.

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* The court discredited these scores based on malingering.

** Ferguson incorrectly lists his score range for the 2017 WAIS-IV as 68.9-78.9. *Compare* Pet.13 *with* Pet.App.27a-28a, 80a.

† The court reduced this score from 85 based on a practice effect.

Ferguson argued that he satisfied the first prong "because *most of his IQ scores* fall within the clinically established range for intellectual functioning deficits" and "the *totality of his IQ test results* show that his intelligence is significantly subaverage." Pet.App.74a. (cleaned up; emphasis added). Based on the scores above, the district court had no trouble rejecting Ferguson's argument. Although it is "*possible*" that Ferguson is intellectually disabled, "it is more likely that [his] true IQ score is above 70." *Id.* at 79a-81a. The court concluded that Ferguson had not shown that he "suffers from *significantly* subaverage intellectual functioning." *Id.* at 81a.

2. Although Ferguson's claim failed at the first prong, the district court also considered whether Ferguson had significant limitations in adaptive behavior. Pet.App.82a. Canvassing the evidence, the district court characterized Ferguson's academic record as a "mixed bag." *Id.* at 94a. In high school, Ferguson moved up from the "mentally handicapped" class to the "learning disabled" class, in which he earned As in Math, History, English, and Science. *Id.* at 93a-94a. In all, Ferguson's grades gave "more support for the State's position." *Id.* at 95a. Additionally, the court found that Ferguson could read at a 9.5 grade level, spell at a 7.5 grade level, and do math at a 6.1 grade level. *Id.* Agreeing with the State's expert Dr. Glen King, the district court noted that performance at such levels is "not consistent" with intellectual disability. *Id.*

The district court also determined that Ferguson had not shown "substantial *present* limitation[s]" in adaptive behavior. Pet.App.103a (quoting *Jenkins v. Comm'r, Alabama Dep't of Corr.*, 936 F.3d 1252, 1278

(11th Cir. 2019), *vacated and superseded*, 963 F.3d 1248 (11th Cir. 2020)). Ferguson's evidence amounted to an interview with his mother about his childhood in the 1980s (despite that she was estranged and not living with him by the time he was 18), as well as Ferguson's school records. Pet.App.89a, 103a-104a. While the evidence addressed his abilities "decades ago," there was "little evidence" that he "*presently* suffers from substantial deficits in any area of adaptive functioning." *Id.* at 103a-104a. The district court concluded that Ferguson had failed to show either prong one or two "by a preponderance of the evidence." *Id.* at 104a.

D. The Eleventh Circuit Unanimously Affirms.

On appeal, Ferguson argued that "the district court clearly erred in finding him not intellectually disabled." Pet.App.24a. First, he maintained that "when considering all his IQ scores, including when adjusted for the Flynn Effect and after the SEM has been applied, he has significantly subaverage intellectual functioning." Pet.App.26a. Second, he claimed the district court erred by requiring him to show that he was presently suffering from substantial deficits in adaptive functioning. Pet.App.24a.

The Eleventh Circuit disposed of Ferguson's claim on the first prong, determining that "Ferguson at no point had subaverage intellectual functioning," so it did not need to address his alleged adaptive deficits, nor the purported error about the timing of them. Pet.App.25a-26a.

The Eleventh Circuit noted that "all but two of Ferguson's IQ scores were above 70," and it found no

clear error in the district court's decision to "discount[]" the two lowest scores. Pet.App.26-27a. Indeed, "the district court properly discredited those IQ scores based on malingering." *Id.* at 27a n.9. Of the remaining five scores, only one had an error range (± 5) dipping below 70, and even then, the bottom of the range was 69.3 "after being adjusted for the Flynn Effect." *Id.* at 27a-28a. The Eleventh Circuit also evaluated the expert testimony: It was "plausible in light of the record" for the district court to credit the assessment of the State's expert over that of Ferguson's expert. *Id.* at 28a. Accordingly, the Eleventh Circuit affirmed because "the district court's finding that Ferguson is not intellectually disabled" was not "clearly erroneous." *Id.* at 29a.

REASONS TO DENY THE PETITION

I. The Decision Below Is Correct Because Ferguson's IQ Is Plainly Higher Than 70.

First and foremost, an *Atkins* claimant must show "significantly subaverage intellectual functioning," which means "an IQ of 70 or below." *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002); *see also* Am. Psych. Ass'n, Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013) (hereinafter DSM-5). In postconviction proceedings in Alabama, the petitioner must prove his entitlement to relief "by a preponderance of the evidence." Ala. R. Crim. P. 32.3. Ferguson's petition does not contest the definition of "significantly subaverage intellectual functioning" or his burden of proof. Thus, he concedes that he is not entitled to relief unless he has shown by a preponderance of the evidence that his IQ is 70 or below.

A. The Preponderance of the Evidence, Including All Five Valid IQ Scores, Shows That Ferguson Failed to Meet His Burden.

There is no error here—let alone one that would justify this Court's intervention. The courts below properly understood Ferguson's burden and applied the law to the facts. Because the possibility that Ferguson has an IQ of 70 or below is almost zero, he is not intellectually disabled and not entitled to relief.

The record contains seven IQ scores, two of which were excluded because Ferguson malingered—a finding and conclusion that his petition does not dispute. The remaining five scores are 87, 84, 78, 77, and 77. Pet.App.22a. Ferguson also does not dispute the validity of these five scores, which plainly prove that his IQ is higher than 70.

Even if Ferguson's scores must be adjusted to account for the Flynn effect—a proposition he has not proven and that was left open by the court below—he still has not carried his burden. Ferguson's Flynn-adjusted scores are 82.2, 79.6, 75.2, 75.15, and 74.3. Pet.App.22a. Again, Ferguson has no argument that these scores prove a greater than 50% likelihood that Ferguson's IQ is 70 or below.

While it's possible that Ferguson's five valid IQ scores were inaccurate, Ferguson has offered no reason to believe that the tests overestimated rather than underestimated his actual IQ. The SEM is no help to Ferguson unless he can show that error is asymmetrically distributed. He hasn't. Thus, if the proper SEM for his score of 78 is ± 5, then his true IQ (based on that 78 alone) is just as likely to be 79 as it

is to be 77, just as likely to be 83 as 73, etc. Representing a score as a range does not move the needle.

The reliability of modern IQ tests is confirmed, not undermined, by their SEMs. As the Court recited in *Hall*, "the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points." 572 U.S. at 713-14 (quoting Br. of Am. Psych. Ass'n et al. as *Amici Curiae* at 23); *see also id.* at 740 (Alito, J., dissenting). These are not wide ranges.

Applying the actual average SEMs (instead of a rough ± 5) to Ferguson's scores does not even create the appearance that his true IQ might be below 70. For example, Ferguson's Flynn-adjusted score of 79.6 on the SB-5 yields a 68% confidence interval (± 1 SEM) of 77.3 to 81.9 and a 95% confidence interval (± 1.96 SEMs) of 75.09 to 84.11. Similarly, Ferguson's 2017 score on the WAIS-IV—his lowest Flynn-adjusted score—yields a 68% CI of 72.14 to 76.46 and a 95% CI of 70.07 to 78.53. The odds are quite slim that Ferguson's true IQ score lies below 70.[5]

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[5] Strictly speaking, the 95% CI does not represent a 95% chance that Ferguson's true IQ score lies within the interval. It means that 95% of CIs generated in a similar manner (*i.e.*, via repeated independent tests) would contain Ferguson's true score. To infer a probability distribution from an observed score, one

Even on the erroneous assumption that ± 5 is the proper interval for *every* IQ test, Ferguson has just one Flynn-adjusted score with a range reaching 70 or below. On that assumption, his 2017 WAIS-IV score would yield a range of 69.3 to 79.3. Still, Ferguson has offered no evidence that his true IQ more likely falls between 69.3 and 70 than between 70 and 79.3. *See* Pet.App.81a. If measurement error is symmetrically distributed, the opposite is almost certainly true (because the larger segment includes a mirror image of the smaller one). And if error is normally distributed,[6] it is *much* more likely that his true IQ

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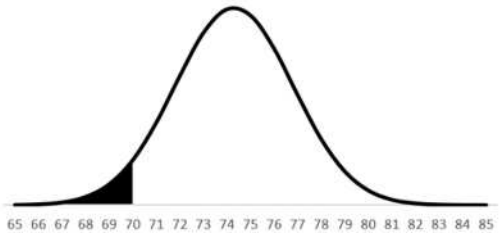
could calculate the standard error of estimate (SEE) rather than the SEM. *See, e.g.*, Richard A. Charter & Leonard S. Feldt, *The Importance of Reliability as It Relates to True Score Confidence Intervals*, 35 Measurement & Evaluation Counseling & Development 104, 105-07 (2002); Richard A. Charter & Leonard S. Feldt, *Confidence Intervals for True Scores: Is There A Correct Approach?*, 19 J. Psychoeduc. Assessment 350, 353, 359-60, 362-63 (2001) (hereinafter *Confidence*); Br. of the Crim. Just. Legal Found. as *Amicus Curiae* at 13-15, *Hall v. Florida*, No. 12-10882 (filed Feb. 3, 2014) (citing Leo M. Harvill, *Standard Error of Measurement*, 10 Educ. Measurement 33 (1991)).

[6] *See, e.g.*, Charter & Feldt, *Confidence*, *supra* at 359; Mary J. Allen & Wendy M. Yen, Introduction to Measurement Theory 88-91 (2001); W. Joel Schneider, *Statistical and Clinical Interpretation Guidelines for School Neuropsychological Assessment* 164-67, in Daniel C. Miller et al., *Best Practices in School Neuropsychology: Guidelines for Effective Practice, Assessment, and Evidence-Based Intervention* (2d ed. 2022).

lies somewhere closer to the measurement (74.3) than to the either of the tails:



Ferguson does not have even "one valid IQ score that suggests intellectual deficit," Pet.16, and the record as a whole strongly refutes that possibility. Even Flynn-adjusted, his five test scores are 82.2, 79.6, 75.2, 75.15, and 74.3. As the State's expert testified, Pet.App.58a-61a & n.47, the conjunction of these five tests provides a more reliable estimate of Ferguson's IQ than one test alone. "In technical terms, because the SEM for a single score is greater than the standard error of the average of several scores, using the single-score SEM as a measure of the probable error in the average score would be a mistake." David H. Kaye, *Deadly statistics: quantifying an 'unacceptable risk' in capital punishment*, 16 Law, Probability, & Risk 7, 29 (2017). For example, one author illustrated how the average of four scores with a SEM of ± 2.16 (*e.g.*, the WAIS-IV) produces an error range of ± 0.73. *See id.* at 29 n.142.

Ferguson's Flynn-adjusted average score across five tests is 77.29. Even if it were correct to assume a SEM of ± 5 for each individual score, the error range for the average of five scores is much smaller. It is thus highly likely that Ferguson's IQ is greater than 70, as the State's expert testified and the court below found "plausible in light of the record evidence viewed in its entirety." Pet.App.28a-29a.

B. It Is Wrong to Consider Only Whether the Lowest IQ Score, Adjusted Downward by 2+ SEMs, Is 70 or Below.

Because there is no way to manipulate Ferguson's scores to produce a likely IQ of 70 or below, the petition argues that he's entitled to a much lighter burden. On Ferguson's view, prong one is satisfied whenever "a single valid IQ test score ranges below 70" after "adjust[ment]" and "accounting for the SEM." Pet.20. On the State's view, Ferguson must show that his true IQ is 70 or below by a preponderance of the evidence. While some courts have adopted Ferguson's view, Pet.16-19, the Eleventh Circuit found itself on the right side of the circuit split in this case. Ferguson's position is wrong as a matter of constitutional law and "the medical community's diagnostic framework," *Hall*, 572 U.S. at 720.

1. There is no national consensus in Ferguson's favor, and the first question presented remains committed to State discretion. This Court's *Atkins* jurisprudence has attempted to adhere to "the clearest and most reliable objective evidence of contemporary values," which is "the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (cleaned up); *see also Hall*, 572 U.S. at 710 ("[H]ow the legislative policies of various States, and the holdings of state courts, implement the *Atkins* rule … informs our determination whether there is a consensus that instructs how to decide the specific issue presented here.").

Ferguson offers no argument about state law, much less evidence of a national consensus. There is no groundswell of State policy declaring prong one satisfied by any single score range reaching 70. To

the contrary, as Ferguson admits, Pet.19, fourteen other States recently criticized his position on the first prong. *See* Br. of Idaho and 13 Other States as *Amici Curiae*, *Hamm v. Smith*, No. 23-167 (filed Sept. 20, 2023). His is not a national view. And when federal courts of appeals take the route Ferguson suggests, they invoke *Atkins* and its progeny, not state law. *See, e.g.*, *Jackson v. Payne*, 9 F.4th 646, 651 (8th Cir. 2021) (citing *Hall* and *Moore* and construing Arkansas law "to be concurrent with … *Atkins*"); *Sasser v. Payne*, 999 F.3d 609, 619 (8th Cir. 2021) (applying *Moore*); *Ochoa v. Davis*, 50 F.4th 865, 903 (9th Cir. 2022) (applying *Hall*).

This Court "le[ft] to the State[s] the task of developing appropriate ways to enforce" the *Atkins* protection. 536 U.S. at 317 (citation omitted). Like "most States," Alabama "require[s] defendants to prove each prong separately by a preponderance of the evidence." *Hall*, 572 at 735 n.12 (Alito, J., dissenting); *see also Raulerson v. Warden*, 928 F.3d 987, 1013-14 & n.2 (11th Cir. 2019) (Jordan, J., dissenting).[7] The legal standard comports with the

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[7] According to Judge Jordan, 19 of 25 States that "currently enforce the death penalty" apply a preponderance-of-the-evidence standard. *Id.* Two States apply a clear-and-convincing-evidence standard, one applies a beyond-a-reasonable-doubt standard, and three have no specific standard. *Id.*

diagnostic criteria and the default burden for post-conviction relief in Alabama. *See* DSM-5 at 33 ("The following three criteria must be met…"); Ala. R. Crim. P. 32.3 ("The petitioner shall have the burden of … proving by a preponderance of the evidence the facts necessary [for] … relief.").

But according to Ferguson, the Cruel and Unusual Punishments Clause relieves him of his burden. It would be unconstitutional to require more than a single adjusted IQ score within five points of 70. On this view, the *likelihood* of Ferguson having an IQ of 70 or below is irrelevant. The State could present dozens of tests above the mark, and it would not matter. Of course, that makes no sense in our adversarial system; typically, claimants must prove their claims to some degree of certainty.

2. Ferguson's position warps the medical definition of intellectual disability. The first criterion, according to the DSM-5, is "[d]eficits in intellectual functions … confirmed by both clinical assessment and individualized, standardized intelligence testing." DSM-5 at 33. From that text, Ferguson gathers that "medical professionals" must "consider IQ scores alongside other evidence." Pet.21. But that's true only to diagnose intellectual disability, not to rule it out. By the plain text of the manual, failure to confirm intellectual deficits by *either* clinical assessment *or* standardized testing would end the inquiry. DSM-5 at 33. On Ferguson's view, intellectual disability could not be ruled out even for someone who repeatedly scores 130. That misreads the DSM.

The petition purports to apply "prevailing clinical standards," Pet.19, but in doing so, it constructs a strawman of the decision below. Ferguson asks,

"Whether a court … may disregard a valid IQ test with a range under 70 simply because not all of the tests available show such a range…." Pet.i. But that does not describe what the Eleventh Circuit did. The court recounted and weighed together all five of his scores and their ranges. *See* Pet.App.22a, 26a-29a. In doing so, the court identified no clear error in the district court's exhaustive analysis, *see* Pet.App.51a-81a. Ferguson does not cite anywhere in the record where either court "disregard[ed]" his Flynn-adjusted score of 74.3. Pet.i.

Because Ferguson attacks a strawman, his evidence of a "medical consensus" is largely inapposite. Pet.19. For instance, he states that one "can be intellectually disabled despite receiving one or more valid IQ scores above the recognized range." Pet.21 (citing DSM-5 at 37). But that fact, whether it reflects consensus or not, makes no difference here because *all* of Ferguson's scores lie above the threshold of 70. And even after multiple adjustments, only one range out of five scratches the 60s. It is Ferguson's position, not the State's, which depends on a single score.

Nor do the "medical standards" support the lowest-score-minus-five rule that Ferguson demands. Pet.21. His sources, the AAIDD-11 and DSM-5, do *not* suggest that a proper diagnosis is rendered by pinpointing the worst score—let alone the worst score shifted down by 2+ SEMs. *See Moore*, 581 U.S. at 13-15; *Hall*, 572 U.S. at 712 (explaining that it is not "established medical practice" to rely on one test score). At best for Ferguson, the DSM-5 states that "clinical judgment is needed in interpreting the results of IQ tests." DSM-5 at 37. But the courts below *did* rely upon clinical judgments—the testimony of

psychologists who assessed Ferguson. And the courts "credited Dr. King's testimony over [that of] Dr. Shaffer," which was "plausible in light of the record." Pet.App.28a. If the constitutional standard is just the "prevailing medical standard[]," Pet.21, then Ferguson's claim was properly denied.

3. This Court's precedents do not dictate a different outcome. Ferguson's position relies on the following language, which has caused great uncertainty in the lower courts:

> Moore's score of 74, adjusted for the [SEM], yields a range of 69 to 79, as the State's retained expert acknowledged. Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning. … Texas and the dissent maintain that the CCA properly considered factors unique to Moore in disregarding the lower end of the standard-error range. But the presence of other sources of imprecision … cannot *narrow* the test-specific [SEM] range.

581 U.S. at 14 (citations omitted). In this passage, the Court *appeared* to focus on the bottom of the range yielded by the offender's lowest IQ score. But even if the Court implicitly applied the kind of rule that Ferguson suggests, the logic underlying *Hall* and *Moore* supports the State's position.

First, *Hall* taught not to treat a single score "as final and conclusive," 572 U.S. at 712, but that is just what Ferguson's lowest-score rule would have courts do. If IQ scores are "imprecise," *id.*, it makes just as

little sense for one score to satisfy prong one as it does for one score to defeat a claim at prong one. *Moore* reiterated that the Eighth Amendment does not "turn[] on the slightest numerical difference in IQ score." 581 U.S. at 15. But if Ferguson's adjusted 74.3 were a 75.1, then he'd have no argument.

Second, the Court has left open how to handle multiple scores and has contemplated that higher scores could affect the analysis. *See Brumfield v. Cain*, 576 U.S. 305, 316 (2015) ("Nor was there evidence of any higher IQ test score that could render the state court's determination reasonable."); *Hall*, 572 U.S. at 714 ("[T]he analysis of multiple IQ scores jointly is a complicated endeavor."); *Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) ("*Hall* also reached no holding as to the evaluation of IQ when an *Atkins* claimant presents multiple scores…."). Ferguson's position would make the presence of multiple scores irrelevant.

Third, the Court explained that "the SEM means that an individual's score is best understood *as a range of scores on either side* of the record score." *Hall*, 572 U.S. at 713 (emphasis added). If the Texas courts were wrong to "disregard[] the lower end of the standard-error range," *Moore*, 581 U.S. at 14, Ferguson is wrong to disregard all but the lowest end. Only the State's position accounts for the full margin of error on either side of a score.

Fourth, though *Hall* noted that two SEMs "generally" means a range of ± 5, the Court also cited the actual average SEM of 2.16 for the WAIS-IV and 2.30 for the SB-5. 572 U.S. at 713-14. And in *Moore*, the Court confirmed that the SEM is a "test-specific" range. 581 U.S. at 14. Consequently, Ferguson's rule,

which would subtract five from every score, is at odds with the science and the facts about these tests.

C. *Hamm v. Smith*, No. 23-167, Is the Better Vehicle To Consider the First Question Presented.

Ferguson correctly identifies an important circuit split over whether courts must "move on" from prong one whenever the offender's lowest IQ score, reduced by five, yields a range that reaches 70 or below. Pet.16-19; *see also* Pet., *Hamm v. Smith*, No. 23-167 (filed Aug. 17, 2023). Some courts rely on the lowest IQ score only; other courts consider all the IQ evidence. Some courts rely on the bottom end of a standard-error range; other courts consider the full margin of error. This issue is worthy of this Court's review, but it is only cleanly presented in *Smith*, not this case. Thus, the Court should grant the State's petition in *Smith* while denying Ferguson's petition. And certainly, if the Court denies review in *Smith*, it should deny Ferguson's petition as well.

First, Ferguson never raised the lowest-score-minus-five rule until his petition for rehearing en banc *after* the Eleventh Circuit's decision against him. Instead, Ferguson argued—and the court understood him to argue—that his "IQ testing … as a whole, demonstrated significantly below average intellectual ability." Appellant's Br. at 40, No. 20-12727 (11th Cir.); Pet.App.26a ("Ferguson argues that when considering all his IQ scores … he has significantly subaverage intellectual functioning."). Ferguson did not argue that the court should focus solely on his lowest score; in fact, he argued just the opposite.

As a result, the decision below did not address the petition's first question presented. In general, this Court has deemed it "unwise to consider arguments in the first instance" that the lower courts "did not have occasion to address." *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018); *see, e.g.*, *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1652 n.4 (2017) ("[Without] a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

In *Smith*, however, the Eleventh Circuit did squarely decide the issue. *See Smith v. Comm'r, Ala. Dep't of Corrs.*, 67 F.4th 1335, 1349 (11th Cir. 2023) ("Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70."). To the extent that there could be distinctions between this case and *Smith* or factors that militate against the *Smith* approach here, Ferguson should have given the Eleventh Circuit the opportunity to say so in the first instance. And if *Hall*, *Moore*, and "medical consensus" require the maneuver he suggests, Pet.19-22, then Ferguson has no excuse for failing to raise it below. He waived the argument and deprived this Court of the benefit of a reasoned decision on the question as it applies to Ferguson's claim.

Second, even if Ferguson had raised the question presented and the Eleventh Circuit had addressed it, the issue would be "better resolved in other litigation where … it would be solely dispositive of the case." *Relford v. Commandant*, 401 U.S. 355, 370 (1971).

Answering the first question presented in Ferguson's favor would not resolve even the first prong of *Atkins* unless the Court wades into several unresolved factual issues.

First is the proper SEM for each test. Ferguson assumes a SEM of ± 5, but his worst test, the WAIS-IV, has a SEM of ± 2.16 (so 1.96 SEMS = ± 4.23). If Ferguson is wrong about the SEM, then he has *no* score with a range reaching 70, which would make his first question immaterial. Thus, to entertain the first question, the Court would awkwardly need to assume ignorance of the proper SEM, despite *Hall*, 572 U.S. at 713 (citing "2.16"), or remand only for Ferguson to lose swiftly. Either scenario makes this an unattractive vehicle.

The second elephant in the room is the Flynn effect. On the Eleventh Circuit's reasoning, it did not need to resolve the applicability of the Flynn effect to reject Ferguson's claim at prong one. *See* Pet.App.27a-29a & n.10. But if Ferguson is correct that a court must consider only whether the lowest score generates a range reaching 70, then the Flynn effect could be dispositive. Ferguson scored a 77 on the WAIS-IV, which (assuming a SEM of ± 5) yields a range of 72-82. At a minimum, Ferguson needs the Flynn effect to reduce that range to 69.3-79.3 in order for his first question to matter.

The outsized role of the Flynn effect makes this case a poor vehicle. The Court would not be able to resolve prong one of Ferguson's *Atkins* claim without addressing the "controversial theory." *Dunn*, 141 S. Ct. at 2408; *see also Raulerson*, 928 F.3d at 1008. Even if *average* IQ scores do change over time, applying the effect to an *individual's* IQ score is highly

complicated. The effect may vary (or disappear) depending on the test. *Ledford v. Warden*, 818 F.3d 600, 629 (11th Cir. 2016). It may vary by population, age, or score range. Lawrence Weiss et al., WAIS-IV Clinical Use and Interpretation: Scientist-Practitioner Perspectives 142-43, 154-55 (1st ed. 2010). And it may slow, stop, or reverse over time. *Id.* at 142-43. Because of its unpredictability and these many variables, "the degree to which group mean score shifts may impact an individual's score is incalculable." Leigh D. Hagan et al., *Science Rather Than Advocacy When Reporting IQ Scores*, 41 Prof. Psychol.: Res. & Prac. 420, 423 (2010) (hereinafter *Science*).[8] Accordingly, a Flynn adjustment is "not used in clinical practice" and rarely seen "outside the context of capital litigation." *Ledford*, 818 F.3d at 629; *accord* Leigh D. Hagan et al., *Adjusting IQ*

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[8] A prominent guide to the WAIS-IV explains that "mean IQ score increases at the country level … are not shared equally by all members … of the population." Weiss, *supra* at 160 (cautioning against the "danger [of] applying group level data to individual practice"); *see also* Xiaobin Zhou et al., *Peeking Inside the 'Black Box' of the Flynn Effect: Evidence from Three Wechsler Instruments*, 28 J. Psychoeduc. Assessment 399, 408 (2010) ("Overall, our findings suggest that the average IQ gain Flynn initially described may only be valid as an aggregated phenomenon."); Hagan, *Science*, *supra* at 421 (The idea "that shifts occur in equal *annual increments* or even in the same direction each year" is supported by "little or no research.").

Scores for the Flynn Effect: Consistent With the Standard of Practice?, 39 Prof. Psychol.: Res. & Prac. 619, 620 (2008).

There is no judicial consensus about whether or how to apply the Flynn effect. *See, e.g.*, *Bean v. State*, No. 69232, 2019 WL 4619533 at *2 n.1 (Nev. Sept. 20, 2019) (collecting cases). And its implications "over a longer period of time are jarring." *Black v. Carpenter*, 866 F.3d 734, 749 (6th Cir. 2017). According to the theory, an average person 100 years ago would be disabled today, and an average person today would be a genius 100 years ago. It "makes little sense," *id.*, and the Court should not grant a case that turns on—but does not squarely present—such a thorny factual dispute.

* * *

The first question presented has divided circuits and is worthy of this Court's review, just not in Ferguson's case, which is a poor vehicle for addressing it. In contrast, *Hamm v. Smith*, No. 23-167, cleanly presents the issue. In that case, the *Atkins* claimant won despite failing to show a likely IQ of 70 or below by a preponderance of the evidence. The *Smith* panel squarely decided the first question presented here when it misconstrued the IQ data and misinterpreted this Court's precedents to require exclusive focus on the lowest score, adjusted downward. *Smith* also lacks the factual wrinkles present here because the Eleventh Circuit did not rely on the Flynn effect or a SEM of ± 5. Thus, *Smith* is the more straightforward vehicle for reviewing and solving the problem. And, absent review, the State will be barred from enforcing a just and lawful sentence against a man who is not intellectually disabled.

II. The Second Question Presented Does Not Warrant Certiorari Review.

A. The Second Question Is Not Dispositive of Ferguson's Claim or Even Prong Two, and It Was Unaddressed by the Court Below.

Because Ferguson lost on prong one, his question solely concerning prong two does not "independently warrant[] this Court's review." Pet.22. Even if this Court were to agree with Ferguson about the proper standard for evaluating adaptive deficits, the courts below would still deny habeas relief because Ferguson failed to show significantly subaverage intellectual functioning. Unless the Court grants certiorari as to the first question too, Ferguson would have no "injury 'fairly traceable to the *judgment below*'" and no "cognizable Article III stake." *West Virginia v. EPA*, 142 S. Ct. 2587, 2606 (2022).

Even in conjunction with the first question, the second would not merit review because the Eleventh Circuit did not pass upon the issue. Deciding on prong one only, the court below stated that it "need not address whether requiring *present* significant deficits in adaptive functioning runs afoul of *Atkins*." Pet.App.25a-26a. For the reasons discussed above, *supra* § I.C, the Court does not ordinarily grant certiorari to review an issue not addressed by the court below. Ferguson does not even identify another decision of the Eleventh Circuit squarely deciding the issue. The supposedly "rogue precedent" is a 2007 decision of the Alabama Supreme Court. *See* Pet.22-24. If that decision was unconstitutional, the Eleventh Circuit should have the chance to correct it in the normal course.

Further, the petition should be denied because the district court's fact findings preclude relief regardless of the proper test for adaptive deficits. *See Relford*, 401 U.S. at 370. True, the court emphasized Ferguson's failure to show "present" deficits, but it issued findings about his past deficits too. For example, the court emphasized that in 1989, "Ferguson's academic performance … improved *significantly*." Pet.App.94a. Ferguson moved out of the "mentally handicapped" class and into the "learning disabled" class where he earned As in Math, History, English, and Science. *Id.* at 93a-94a. Though his school record was a "mixed bag," it gave "more support for the State's position." *Id.* at 94a-95a. Additionally, the State rebutted Ferguson's academic performance with other evidence that Ferguson could read, spell, and perform math at grade levels "not consistent" with intellectual disability. *Id.* From the State's present-day evidence, the court could infer that Ferguson was not intellectually disabled at any earlier time. Thus, even under Ferguson's preferred test, the record does not show that Ferguson has satisfied his burden. This case is a poor vehicle because the proposed rule would not make a difference.

B. The District Court Correctly Held That Ferguson Must Show He *Is* Intellectually Disabled.

Nothing in this Court's *Atkins* jurisprudence prevents States from requiring evidence of present deficits in adaptive functioning. In fact, the permanence of such deficits is inherent to the concept of intellectual disability. According to one definition cited by this Court, "*[m]ental retardation* refers to substantial limitations in present functioning." *At-*

kins, 536 U.S. at 309 n.3 (quoting Ruth Luckasson, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992)). Some definitions include the "present" qualifier; others do not. As the petition admits, Pet.23, 25, States have exercised their discretion under *Atkins* to adopt a great variety of definitions.

The State's position is supported by Ferguson's implicit concession that the *first* prong may involve or require proof of present deficits. Ferguson relies heavily on evidence of his *present* IQ—*viz.*, a 2017 test score. Under common definitions of intellectual disability, Ferguson must show that his low IQ "exist[s] concurrently" or is "accompanied" by adaptive deficits. *Atkins*, 536 U.S. at 309 n.3; *see also* DSM-5 at 38. Ergo, if he has shown (or must show) a present prong-one deficit, he must also show a present prong-two deficit.

Moreover, Ferguson's position would require courts to rely solely on evidence about his functioning from "over 20 years" before "his *Atkins* hearing." Pet.26. Ferguson would have the court prioritize, for instance, the testimony of his mother about how he behaved in the 1980s. *See* Pet.App.89a. In some cases, the distance in time could be even larger.

Ferguson's citations to *Moore* and *Moore II* do not advance his position. In those cases, the Court chastised the Texas Court of Criminal Appeals for emphasizing adaptive strengths that Moore developed in prison, rather than focusing on his deficits. *See Moore v. Texas*, 139 S. Ct. 666, 668-71 (2019) (*Moore II*), 671; *Moore*, 581 U.S. at 15-16. The Court did note that prison is "a controlled setting," so evidence about behavior in prison should be

corroborated. *Moore*, 581 U.S. at 16; *see also Moore II,* 139 S. Ct. at 671 (courts ought not "rel[y] heavily" upon such evidence). But those observations about the weight of certain evidence did not change the *legal standard* to ask *only* whether adaptive deficits were present at some time in the past. To the contrary, the Court acknowledged that present-day evidence "is relevant" to the second prong. *Moore II,* 139 S. Ct. at 671.

Again, *Atkins* left to States the discretion to choose "appropriate ways to enforce" the Eighth Amendment right. 536 U.S. at 317. Alabama's present-deficit requirement is appropriate. It has support in the definitions cited by *Atkins*, and it accords with the familiar practice of showing intellectual functioning by present-day IQ testing. The second question presented is not worthy of this Court's review.

CONCLUSION

The Court should deny the petition.

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January 12, 2024