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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent concedes that the first question presented "is worthy of this Court's review" because the circuits are split on "whether courts must 'move on' from prong one" of the *Atkins* analysis "whenever the offender's lowest IQ score * * * reaches 70 or below" after adjustments. Opp. 22. Indeed, Respondent is currently seeking certiorari to resolve the very same circuit split. *See Commissioner* v. *Smith*, *petition for cert. filed*, No. 23-167 (Aug. 17, 2023).

The second question presented also merits review. The district court required Petitioner to show a *present* adaptive functioning deficit—a rule enunciated by the Alabama Supreme Court in *Smith* v. *State*, 213 So. 3d 239 (Ala. 2007). Although the Eleventh Circuit did not address the district court's adoption of that rule in this case, Respondent cannot dispute that the rule stands alone, with the Eighth and Ninth Circuits rejecting it and no other court or legislature adopting it. And although Respondent argues that the Eleventh Circuit should get the first crack at examining *Smith* v. *State*'s present-deficit requirement, the Eleventh Circuit has already done so in previous cases. Review is thus warranted on this question as well.

Respondent cannot deny that granting review here would enable the Court to resolve both questions, which for Petitioner would spell the difference between death and life. Instead, Respondent raises factual issues and other arguments that go to the merits of Petitioner's case. These arguments are incorrect and, if anything, underscore the compelling need for the Court to clarify the law in this critical area. The Court should grant review in this case—or, at a minimum,

hold this case pending a merits decision in *Commissioner* v. *Smith*.

ARGUMENT

I. The Opposition concedes that this Court should grant certiorari on the first question presented, and its factual arguments do not stand in the way of doing so in this case.

A. The Court can and should use the instant case to resolve the first question.

Along with the attorneys general of fourteen other States, Respondent agrees that the Petition "correctly identifies an important circuit split over whether courts must 'move on' from [*Atkins*'s] prong one whenever the offender's lowest IQ score * * * reaches 70 or below." Opp. 22. The Fifth, Eighth, and Ninth Circuits have held that a single adjusted IQ score below 70 requires the court to go on to consider adaptive functioning. *See Garcia* v. *Stephens*, 757 F.3d 220, 226 (5th Cir. 2014); *Jackson* v. *Payne*, 9 F.4th 646, 655 (8th Cir. 2021); *Sasser* v. *Payne*, 999 F.3d 609, 619 (8th Cir. 2021); *Ochoa* v. *Davis*, 50 F.4th 865, 903 (9th Cir. 2022). In contrast, the Panel below joined the Sixth, Seventh, and Tenth Circuits in holding that a single adjusted IQ test result below 70 is not enough to require "mov[ing] on" to adaptive functioning. *See Black* v. *Carpenter*, 866 F.3d 734, 750 (6th Cir. 2017); *McManus* v. *Neal*, 779 F.3d 634, 652 (7th Cir. 2015); *Smith* v. *Duckworth*, 824 F.3d 1233, 1244–45 (10th Cir. 2016). Respondent agrees that this circuit split "is worthy of this Court's review." Opp. 22.

Having conceded that the first question is cert-worthy, Respondent argues that *Commissioner* v. *Smith* presents the question more cleanly than the instant case. Not so.

To begin, there is no waiver here. Respondent points out that Petitioner did not raise the first question until his rehearing petition. Opp. 22. But that is because the district court did not err on this issue. Instead, the district court acknowledged that because one of Petitioner's adjusted IQ scores fell below 70, "it is *possible* his IQ falls within the range of intellectual disability." App. 80a. The district court then moved on to consider adaptive functioning. App. 82a. So in his appeal briefs, Petitioner had no need to argue that his IQ scores required evaluation of adaptive functioning. That changed when the Panel held—contrary to this Court's precedents in *Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas* ("*Moore I*"), 581 U.S. 1 (2017)—that a single adjusted IQ score below 70 was *not* enough to require the Court to move on and consider adaptive functioning. App. 25a–26a. Petitioner then promptly challenged that error in his petition for rehearing en banc. Pet. for Panel Reh'g at 18–20, *Ferguson* v. *Commissioner*, No. 20-12727 (11th Cir. July 22, 2020), ECF No. 59. Thus, Petitioner made the argument at the first available opportunity.

Nor is there anything unique about the facts here that would make this case less suitable than *Commissioner* v. *Smith* to resolve the question presented. Respondent points to the fact that the district court found Petitioner to have a sub-70 IQ score only after applying a standard error of measurement ("SEM") and the Flynn Effect.[1] Opp. 24. Thus, Respondent argues,

[1] Despite some rhetoric to the contrary, Respondent concedes that Petitioner has at least one IQ score—from the 2017 WAIS-IV—ranging below 70 after adjusting for the SEM and Flynn Effect. Opp. i, 1, 8, 11, 14, 24.

granting certiorari here would require the Court to address the district court's application of those adjustments below. These arguments miss the mark.

First, just like in this case, the district court in *Commissioner* v. *Smith* adjusted the defendant's raw IQ scores based on the SEM. 67 F.4th 1335, 1345 (11th Cir. 2023). Like Petitioner, the defendant in *Commissioner* v. *Smith* would have had no scores below 70 *without* that adjustment. In this respect, the cases are identical.

Second, the Court need not address the appropriateness of recognizing the Flynn Effect in this case because Respondent never argued below that the district court erred in considering it. In the Eleventh Circuit, application of the Flynn Effect is committed to the district court's discretion: the court "*may* consider" the Flynn Effect "in assessing an offender's possible intellectual disability," but it need not do so. App. 28a n.10 (collecting cases). Yet Respondent never challenged the Eleventh Circuit's grant of that discretion or the district court's exercise of that discretion below. Those arguments should not be raised in this Court in the first instance—and thus, the Flynn Effect will not interfere with this Court's review of the first question presented. *See Byrd* v. *United States*, 584 U.S. 395, 404 (2018) ("Because this is a court of review, not of first view, it is generally unwise to consider arguments in the first instance[.]" (cleaned up) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005))).

In the most important respect, this case and *Commissioner* v. *Smith* are identical. In both cases, the lower courts found a single *adjusted* IQ score ranging below 70, with the rest ranging higher. App. 22a; *Smith*, 67 F.4th at 1347. The two cases differ only in

that one panel "moved on" to consider adaptive functioning while the other did not. App. 25a–26a; *Commissioner* v. *Smith*, 67 F.4th at 1349. And while both cases are good vehicles for certiorari, this case is better, simply because of the stakes: Petitioner faces execution should this Court deny the Petition.

B. Respondent's merits arguments are misplaced.

Respondent's arguments as to the merits of the Petition fare no better—and are not a basis to deny the Petition in any event. For example, Respondent contends that an *Atkins* claim should not be determined by a single IQ test. *See, e.g.*, Opp. 19, 21. But Petitioner never argued it should. Rather, he contends only that a single adjusted IQ score under 70 requires the court to move on to the next step in the analysis: to consider adaptive functioning. Simply put, no court should "end the intellectual-disability inquiry, one way or the other, based on [Petitioner's] IQ score," once he provides at least one IQ score under 70. *Moore I*, 581 U.S. at 15.

Respondent is also wrong to assert that *Atkins*'s first prong should turn on the "likelihood" that Petitioner's IQ score is above 70, rather than the numerical results of his IQ tests showing a score range below 70. Opp. 12–15. As this Court's precedents make clear, "execution is the most irremediable and unfathomable of penalties." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986). Thus, "this Court has demanded that factfinding procedures [in capital proceedings] aspire to a heightened standard of reliability." *Id.* Respondent's emphasis on likelihood, rather than actual test scores, "creates an unacceptable risk that persons with

intellectual disability will be executed, and thus is unconstitutional." *Hall*, 572 U.S. at 704. And Respondent's proposed "likelihood" requirement would introduce unacceptable variance and unpredictability into the Eighth Amendment. Under Respondent's proposed rule, some courts would consider adaptive functioning and some not, even in cases presenting the same range of IQ scores, because they have differing views on "likelihood." By requiring *all* courts to "move on" *whenever* confronted by a "score range fall[ing] at or below 70," *Moore I* tried to end—not enshrine—the unpredictability advanced by Respondent. *See Moore I*, 581 U.S. at 14; *id.* at 20 ("If the States were to have complete autonomy to define intellectual disability as they wished, we have observed, *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." (cleaned up)); *Hall*, 572 U.S. at 719 ("*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection.").

Nor is Respondent correct to say that Petitioner must demonstrate a "national consensus" or a "groundswell of State policy declaring prong one satisfied by any single score reaching 70." Opp. 16–17. This is an argument against *Moore I*, not the Petition. The Court in *Moore I* held that "the [state court] *had to* move on to consider Moore's adaptive functioning" and that it was "*requiring* the [state court] to move on to consider Moore's adaptive functioning in light of his" single IQ score below 70. 581 U.S. at 14–15 (emphasis added). Nothing in this language suggests that the decision to move on "remains committed to State discretion," as Respondent urges. Opp. 16.

Finally, Respondent is wrong to say this Court "left open how to handle multiple scores" because *Moore I*

only "*appeared* to focus on the bottom of the range yielded by the offender's lowest IQ score." Opp. 20. Denigrating *Moore I*'s holding as mere "appear[ance]" does not make it so. And Respondent's suggestion that *Moore I*'s focus on the lowest IQ score "has caused great uncertainty in the lower courts" is a compelling argument for granting certiorari, not denying it. Opp. 20.

II. Certiorari is also necessary to resolve the disagreement over *present* deficits in adaptive functioning.

A. The fact that the Eleventh Circuit did not decide this issue in this case does not stand in the way of certiorari.

As for the second question presented, Respondent largely misses the point. Respondent contends that this question does "not merit review" because the decision below "did not pass upon" the present-deficit requirement enunciated in *Smith* v. *State*, 213 So. 3d 239 (Ala. 2007), despite the parties' fully briefing it below. *See* Appellant's Br. at 18–23, *Ferguson* v. *Commissioner*, No. 20-12727, ECF No. 24; Appellee's Br. at 22–25, *id.*, ECF No. 33. Although the Eleventh Circuit sidestepped whether the present-deficit requirement violates *Atkins* in *this* case, it has fully embraced *Smith* v. *State*'s erroneous rule in *earlier* cases. As Respondent argued below, the Eleventh Circuit in *Jenkins* v. *Commissioner*, 963 F.3d 1248, 1277 (11th Cir. 2020) required Petitioner "to prove that he has substantial *present* limitations in his adaptive function-

ing." Appellee's Br. at 38–39, *Ferguson* v. *Commissioner*, No. 20-12727, ECF No. 33 (emphasis added).[2] Indeed, *Jenkins* took the *Smith* v. *State* rule one step further, by disregarding evidence of "childhood academic and social deficits" altogether, under the mistaken view that those childhood deficits were "not directly relevant to [its] consideration of his *present* limitations." *Jenkins*, 963 F.3d at 1278 (emphasis added); *contra Moore I*, 581 U.S. at 7 (intellectual disability finding requires "onset of these deficits *while still a* minor" (emphasis added)). It is hard to imagine a more full-throated endorsement of *Smith* v. *State*'s present-deficit requirement.

Further, there are no factual findings in this case that prevent review of this issue. According to Respondent, the district court "issued findings about [Petitioner's] past deficits" based on his school records—findings that Respondent contends "preclude relief regardless of the proper test for adaptive deficits." Opp. 28. But the district court never made any such findings. Instead, it found that Petitioner's school records "address only his adaptive functioning abilities decades ago, and *not presently*." App. 104a (emphasis added). Thus, the school records did not answer the

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[2] *See also Thomas* v. *Allen*, 607 F.3d 749, 752–53 (11th Cir. 2010) (applying *Smith* v. *State*'s requirement that "a defendant must exhibit significantly subaverage intellectual functioning abilities and significant deficits in adaptive behavior during three periods of his life: before the age of eighteen, on the date of the capital offense, *and currently*" (emphasis added)); *Powell* v. *Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010) (same); *cf*. *Burgess* v. , 723 F.3d 1308, 1321 n.13 (11th Cir. 2013) (noting without criticism that the present-deficit requirement was "an additional element" imposed by *Smith* v. *State*).

critical inquiry, as the district court saw it: whether Petitioner "*presently* suffers from substantial deficits in any area of adaptive functioning." App. 103a. The district court erred when it focused on present deficits to the exclusion of historical deficits. And Respondent's speculation that the district court might reach the same result after applying the correct rule is no reason to deny certiorari, as that risk is present in many cases reviewed by this Court. *See, e.g.*, *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 238 (2007) (remanding after trial court erred in sentencing, even though same sentence may result on remand); *Pepper* v. *United States*, 562 U.S. 476, 486, 507 (2011) (same).

B. Respondent's merits arguments are misplaced.

Respondent cannot defeat certiorari simply by arguing that Petitioner is wrong on the merits of the question. But in any case, the error is on Respondent's side. Respondent contends that nothing in this Court's jurisprudence "prevents States from requiring evidence of present deficits in adaptive functioning." Opp. 28. Not true. *Moore* v. *Texas* ("*Moore II*") counsels *against* focusing on present adaptive deficits, particularly when the capital defendant has been imprisoned for decades. 139 S. Ct. 666, 669 (2019) (considering the "medical community's diagnostic framework" and cautioning against reliance on adaptive strengths developed in prison when making intellectual disability determination); *see also Moore I*, 581 U.S. at 16. While Respondent points to a 1992 source quoted in *Atkins*, Opp. 28–29, the Opposition fails to take on the body of literature cited in the Petition showing the medical consensus that imprisonment prevents any valid measure of present adaptive functioning. Pet. 27–28; *see also Moore I*, 581 U.S. at 16 ("Clinicians,

however, caution against reliance on adaptive strengths developed in a controlled setting, as a prison surely is." (cleaned up)).

Respondent's appeal to superficial symmetry—suggesting that if Petitioner must show "a present prong-one deficit, he must also show a present prong-two deficit"—confuses the nature of intellectual and adaptive functioning. Opp. 29. A person's "true" IQ is fixed, and thus it does not matter when it is tested. *Hall*, 572 U.S. at 713; *Moore I*, 581 U.S. at 13. But adaptive functioning depends on context. *See Hall*, 572 U.S. at 712 (measuring adaptive functioning as a person's "inability to adapt to his social and cultural environment"); *Moore I*, 581 U.S. at 16 (identifying prison as a controlled setting where "adaptive strengths develop[]"); *Moore II*, 139 S. Ct. at 671. Thus, as the medical consensus recognizes, prisoners may appear to show high adaptive functioning where none exists. Pet. 27–28.

Nor is the mere age of the evidence a reason to prefer present adaptive functioning over historical deficits. Opp. 29. *Atkins* is intrinsically backward-looking. As this Court has explained, the "generally accepted, uncontroversial intellectual-disability diagnostic definition" focuses on (1) "intellectual-functioning deficits," (2) "adaptive deficits," and (3) "the onset of these deficits while still a minor." *Moore I*, 581 U.S. at 7; *see also Moore II*, 139 S. Ct. at 668; *Hall*, 572 U.S. at 710. Thus, an *Atkins* claim *always* requires a court to examine historical evidence to determine when the deficits began. Proof of historical adaptive functioning deficits is no different. Respondent's complaint boils down to a truism: historical deficits will naturally require examination of historical evidence.

At bottom, Respondent agrees that *Atkins* requires lower courts to consider the "consensus" of "the citizenry and its legislators" when construing an Eighth Amendment intellectual disability claim. Opp. 16; *Atkins* v. *Virginia*, 536 U.S. 304, 312–13 (2002); *Hall*, 572 U.S. at 710. Yet Respondent never disputes that *Smith* v. *State*'s present-deficit requirement stands alone among the rules adopted by circuit courts, state courts, and state legislatures considering the issue. This concession is enough to show that the question merits this Court's review.

CONCLUSION

The Court can and should grant review in this case to resolve both questions presented. At a minimum, though, this Court should hold this case pending review in *Commissioner* v. *Smith*.

Respectfully submitted.

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