No. 24-872

Supreme Court of the United States

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JOSEPH CLIFTON SMITH,
Respondent.

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

Joseph Smith's *Atkins* claim escaped plenary review once because the court below was "unclear" about how it had evaluated his IQ scores. App.13a. In ten days, the panel issued a new opinion with the same incredible result: Smith had won his claim, which "turns" on his IQ being 70 or less, despite IQ scores of 75, 74, 72, 78, and 74. It does not take "a precise math equation" (BIO.2) to see the problem.

The brief in opposition tries to muddy the waters, accusing the petition of "mischaracterizations," *id.*, but that tack should not work twice. The panel opinion was crystal clear, and so were its errors.

First, it is *undisputed* that the court below never found Smith's true IQ to be 70 or less, yet it "moved on" anyway. Even the brief in opposition seems to concede that Smith's IQ is "somewhat higher than 70." BIO.20. Smith owes his success "largely" to adaptive deficits (BIO.18) because the court applied a balancing test, whereas Alabama (and *Atkins*) require proof of three distinct elements. Second, it is *undisputed* that the court below shifted Smith's burden to the State to prove that his scores "foreclose" or "rule out" disability. App.5a, 7a. Then it simply counted scores of 75 or less for Smith. App.7a. Both moves reflect how courts have manipulated IQ data to expand *Atkins* well beyond the "national consensus" identified in 2002.

The first question presented is whether *Atkins* really requires two thumbs on the scale for the capital murderer. The petition does not raise "a factual dispute about a factfinder's credibility determinations." BIO.4. It raises a constitutional question about the

power to punish capital murderers whom States deem culpable for their crimes.

A split has emerged, such that States in three circuits have no real discretion to define the first prong of *Atkins*. Plucking lines from the latest DSM, these courts will readily "move on" from IQ, the most reliable proof of disability, unless the State can *disprove* the claim to a moral certainty. Some courts focus on the lowest IQ score, as the panel did initially; some let the offender off the hook if it's a "close case," BIO.17. Either way, these courts shift the burden, ignore state law, and demote IQ in favor of wholly unscientific lay testimony (*e.g.*, BIO.12-13).

The Court should also grant the petition to specify how courts should "evaluate multiple IQ scores." App.12a. The "confusion" is real, *contra* BIO.23, 29, as the panel opinion well illustrates. The panel thought it was bound by *Hall v. Florida*, 572 U.S. 701 (2014), despite the Court stating ten days prior that it had left the matter open. This case is the right vehicle because the issue was squarely addressed and dispositive. The lower court ruled that scores of 75 or less always count for the offender; as "four out of Smith's five IQ scores" were 75 or less, the State's evidence was not "strong enough" to reject the claim. App.5a, 7a. But that rule treats IQ scores as independent and incommensurable when in reality, they are highly correlated measures of the same trait. Even the most elementary computation—taking the average—would be more accurate. Had the panel done so, it would have reached the obvious inference from Smith's five-score average of 74.3 that his true IQ is not "as low as 69." *Contra* App.5a.

Smith hardly defends the panel's answer to the Court's remand question, and it should be reversed.

The way to assess "scores jointly" (App.12a) is not to take each one in isolation as a State score or a Smith score. A prisoner with ten scores of 76 (or higher) could prevail by producing eleven scores of 75, and a prisoner with infinite scores of 75 could be treated as if he has an IQ of 69. No "medical community" or "clinical authorit[y]" supports such results. *Contra* App.4a.

It cannot be overlooked that *Atkins* itself claimed a "national consensus" based on eighteen state laws. Here are nineteen States and the federal government, urging that the doctrine is "evolving" without being "informed by objective factors to the maximum possible extent." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (cleaned up). Federal courts have enforced greater leniency in state criminal justice not because of "contemporary values," but in spite of them. *Id.* The Court should grant certiorari to correct course in this vital area of Eighth Amendment doctrine.

I. The Court should grant review of the first question presented.

A. The burden of proof under prong one of *Atkins* is critically important.

The United States observes that in the first decade of *Atkins*, nearly four hundred inmates had alleged intellectual disability. *See* U.S. Br.17. The rate has likely grown. After all, the reward is not just resentencing, but a permanent immunity from the death penalty. The stakes are high for all sides.

To "lower the bar on the first prong," U.S. Br.15, is to strike at the heart of *Atkins*. IQ has been the primary diagnostic criterion since the very first DSM. *See* DSM-I at 23-24. IQ scores are not only the best *evidence* of intellectual functioning; any deficits must

be "confirmed" by IQ tests to meet the very *definition* of the disorder. DSM-5-TR at 37. The tests are reliable and objective. And they directly measure the trait that motivated the Court's moral judgment in *Atkins*.

Any rule that subordinates IQ to adaptive deficits weakens the test. Instead of standardized measures developed over a century, the adaptive-skills inquiry relies on the memories of teenage friends and the opinion of the defendant's mother. BIO.12. Facts like whether he had insurance or "cook[ed] food" become pivotal. BIO.12-13. After decades on death row, how does he manage his finances? BIO.14. Can he use "a map … to drive from point A to point B"? *Id.*

It is anathema to "evenhanded[]" justice for *Atkins* to turn on facts like these. U.S. Br.17. And invoking the "experts" (BIO.1; App.7a-9a) does not cure the ill. An expert's recitation of the mother's opinion does not make it expert. Prioritizing that kind of evidence is just *Briseno* in reverse; if the State cannot rely on a "father's reactions" or a "sister's perceptions," then neither can the prisoner. *Moore v. Texas*, 581 U.S. 1, 18 (2017). Even school records, BIO.7-13, which may be less "readily … feigned," *Atkins*, 536 U.S. at 353 (Scalia, J., dissenting), are a poor substitute for IQ. It makes no sense to take grade-school spelling tests as evidence of intellectual ability when there are tests that measure intellectual ability—tests that Smith has taken five times.

To be sure, deficits in social and practical domains may well support a diagnosis. And the petition does not ask the Court to reverse "fact-intensive" findings about Smith's adaptive skills. BIO.1. But the difficulty of obtaining appellate reversal of such a standardless

and subjective analysis is all the more reason for the Court to protect the integrity of prong one.

B. *Hall* and *Moore* do not preclude Alabama's familiar evidentiary framework.

Smith does not dispute that a State can define prong one as an "IQ of 70 or below," as Alabama has done for over two decades. Pet.13-14. *Hall* did not move the line to 75. *Id.* What *Hall* forbids, the parties agree, is a strict cutoff, such that "a score above 70" ends the inquiry. BIO.17 Rather, courts must "acknowledge[] the inherent error in IQ testing." BIO.21. Alabama law is consistent with *Hall* because a single score above 70 is not disqualifying.

But the question remains whether States can ask a claimant to prove that his IQ is 70 or below. Or, as the court below held, do States have the burden to "foreclose" and "rule out" any risk of disability? App.6a. *Hall* and *Moore* did not answer that question. *See* Pet.14. The Court did not "say that it was setting out a rule that would displace state evidentiary frameworks" or "even address [them]." U.S. Br.14.

Smith's view is opaque and ambiguous, which just confirms that *Hall* and *Moore* do not dictate the outcome. On the one hand, Smith suggests that the State must rebut evidence that his "actual functioning is lower" than his IQ score. BIO.18; *see also* BIO.19; App.4a, 8a, 61a, 75a (relying on "actual functioning"). But if that were the rule, then the second prong would swamp the first; state law could not require *any* proof with respect to IQ. Smith wins if he acts like a person with a 69 IQ regardless of his actual IQ. That's not the science, and it's not what *Hall* held. Pet.24-25.

On the other hand, Smith states that his "IQ score range placed his true IQ at or below 70," so the courts had to "consider his adaptive functioning." BIO.19. But that assertion elides the issue in dispute: What is needed to prove that his "true IQ" is "at or below 70"? *Id.* Smith never explains how his five scores combine to yield a range that includes 70. Compounding the confusion, Smith appears to admit on the next page that his true IQ is "somewhat higher than 70." BIO.20. At best, he states in passing that the relevant range is generated by the "lowest score" alone. BIO.19. But the Court has *never* endorsed a lowest-score test for prong one of *Atkins*. Its *per curiam* opinion all-but rejected that move, causing the panel to disavow "unambiguously" any reliance on the "lower end of the … lowest of multiple IQ scores." App.2a.

Smith's citations to *Hall* and *Moore* do not clear things up. The Court said that it is proper to move on from IQ "where an individual's IQ *score*, adjusted for *the* test's standard error," yields a range including 70. BIO.22 (quoting *Moore*, 581 U.S. at 15) (emphasis added); BIO.28-29 (same). That rule can be mechanically applied to one score, but Smith's claim "requires evaluating … multiple IQ scores." App.12a.

The Eleventh Circuit also thought it was obliged to "move on" from IQ. But the idea that this judgment flows "merely" from *Hall* and *Moore*, App.38a, is belied by the panel's own dramatically different opinions. First, the panel held that "if even one valid IQ test score generates a range that falls to 70," the case is over. App.42a; *accord* App.39a-40a. But on remand, the panel held that "four out of Smith's five IQ scores" are "consistent evidence" of disability because each, on its own, could not "rule out" a diagnosis. App.6a-7a.

Smith never mentions the holding that four scores *above* 70 strengthen an *Atkins* claim. *See* BIO. All he can say is that "IQ scores were not the sole basis" for the court's ruling on prong one. BIO.19. But that's not a defense of the decision; it's an indictment that the panel's treatment of the IQ data cannot stand on its own. Indeed, the panel could grant relief *only* by reducing Smith's burden and refusing to credit the cumulative effect of five IQ scores. Nothing in *Hall* or *Moore* commands that result.

C. The circuits are deeply divided.

The circuit courts cannot agree on what remains of a State's power to enforce burdens of proof under *Hall* and *Moore*. On one side, courts like the Eleventh Circuit will force the State to "rule out the possibility" of a 70 IQ. App.6a. Even if "multiple IQ scores … over a long period of time" "lean[] in favor" of finding an IQ above 70, it's not enough. App.70a. Courts in the Eleventh Circuit must "move on" to adaptive deficits unless the scores "foreclose the conclusion" that the prisoner is disabled. App.4a-5a; *accord, e.g.*, *Jackson v. Payne*, 9 F.4th 646, 653-54 (8th Cir. 2021); *Pizzuto v. Yordy*, 947 F.3d 510, 526, 528 (9th Cir. 2019).

In the Fifth, Sixth, and Tenth Circuits, the State would not have been asked to "rule out" anything. The Fifth Circuit would have looked for Smith's "likely" IQ. *Garcia v. Stephens*, 757 F.3d 220, 226 (5th Cir. 2014). The Sixth Circuit would have known that "there is almost always a *possibility*" of a 70 IQ, but a "possibility" is not proof by a "preponderance." *Black v. Carpenter*, 866 F.3d 734, 748 (6th Cir. 2017). And the Tenth Circuit would have let the inquiry end with Smith's score of 78. *Smith v. Duckworth*, 824 F.3d

1233, 1245 (10th Cir. 2016). In any of these circuits, Smith's claim would have failed at step one.

While the United States sees the "confusion among the circuit courts," U.S. Br.16, Smith calls it a "false flag," BIO.23. He cites procedural distinctions that make no difference. *See* BIO.23-27. The bottom line is that some circuits apply *Hall* to demand more from States, whereas some circuits hold claimants to their state-law burdens. The varying postures cannot explain why courts derive different rules from *Hall*.

Smith emphasizes that the Fifth, Sixth, and Tenth Circuits heed *Hall*, for instance, by consulting medical opinion and clinical practices, BIO.26. These courts do not apply a strict score cutoff at 70, and they account for measurement error. BIO.24, 28. But if that's all it takes to adhere to *Hall*, then *Hall* did not require the result below. *None* of those circuits endorse a burden-shifting framework. And *none* of them estimate "true IQ" by focusing on the lowest end of the offender's "lowest score," as some think *Hall* and *Moore* require. BIO.19; *accord Sasser v. Payne*, 999 F.3d 609, 619 (8th Cir. 2021); *Ochoa v. Davis,* 50 F.4th 865, 903 (9th Cir. 2022); App.6a.[1]

The circuit split proves that *Hall* and *Moore* must be clarified. But if the Eleventh Circuit's view is correct, then *Hall* and *Moore* must be reconsidered. On its own, *Atkins* trampled on the traditional state power to punish a whole class of criminals; it replaced

[1] Indeed, the Tenth Circuit permits a state law focused on the *highest* score, whereby a "76 or higher on *any* IQ test bars" relief. *Smith*, 824 F.3d at 1244. Smith cannot endorse that rule, *contra* App.27-28, which would automatically defeat his claim. And the split could not be more blatant, for the court below rejected the idea that Smith's 78 could "trump[]" his other scores. App.7a.

"individualized" judgments of moral culpability with a universal rule. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *see Atkins*, 318-21. But *Atkins* was limited in other respects. It "swept only as far as [the national] consensus" would permit, *Moore*, 581 U.S. at 27 (Roberts, C.J., dissenting), and it left to "State[s] the task of developing appropriate ways to enforce" it, *Atkins*, 536 U.S. at 317. The Court avoided "definitive" rules, *Bobby v. Bies*, 556 U.S. 825, 831 (2009), for psychiatry is "not precise," BIO.2-3, and "uncertainties about the human mind loom large," *Kahler v. Kansas*, 589 U.S. 271, 280-81 (2020); *see also Hall*, 572 U.S. at 723; Idaho Br. 15-18. If *Hall* and *Moore* broke *Atkins*'s promise, leaving little room for the people and their representatives to decide whom should be punished, then those cases should be overruled.

II. The Court should grant review of the second question presented.

The Court should also grant certiorari to clarify how courts should assess multiple IQ scores. Nearly every *Atkins* case litigated today involves multiple IQ scores. Evaluating their cumulative effect can be "complicated," *Hall*, 572 U.S. at 714, but it is "require[d]" in cases like this one, App.12a. *Hall* itself "reached no holding" about "multiple scores," leaving open "the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores." *Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting).

Given the Court's opinion *in this case* that the issue is unsettled, App.12a, it should have been clear that *Hall* would not control the outcome. Yet for Smith and the Eleventh Circuit, *Hall* seems to be a magic eight ball that holds the answer to every question. *See,*

e.g., App.4a-5a; BIO.23. It's just not true. This Court did not count three scores below 75 for Hall and one score above 75 for Florida. The Court instructed that "an IQ score" cannot be "final and conclusive" because "the score is … imprecise." 572 U.S. at 712. Even if that limited holding meant that "65 to 75" is always the relevant range for a single score, App.7a; *but see* Pet.14, 21-22 & n.6, 28-29, it would mean nothing for computing a range from multiple scores. Regrettably, the Court's first opinion in this case was not enough to stop the Eleventh Circuit from overreading *Hall* and overriding a lawful state sentence. This Court must intervene again.

The Court need not constitutionalize "a precise math equation" to decide this case. BIO.2. First, if what is "'cruel and unusual' depends on currently prevailing societal norms," the Court should grant the petition and reverse because Alabama has not "contravened a clear national consensus" about handling multiple IQ scores. *Hall*, 572 U.S. at 725-26. Absent a consensus, States are free to punish offenders when their IQ scores, taken together, suggest they are not disabled. Such matters lie well within the discretion *Atkins* left to States to "develop[] appropriate ways to enforce" the Eighth Amendment. 536 U.S. at 317.

Second, even if the doctrine should evolve with "medical standards," BIO.21-22, the Court should still grant the petition and reverse. Smith cites no scientific authority on the evaluation of multiple IQ scores. As the petition explained, experts in the field credit the cumulative effect of scores above 70 to produce a better estimate. Pet.27-29. Each score alone can be "consistent with mild intellectual disability," App.7a, yet the scores combined are not. The State's expert

testified as much in this case. Pet.9-10. If courts must account for measurement error because it is a "statistical fact," *Hall*, 572 U.S. at 713, they should use it in a statistically sound manner. There are multiple ways to do that, *see* Pet.27-29, but ignoring how multiple tests can produce a better estimate is not one of them.

CONCLUSION

The Court should grant Alabama's petition for a writ of certiorari and reverse.

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