No. 24-872

Supreme Court of the United States

JOHN Q. HAMM,
COMMISSIONER OF THE ALABAMA
DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

JOSEPH CLIFTON SMITH,
Respondent.

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

BRIEF FOR PETITIONER

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August 4, 2025

CAPITAL CASE
QUESTION PRESENTED

Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

OPINIONS BELOW

The Eleventh Circuit's 2024 opinion is available at 2024 WL 4793028 and reproduced at Pet.App.1a-9a.

This Court's 2024 opinion is reported at 604 U.S. 1 and reproduced at Pet.App.10a-13a.

The Eleventh Circuit's 2023 opinion is reported at 67 F.4th 1335 and reproduced at Pet.App.18a-57a. The court's 2023 order on motion to stay is reproduced at Pet.App.14a-17a.

The district court's opinion is available at 2021 WL 3666808 and reproduced at Pet.App.63a-97a. The court's order on motion to alter or amend the judgment is reproduced at Pet.App.58a-62a.

JURISDICTION

The Eleventh Circuit entered judgment on November 14, 2024. The petition for a writ of certiorari was filed on February 12, 2025, and granted on June 6, 2025. Jurisdiction rests on 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

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

Rule 32.3 of the Alabama Rules of Criminal Procedure provides in pertinent part that a petitioner for post-conviction relief "shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."

STATEMENT

Joseph Smith is not intellectually disabled, and the Eighth Amendment does not override the death sentence he earned for murdering Durk Van Dam. Smith cannot prove an IQ of 70 or less with his test scores of 75, 74, 72, 78, and 74. So he urges a new rule of constitutional law that when "scores fall in the 70 to 75 range," the claimant satisfies the first prong of *Atkins*. BIO.1. The Eleventh Circuit too counted scores up to "about" 75 for Smith; any number of scores from 70 to 75 could not "rule out the possibility" that his true IQ "could be" 70 or less. Pet.App.6a-8a.

This new rule takes *Atkins* beyond "the range of … offenders about whom there is a national consensus." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). In 2002, the Court found that state laws "generally" immunize offenders known to have an IQ under 70. *Id.* at 317 n.22. In 2014, the Court found that state laws tend to account for testing error. *Hall v. Florida*, 572 U.S. 701, 714-18 (2014). But the Court has never said how to evaluate multiple IQ scores. For good reason: No consensus can be found in state statutes, the best indicator of societal values. Thus, "whether and how" to weigh multiple IQ scores is left to state discretion.

Alabama's approach to IQ is not an "outlier." *Cf. Moore v. Texas*, 581 U.S. 1, 18 (2017). Claimants must prove an IQ of 70 or less by a preponderance of the evidence. That law is common, even lenient. *Hall* did not displace it. Smith never proved that his five scores *together* imply an IQ of 70, so he falls outside the ambit of *Atkins* and *Hall*. Yet the courts crafted new rules to negate the cumulative effect of his IQ scores. This evolution of the Eighth Amendment by judicial fiat must be reversed.

A. Constitutional Background

1. The Eighth Amendment prohibits "cruel and unusual punishments." "What does this term mean? At the time of the framing," it meant rare and inhuman practices like "disemboweling, quartering, public dissection, and burning alive." *Bucklew v. Precythe*, 587 U.S. 119, 130 (2019); *see id.* at 136-37; *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death.").

Today, "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality). In an "extreme" case, a sentence can be so "grossly disproportionate" as to violate the Constitution. *Rummel v. Estelle*, 445 U.S. 263, 273, 274 n.11, 281 (1980); *see Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (opinion of Kennedy, J.).

But otherwise, proportionality is "the province of legislatures" because it depends on "the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel*, 445 U.S. at 275-76. Courts therefore "presume [the] validity" of a sentence, and a "heavy burden rests on those who would attack [it]." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (plurality).

For several reasons, that heavy burden demands a nationwide consensus of state legislation barring the challenged sentence. First, the text. If "contemporary standards" define the meaning of "cruelty," then courts must defer to those who "respond to the will and consequently the moral values of the people." *Id.* States are sensitive to the "evolving aims" and "ethical foundations" of criminal law in ways that "rigid

constitutional formulas" are not. *Cf. Kahler v. Kansas*, 589 U.S. 271, 280 (2020) (cleaned up). So too whether a punishment is "unusual" today depends on its "occurrence" and "acceptance" (and accordingly, its lawfulness) across the country. *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988) (plurality).

Second, in "our federal system," state legislatures are "the ultimate arbiter of the standards of criminal responsibility." *Gregg*, 428 U.S. at 176. "Beyond question," the power of criminal justice "lies at the core of their sovereign[ty]." *Oregon v. Ice*, 555 U.S. 160, 170 (2009). But if "a restriction upon sovereign power" is *already* "firm" and "widespread," then it can "find[] enforcement in the Eighth Amendment." *Ford v. Wainright*, 477 U.S. 399, 409-10 (1986). "Caution is necessary" because doctrinal evolutions "shut off" "the normal democratic processes," *Gregg*, 428 U.S. at 176, in an area where "the role of the States" is "paramount," *Kahler*, 589 U.S. at 280.

Third, relying on a state legislative consensus is a bulwark against "the passions of the day," which threaten "the independence of the judiciary." *Gregg*, 428 U.S. at 175. The Court's "judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Coker*, 433 U.S. at 592.

To these ends, the doctrine has settled on state legislation as the "clearest and most reliable objective evidence of contemporary values." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *see also Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality) ("A revised national consensus … must appear in the operative acts (laws and the application of laws) that the people

have approved."). The Court has sometimes adduced other indicia of social values, but whether those views "ultimately find expression in legislation" is the "objective indicator … upon which [this Court] can rely." *Penry*, 492 U.S. at 335.

Thus, while the "case law" has struggled "in search of a unifying principle," *Kennedy v. Louisiana*, 554 U.S. 407, 437 (2008), one rule is crystal clear. "[W]hen the Court has established such an eligibility criterion" for a punishment, it first finds a "national consensus" of state legislation and practice. *Jones v. Mississippi*, 593 U.S. 98, 107-08 (2021); *Thompson*, 487 U.S. at 822-23 ("[W]e first review relevant legislat[ion]" to "confirm our judgment.").[1] In the absence of consensus, when the law "varies markedly from one State to another," a State remains "entitled to make its own judgment." *Rummel*, 445 U.S. at 284; *see also Stanford*, 492 U.S. at 470-73; *Penry*, 492 U.S. at 333-40; *Tison v. Arizona*, 481 U.S. 137, 152-54 (1987).

Even if there is a legislative consensus against a punishment, the Court still must determine whether it has "reason to disagree," *Enmund*, 458 U.S. at 801, based on precedent and "interpretation of the Eighth Amendment's text, history, meaning, and purpose," *Kennedy*, 554 U.S. at 421.

2. The Court has twice considered whether there is a national consensus against capital punishment when the offender is intellectually disabled. In 1989,

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[1] *See, e.g.*, *Coker*, 433 U.S. at 593-96; *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982); *Solem v. Helm*, 463 U.S. 277, 299-300 (1983); *Ford*, 477 U.S. at 408-10 & n.2; *Thompson*, 487 U.S. at 829-30; *Atkins*, 536 U.S. at 313-16; *Roper v. Simmons*, 543 U.S. 551, 564-67 (2005); *Kennedy*, 554 U.S. at 422-26; *Graham v. Florida*, 560 U.S. 48, 62-68 (2010); *Hall*, 572 U.S. at 714-18.

only one State had banned it, *see Penry*, 492 U.S. at 334 (citing Ga. Code Ann. §17-7-131(j) (1988)), so Penry tried to show a consensus with opinion surveys and the views of his *amici*, *id.* at 334-35. But in the end, such sentiments were "insufficient" to cement a categorical rule because they were not "express[ed] in legislation." *Id.* at 335.

"Much ha[d] changed" by the time of *Atkins*. 536 U.S. at 314. A "large number of States" had prohibited the execution of intellectually disabled offenders, and none had reinstated it. *Id.* at 316. It was significant to the Court that since *Penry*, "only five [States] ha[d] executed offenders possessing a known IQ less than 70." *Id.* Still, the Court noted the possibility of "serious disagreement" over determining who "fall[s] within the range of … offenders about whom there is a national consensus." *Id.* at 317. Virginia disputed that Atkins himself was disabled, and he had an IQ of 59. *Id.* Noting only that state laws "generally conform to the clinical definitions," the Court left States "the task of developing appropriate ways" to enforce the new rule. *Id.* at 317 & n.22.

As a result, *Atkins* offered no "definitive procedural or substantive guides," *Bobby v. Bies*, 556 U.S. 825, 831 (2009), "no comprehensive definition" of the class, and "no[] definitive[] resol[ution]" of the elements, *Shoop v. Hill*, 586 U.S. 45, 49 (2019). Refusing to heed what *Atkins* "stated in clear terms," some federal courts tried to invent their own rules and usurp the role of States. *Schriro v. Smith*, 546 U.S. 6, 7 (2005).

Hall provided some guidance in rejecting Florida's "strict IQ test score cutoff." 572 U.S. at 712. In Florida, an *Atkins* claim would fail unless the offender offered "an IQ test score of 70 or below." *Id.* at 707. This Court

faulted that rule for ignoring the imprecision in IQ testing, reflected in metrics like the standard error of measurement (SEM). The Court cited error ranges of ± 2.16 and ± 2.30 for two major tests, WAIS-IV and SB-5. *Id.* at 713-14. Because "the vast majority of States" rejected Florida's strict cutoff and a "significant majority" accounted for error, the Court found "strong evidence" of a consensus against the Florida law. *Id.* at 714, 718. The Court's decision was also "informed" (but not "dictate[d]") by "the views of medical experts." *Id.* at 721.

The rule of *Hall* is that an *Atkins* claim cannot fail at prong one based on an IQ score above 70 when 70 "falls within the [obtained score]'s acknowledged and inherent margin of error." *Id.* at 723. Assuming a SEM of ± 2.5, for example, Hall's test score of 71 reflected "a range of 68.5 and 73.5 with a 68% confidence." *Id.* at 713. Therefore, his score of 71 could not on its own bar consideration of other evidence. *Id.* at 723-24; *see also Shoop*, 586 U.S. at 49 ("[Florida's] rule violated the Eighth Amendment because it treated an IQ score higher than 70 as conclusively disqualifying….").

Hall's rule required reversal in *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 581 U.S. 1 (2017). In *Brumfield*, the state trial court had treated a single "reported IQ test result of 75" as conclusive. 576 U.S. at 315. Critically, there was no "evidence of any higher IQ test score that could render the state court's determination reasonable." *Id.* at 316. Another expert had conducted a short screening test, but that second source of IQ data was not "sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence." *Id.*; *see also id.* at 313, 320 (state law required Brumfield "only to raise a 'reasonable doubt' as to his intellectual disability").

And in *Moore*, the state court had "disregard[ed] the lower end of … the test-specific standard-error range" by relying on "other sources of imprecision" in the test. *Moore*, 581 U.S. at 14. In both cases, the Court also took issue with state-court findings about adaptive deficits. *Moore II* reversed again because the lower court had repeated its errors as to the second prong, 586 U.S. 133, 139 (2019), but the Court's "articulation of how courts should enforce" *Atkins* still "lacked clarity," *id.* at 143 (Roberts, C.J., concurring).

Earlier in this case, the Court held that Smith's claim "requires evaluating his various IQ scores." *Hamm v. Smith*, 604 U.S. 1, 2 (2024). The Court "has not specified how" to "evaluate multiple IQ scores." *Id.*

B. Statutory Background

1. Alabama's Enforcement of *Atkins*

On remand for reconsideration in light of *Atkins*, *see Perkins v. Alabama*, 536 U.S. 953 (2002) (mem.), the Alabama Supreme Court (ASC) held that an *Atkins* claimant must prove:

1. "significantly subaverage intellectual functioning (an IQ of 70 or below)";
2. "significant or substantial deficits in adaptive behavior"; and
3. "[that] these problems … manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So.2d 453, 456 (Ala. 2002) ("*Perkins*"). The ASC's definition hewed closely to the definitions cited in *Atkins*.[2]

Whether at trial or in postconviction proceedings, "all three *Perkins* factors must be proven" "by a preponderance of the evidence." *Ex parte Smith*, 213 So.3d 313, 319-20 (Ala. 2010) ("*Jerry Smith*") (citing *Morrow v. State*, 928 So.2d 315, 322-23 (Ala. Crim. App. 2004)); *see also* Ala. R. Crim. P. 32.3 (petitioners "shall have the burden" to prove necessary facts "by a preponderance of the evidence"). A preponderance means the "greater weight of the evidence … that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Callen v. State*, 284 So.3d 177, 192 (Ala. Crim. App. 2017) (quoting Black's Law Dictionary 1373 (10th ed. 2014)). Alabama courts consider "the totality of the evidence (scores)." *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010).

Beyond *Atkins*'s constitutional baseline, Alabama courts have implemented *Hall* by "considering a margin of error or SEM when evaluating a defendant's IQ test score." *Lane v. State*, 286 So.3d 53, 57 (Ala. Crim. App. 2016); *see, e.g.*, *Callen*, 284 So.3d at 192, 196-97 (crediting testimony that the WAIS-IV's SEM is ± 2.12 or ± 2.6). Alabama does not "preclude a person from presenting additional evidence … merely because that

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[2] As to the first prong, the difference between the two is that Alabama added the Court's observation that mild intellectual disability begins at an IQ level of "approximately 70." 536 U.S. at 308 n.3 (citing DSM-IV at 41)); *cf. Kennedy*, 554 U.S. at 425 (*Atkins* protects those "known to have an IQ below 70"); *Roper*, 543 U.S. at 564 ("known to have an IQ under 70"). Today, the diagnostic line remains at 70. *See, e.g.*, DSM-5-TR at 41.

person attained an IQ score above 70." *Reeves v. State*, 226 So.3d 711, 728 (Ala. Crim. App. 2016). But accounting for error does not "make" scores "lower" or require courts "to presume that a person's IQ score falls in the bottom" of an error range. *Id.* at 739 n.14; *accord Byrd v. State*, 78 So.3d 445, 452 (Ala. Crim. App. 2009) (rejecting claim where petitioner failed to prove "it is more likely than not that his IQ is 70 or below" despite the "mere possibility"). In Alabama, "application of the standard error of measurement" can "make a finding of significantly subaverage intellectual function more likely, less likely, or have no effect on the court's determination." *Reeves*, 226 So.3d at 740 (quoting *Ledford v. Warden*, 818 F.3d 600, 640-41 (11th Cir. 2016)).

As to the cumulative effect of multiple IQ scores, "the Alabama Supreme Court's post-*Atkins* opinions make clear that a court should look at all relevant evidence in assessing an intellectual-disability claim and that no one piece of evidence, such as an IQ test score, is conclusive as to intellectual disability." *Reeves*, 226 So.3d at 729. Consequently, Alabama courts consider multiple scores, rather than just the lowest one. *See, e.g.*, *Byrd*, 78 So.3d at 452. And they consider the cumulative effect of multiple scores, rather than counting each individually as a score favoring the State or a score favoring the offender. *See, e.g.*, *Reeves*, 226 So.3d at 737, 740 (crediting "repeated IQ scores of over 70" despite objection that "all of his IQ scores fell within the range … when the SEM is considered"); *Bush v. State*, 92 So.3d 121, 150-51 (Ala. Crim. App. 2009) (denying claim based on three scores "between 69 and 74"); *Clemons v. State*, 55 So.3d 314, 329 (Ala. Crim. App. 2003) (relying on "consistent[] scores in the 70-80 range").

2. Nationwide Enforcement of *Atkins*

The Federal Death Penalty Act of 1994 states that a "sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. §3596(c). The United States and the Seventh Circuit have taken the position that §3596(c) is coextensive with *Atkins* and its progeny. *See* U.S. BIO at 23-24, *Bourgeois v. Watson*, No. 20-6500 (U.S. Dec. 4, 2020); *Bourgeois v. Watson*, 977 F.3d 620, 630 (7th Cir. 2020).

Of the 27 States with the death penalty,[3] 20 have statutes barring that sentence for the intellectually disabled. Aside from Montana, the remaining States (Alabama, Ohio, Oregon, Mississippi, Pennsylvania, and Texas) have defined intellectual disability in non-criminal statutes and/or in judicial decisions. By and large, these 26 definitions "conform" to the two cited in *Atkins*, featuring distinct criteria, the first of which is "significantly subaverage intellectual functioning" ("SSIF"). 536 U.S. at 308 n.3, 317 n.22.[4] Often these

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[3] *Cf. Thompson*, 487 U.S. at 829 ("[W]e confine our attention to the 18 States that have expressly established a minimum age in their death-penalty statutes[.]").

[4] *See Perkins*, 851 So.2d 453, 456 (Ala. 2002); Ariz. Rev. Stat. §13-753(K)(3); Ark. Code Ann. §5-4-618(a)(1)(A); Cal. Penal Code §1376(a)(1); Fla. Stat. Ann. §921.137(1); Ga. Code Ann. §17-7-131(a)(2); Idaho Code Ann. §19-2515A(1)(a); Ind. Code Ann. §35-36-9-2; Kan. Stat. §76-12b01(d); Ky. Rev. Stat. Ann. §532.130(2); La. Code Crim. Proc. Ann. art. 905.5.1(H)(1)(a); Miss. Code Ann. §1-3-24; Mo. Ann. Stat. §565.030.6; Neb. Rev. Stat. Ann. §28-105.01(3); Nev. Rev. Stat. Ann. §174.098.7; N.C. Gen. Stat. Ann. §15A-2005(a)(1); Ohio Rev. Code Ann. §5123.01(N); Okla. Stat. Ann. tit. 21, §701.10b(A)-(B); Or. Rev. Stat. Ann. §427.005(10); *Commonwealth v. Bracey*, 117 A.3d 270, 273-74 & n.4 (Pa. 2015); S.C. Code Ann. §16-3-20(C)(b)(10); S.D. Codified Laws §23A-27A-26.2; Tenn. Code Ann. §39-13-203(a); Tex. Health & Safety Code Ann. §591.003(7-a); Utah Code Ann. §77-15a-102; Wyo. Stat. Ann. §8-1-102(a)(xiii).

definitions specify (like the first one cited by *Atkins*) that each prong must exist "concurrently."[5] When States define the claimant's burden of proof, they require at least a preponderance of the evidence.[6]

Ten of the 20 state legislative enactments directly address IQ scores. Of those, nine define SSIF as an IQ of 70 or specify that an IQ test score of 70 or less is probative evidence.[7]

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[5] *See, e.g.*, Neb. Rev. Stat. Ann. §28-105.01(3) ("[SSIF] existing concurrently with deficits in adaptive behavior."). Courts tend to treat the definitions this way as well. *See, e.g.*, *Salazar v. State*, 188 So.3d 799, 812 (Fla. 2016) ("If the defendant fails to prove any one of these components, the defendant will not be found to be intellectually disabled.").

[6] *See, e.g.*, Ariz. Rev. Stat. Ann. §13-753(G) (pretrial burden of "clear and convincing evidence"); Cal. Penal Code §1376(c)(3), (g), (j) ("preponderance of the evidence"); Fla. Stat. Ann. §921.137(4) ("clear and convincing evidence"); N.C. Gen. Stat. Ann. §15A-2005(c), (f) (pretrial burden of "clear and convincing evidence"); *id.* §15A-2005(f) (sentencing burden of "a preponderance of the evidence").

[7] Ariz. Rev. Stat. Ann. §13-753(K)(5) (SSIF "means a full scale [IQ] of seventy or lower. The court … shall take into account the margin of error for the test administered."); Fla. Stat. Ann. §921.137(1) (SSIF is "performance that is two or more standard deviations from the mean" on an approved test.); Idaho Code Ann. §19-2515A(1)(b) (SSIF "means an [IQ] of seventy (70) or below."); Kan. Stat. §76-12b01(i) (SSIF "may be established by performance which is two or more standard deviations from the mean score" on an approved test "tak[ing] into account the [SEM]" and by "means in addition" to test scores.); Ky. Rev. Stat.

A few statutes do more. In Arizona, an appointed expert administers an IQ test before every capital trial (unless waived). Ariz. Rev. Stat. Ann. §13-753(B). If the first score is above 75 or if the first and subsequent scores are "all" above 70, then Arizona can proceed to seek the death penalty (without prejudice to a later claim). *Id.* §§13-753(C)-(D), (F). A court-determined IQ of 65 or lower creates "a rebuttable presumption" in favor of the offender. *Id.* §13-753(G). Likewise in Arkansas, an IQ of 65 or lower creates "a rebuttal presumption." Ark. Code Ann. §5-4-618(a)(2). In Oklahoma, a score above 75 on any "individually administered, scientifically recognized standardized [IQ] test administered by a licensed psychiatrist or psychologist" defeats a claim at prong one, regardless of any other test scores.[8]

Most States with capital punishment have had at least one *Atkins* decision from the court of last resort. Often, these cases do not require resolving complex questions about the evaluation of multiple IQ scores. But in those cases that do, state courts take various

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Ann. §532.130(2) (SSIF means "an intelligence quotient (I.Q.) of seventy (70) or below."); Neb. Rev. Stat. Ann. §28-105.01(3) (A score of "seventy or below … shall be presumptive evidence of intellectual disability."); N.C. Gen. Stat. Ann. §15A-2005(a)(1)c (SSIF is an "[IQ] of 70 or below."); Okla. Stat. Ann. tit. 21, §701.10b(A), (C) (SSIF "means an [IQ] of seventy (70) or below," and a score of 70 or less is "evidence" of SSIF.); S.D. Codified Laws §23A-27A-26.2 (An IQ score over 70 on a reliable test "is presumptive evidence that the defendant does not have [SSIF].").

[8] Okla. Stat. Ann. tit. 21, §701.10b(C); *see, e.g.*, *Fuston v. State*, 470 P.3d 306, 318, 335 (Okla. Crim. App. 2020) (holding that despite scores of 67, 59, 69, and 75, court was not "required to look beyond the 81 score and consider the totality of the circumstances in determining whether an *Atkins* hearing was necessary").

approaches. Courts in at least seven States seem to consider the cumulative effect of IQ scores.[9] Courts in two or three States have issued decisions that did not consider (or expressly rejected) the cumulative effect of multiple IQ scores.[10] And courts in at least three States have placed greater weight on an offender's

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[9] *See, e.g.*, *supra* Statement §B.1 (Alabama); *State v. Escalante-Orozco*, 386 P.3d 798, 834 (Ariz. 2017), *abrogated on other grounds by State v. Escalante*, 425 P.3d 1078 (Ariz. 2018) (relying on the median IQ score and weighing three scores below 70 against one above 70); *Haliburton v. State*, 331 So.3d 640, 646-47 (Fla. 2021) (reviewing "totality of the evidence," testimony about "true IQ" derived from multiple scores); *Caldwell v. Edenfield*, 890 S.E.2d 238, 258, 260, 270-71 (Ga. 2023) (relying on scores "consistently in the 70s" to find no *Strickland* prejudice); *Pizzuto v. State*, 484 P.3d 823, 831-32 (Idaho 2021) (endorsing decision that "reconcile[d] the divergent scores into a coherent and accurate picture," *Pizzuto v. Blades*, 1:05-cv-516, 2012 WL 73236, at *13, *16 (D. Idaho Jan. 10, 2012)); *Baer v. State*, 942 N.E.2d 80, 110 (Ind. 2011) (applying holding that five scores above 70 and three above 75 supported denial) (citing *State v. McManus*, 868 N.E.2d 778 (Ind. 2007)); *State v. Scott*, 233 So.3d 253, 261-62 & n.15 (Miss. 2017) (relying on "multiple consistent IQ scores" to rule out malingering and "establish a much higher degree of confidence").

[10] *White v. Commonwealth*, 600 S.W.3d 176, 180-81 (Ky. 2020) (remanding for evidentiary hearing because 76 ± 5 and 73 ± 5 each produced a range reaching "roughly 70" or less); *State v. Ford*, 140 N.E.3d 616, 652-53 (Ohio 2019) (vacating sentence based on "significance" of one test score range of 69 to 83 despite "higher performance on [three] other IQ tests"; trial court not free to deem lowest score "substantially outweighed"); *see id.* at 711-12 (Dewine, J., concurring in part and dissenting in part). The Mississippi Supreme Court seems to have reasoned similarly. *See, e.g.*, *Carr v. State*, 196 So.3d 926, 935, 939, 941-43 (Miss. 2016) (reversing denial despite "fairly consistent" scores of 75, 72, and 70). But that court has defined SSIF as an IQ of 75 or less. *See Chase v. State*, 873 So.2d 1013, 1029 n.20 (2004).

highest score, reducing or eliminating any need to assess the cumulative effect of multiple IQ scores.[11]

C. Factual Background

1. Smith's Crime

On November 25, 1997, Smith had been out of prison for two days on work release, still serving the remainder of a sentence for burglary and receipt of stolen property.[12] With an accomplice, Smith planned to rob his next victim, Durk Van Dam, because he had heard the man was carrying cash. They convinced Van Dam to drive the three of them in his truck to a remote location in the woods. Once there, they brutally beat him to death with a hammer and saw. They stole $140 and left him for dead, although Smith had proposed dumping the body in a nearby lake. Smith took Van Dam's boots and pawned the tools from his truck.

Law enforcement discovered the body, which had suffered thirty-five blunt-force injuries. There were saw-marks on his neck, shoulder, and back; a large hemorrhage beneath his scalp; brain swelling; rib fractures; and a collapsed lung, which was the most likely cause of death.

Although Smith tried to deceive the police, he ultimately confessed to the robbery-murder. Smith

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[11] *Haliburton*, 331 So.3d at 647 (Fla. 2021) (crediting expert testimony that "you can't fake good," so "higher IQ scores will more accurately reflect a person's capacity"); *Nixon v. State*, 327 So.3d 780, 782-83 (Fla. 2021) (similar); *State v. Robertson*, 239 So.3d 268, 273-74 (La. 2018) (rejecting numerical cutoff yet affirming no-disability finding based on score of 76 and testimony that an expert "weighed [the 76] heavily" despite three scores between 70 and 74); *Fuston*, 470 P.3d at 316, 318 (Okla. 2020) (applying statute).

[12] The facts of the crime appear in *Smith v. State*, 795 So.2d 788, 796-97 & n.1 (Ala. Crim. App. 2000).

admitted to striking Van Dam in the head, throwing a saw at him, kicking him in the ribs several times, and holding him down. Other evidence included the testimony of an eyewitness who saw Smith return from the woods in bloody clothing; Smith also told this witness that he had hit Van Dam and stabbed him in the back. An employee of a pawn shop confirmed that Smith had pawned Van Dam's tools for $200.

2. Smith's IQ Scores

Smith took several IQ tests over nearly forty years. The lower courts found five valid full-scale IQ scores:

Date	IQ Test	Score
1979	WISC-R	75
1982	WISC-R	74
1998	WAIS-R	72
2014	SB-5	78
2017	WAIS-IV	74

See, e.g., Pet.App.5a (listing scores); J.A.64 (first WISC-R); Pet.App.93a (second WISC-R); Pet.App.73a (WAIS-R); J.A.167 (SB-5); Pet.App.69a (WAIS-IV).

Identifying the margin of error for each score is complicated. Error ranges come from test reliability, which is "never determined exactly" but "*estimated* for a given sample of individuals responding to a given sample of test items."[13] If experts agree about a test's reliability, they may still disagree about the proper

[13] L. Crocker & J. Algina, *Introduction to Classical and Modern Test Theory* 131 (2006); *accord* Br. of Am. Psychological Ass'n et al. as *Amici Curiae* at 23, *Hall v. Florida*, No. 12-10882 (U.S. Dec. 23, 2013) ("APA *Hall* Br.").

confidence interval or method used to make a range.[14] The SB-5 and WAIS-IV, for example, use the estimated true score (ETS) and standard error of estimate (SEE). *See* G. Roid, *Stanford-Binet Intelligence Scales, Fifth Edition, Technical Manual* 65-67 (2003) ("SB-5 Manual"); D. Wechsler, *WAIS-IV Technical and Interpretive Manual* 45-46 (2008) ("WAIS-IV Manual"). Accordingly, the margin-of-error evidence for Smith's scores varied, and for two scores, Smith provided no evidence at all.

WISC-R. Smith never proved the error range for the first two scores he obtained on the WISC-R.

WAIS-R. Smith's trial expert testified that Smith's score on the WAIS-R has an error range of "about three or four points." J.A.364. He computed a range of ± 3 (*id.*) which is the range that the federal courts ultimately relied upon. *See, e.g.*, Pet.App.5a.

SB-5. Smith's habeas expert testified that Smith's SB-5 score has a SEM of "about three points." J.A.169. The test-makers report an average SEM for Smith's age group of ± 2.12. *See* SB-5 Manual 66.[15]

WAIS-IV. The State's expert testified that a 95% confidence interval for Smith's score would be a range of 70 to 79, *i.e.*, an error margin of five above the score and four below it. Pet.App.70a.[16] One of Smith's

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[14] *See* R. Charter & L. Feldt, *The Importance of Reliability as It Relates to True Score Confidence Intervals*, 35 Measurement & Evaluation in Counseling & Dev. 104, 105-07 (2002).

[15] The SEMs for Smith's SB-5 and WAIS-IV scores are slightly smaller than the SEMs cited by the APA and the Court in *Hall* because those were the *average* values for all ages. *See* APA *Hall* Br. 23; 572 U.S. at 713-14; SB-5 Manual 66; WAIS-IV Manual 45. The tests are more reliable for adults.

[16] *See* J.A.268, 278; *accord* D. Wechsler, *WAIS-IV Administration and Scoring Manual* 224 (2008).

experts testified that the test has a SEM "of about three" and that the 90% confidence interval is "five points above and below." J.A.24-25. Another one of Smith's experts testified that the SEM for the WAIS-IV is "approximately … two and a half to three points." J.A.169. The test-makers report an average SEM for Smith's age group of ± 2.12. *See* WAIS-IV Manual 45.

The Eleventh Circuit stated that the proper error range to apply is "generally" ± 5 points. Pet.App.7a.

D. Procedural Background

1. Smith's Trial

Smith was convicted of capital murder during a robbery. At sentencing, he raised the mitigating factor of extreme mental or emotional disturbance, and his expert, Dr. James Chudy, testified that Smith's IQ "could be as high as 75 or as low as 69." *Smith v. State*, 71 So.3d 12, 19 (Ala. Crim. App. 2008). In response, the State pointed to Smith's scores of 74 and 75 on two prior IQ tests. *Id.* at 18-20. The jury recommended a death sentence, which the court entered. *Id.* at 14. On direct appeal, the Alabama Court of Criminal Appeals (ACCA) affirmed. *Smith*, 795 So.2d 788. The ASC denied Smith's petition for a writ of certiorari, *Ex parte Smith*, 795 So.2d 842 (Ala. 2001) (mem.), as did this Court, *Smith v. Alabama*, 534 U.S. 872 (2001) (mem.).

2. Smith's *Atkins* Claim

a. Smith raised an *Atkins* claim in a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32. The state trial court denied his petition, the ACCA affirmed, *Smith*, 71 So.3d 12, and the ASC declined to hear the case, *Smith v. State*, No. 1080589 (Ala. Apr. 15, 2011). Smith then raised his *Atkins* claim in an amended habeas petition, which the

district court denied. *Smith v. Thomas*, 1:05-cv-474, 2013 WL 5446032, at *29 (S.D. Ala. Sept. 30, 2013). Smith appealed.

Overcoming AEDPA, the Eleventh Circuit found unreasonable determinations of fact and reversed. *Smith v. Campbell*, 620 F. App'x 734 (11th Cir. 2015). The panel hardly discussed Smith's IQ scores. It cited the trial expert's opinion that Smith's 72 ± 3 meant his IQ "could be as low as 69" and noted the state court's "refus[al] to downwardly modify" that score. *Id.* at 745, 749-51. Smith's higher scores (74 and 75) played *no role* in the analysis.

On remand, the district court ordered discovery and held an evidentiary hearing. Smith took two more tests and scored 74 and 78. Because his scores were all above 70, Smith tried to persuade the district court to adjust his scores to account for the "Flynn effect," Pet.App.71a, which remains "controversial," *Dunn v. Reeves*, 594 U.S. 731, 736 (2021). Relying on both the Flynn effect and a downward adjustment for error, Smith's expert testified that Smith's IQ was "around 70." J.A.181.

Alabama urged the court to consider the joint effect of Smith's *five* IQ scores above 70. To that end, the State's expert testified that having "multiple sources of IQ … contributes to the construct of validity indicating what a true IQ score is for an individual." Pet.App.70a. He further testified that the five scores "were obtained over a lengthy period of time by different examiners under different conditions," and they "are all in the borderline range." *Id.*[17]

[17] The term "borderline range" means the category between one and two standard deviations below the mean, *i.e.*, 70-85 IQ.

The district court did not dispute the "evidence" that Smith's "IQ is above 70," Pet.App.60a, but held that the scores were still not "strong enough" to deny the claim. Pet.App.70a. The court expressly relied on Smith's lowest score's lowest range: His score of 72 "could mean his IQ is actually as low as 69." Pet.App.68a. Calling it "a close case," the court "could not determine solely by [Smith's] scores" whether he satisfied the first prong, so the analysis would "fall largely" on the other prongs. Pet.App.60a, 74a. In light of his adaptive deficits, the court deemed Smith's "actual functioning [to be] comparable" to that of someone who is intellectually disabled. Pet.App.61a. The court granted relief and vacated Smith's sentence.

b. The Eleventh Circuit affirmed. Recognizing that the first prong "turns on whether [Smith] has an IQ equal to or less than 70," the panel held that it was required "to move on" from IQ because Smith had scored "as low as 72," meaning his IQ "*could be*" 69, according to the panel. Pet.App.17a, 35a, 44a-45a.

Rejecting the argument that Smith had failed to prove his claim by "a preponderance of the evidence," the panel "disagree[d] … because Smith carried his burden" with testimony about his 72 ± 3. Pet.App.43a-44a. "Smith needed to prove *only* that the lower end of his standard-error range is equal to or less than 70," which occurs "*if even one valid IQ test score generates [such] a range*." Pet.App.42a, 44a. (emphasis added). Also rejecting the argument that error is not a "one-way ratchet," the panel held that it could not "consider anything other than the lower end of [the] standard-error range." Pet.App.41a-42a; *see also* Pet.App.16a-17a ("[We] presumed that [Smith's] 'IQ score *could*' fall at the bottom of his range of admissible IQ scores.").

c. The State sought review from this Court, which granted the petition, vacated the judgment below, and remanded for the panel below to clarify its opinion. The Court noted the panel's emphasis on Smith's "lowest score of 72," which could be "read to afford conclusive weight" to that fact, creating "a *per se* rule that the lower end of the standard-error range for an offender's lowest score is dispositive." *Hamm*, 604 U.S. at 2. "On the other hand," the panel stated that "Smith's lowest score is not an outlier," which could suggest "a more holistic approach" that analyzed "multiple IQ scores jointly." *Id.*

Ten days later, the Eleventh Circuit issued a new opinion "reject[ing] any suggestion" that the first prong is satisfied whenever "the lower end of the standard-error range for [the] lowest of multiple IQ scores is 69." Pet.App.2a. According to the panel, a "holistic" analysis of prong one asks the State to "rule out the possibility" of disability based on "the body of evidence that [the] IQ scores represent." Pet.App.6a.

The court noted expert testimony "that Smith's multiple IQ scores … taken over a long period of time place him in the borderline range." Pet.App.5a; *see* Pet.App.70a. Smith's scores were not "so high," however, that a court could "disregard[]" what some of them "individually suggest." Pet.App.6a. Scores "within the 'range of about 65 to 75,'" the panel held, "individually suggest Smith's true IQ may be 70 or lower." Pet.App.6a-7a. Counting four of five scores in that range, the panel identified "consistent evidence" that Smith's true IQ "could" satisfy the first prong. Pet.App.7a. Thus, the Eleventh Circuit held that the district court had correctly moved on from IQ because Smith's scores did not "foreclose the conclusion" that he had satisfied the first prong. App.4a-5a.

SUMMARY OF ARGUMENT

I. Smith failed to carry his state-law burden to prove an IQ of 70 or less by a preponderance of the evidence. Alabama courts would assess Smith's claim by relying on the fact that he has five scores above 70, which together tend to prove his IQ is above 70. In Alabama, scores below 76 do not automatically count for the offender.

Smith's sentence is presumptively valid and runs afoul of no precedent. Thus, for Smith to receive relief, the courts had to expand the scope of the Eighth Amendment to defendants whose IQ scores tend to prove an IQ above 70. But no national consensus of state legislation exists on the cumulative effect of multiple IQ scores; to the extent there is any consensus, it favors the State.

Even if Smith could identify a consensus of States, the Court should not craft a new substantive rule of constitutional law about whether and how States must evaluate the cumulative effect of IQ scores. There is no basis in "the Eighth Amendment's text, history, meaning, and purpose" to immunize Smith—a man whose IQ is likely above 70—from capital punishment. *Kennedy*, 554 U.S. at 421.

II. The Eleventh Circuit wrongly expanded the scope of *Atkins* by eviscerating its most vital prong. The panel relaxed Smith's burden such that he needed to prove only a "possibility" of a 70 IQ, shifted the burden to the State to "foreclose" Smith's claim, and then made up for Smith's lack of intellectual-functioning proof by injecting evidence of adaptive deficits into the first prong. State law did not sanction these maneuvers, nor did *Atkins* and its progeny require them.

Nor was the Eleventh Circuit authorized to count every IQ score between 70 and 75 as a score for Smith while ignoring evidence about the cumulative effect of multiple scores. The State (and the experts) set the line at 70, not 75. And while *Hall* held that a score of 75 ± 5 *alone* could not defeat an *Atkins* claim, a string of 75s or a single 76 ± 5 still can. Moreover, science, precedent, evidence in the record, and even other parts of the Eleventh Circuit's opinion contradict the assumption that "the SEM" is always ± 5.

There are many "appropriate ways" that States can account for testing error. *Atkins*, 536 U.S. at 317. And there are many "appropriate ways" to evaluate multiple IQ scores. *Id.* Neither the Eighth Amendment nor *Atkins* "required" the Eleventh Circuit's approach. Pet.App.5a. Its judgment must be reversed.

ARGUMENT

I. The Eighth Amendment Does Not Immunize Joseph Smith from Capital Punishment.

Alabama has implemented *Atkins* by requiring an inmate to prove that he has "significantly subaverage intellectual functioning (an IQ of 70 or below)," that he has deficits in adaptive behavior, and that these deficits began in childhood. *Perkins*, 851 So.2d at 456. All three criteria must be proven by a preponderance of the evidence. *See, e.g.*, *Jerry Smith*, 213 So.3d at 320; *Morrow*, 928 So.2d at 322-23. Alabama law is enforceable unless it violates the Eighth Amendment. Virtually all the death-penalty States and all the Court's *Atkins* cases endorse the same definition, which Smith has not challenged. Nor has he challenged his preponderance burden. The courts below purported to apply Alabama's framework and acknowledged that Smith's claim "turns on whether

he has an IQ equal to or less than 70." Pet.App.35a; *see also* Pet.App.3a; *Smith*, 620 F. App'x at 747.

But Smith never proved that his IQ is 70 or below. His scores of 75, 74, 72, 78, and 74 prove the opposite. As the State's expert testified, five test scores yield a more reliable estimate of true IQ than one test alone. Pet.App.70a. Smith took many "different tests" "over a long period of time" "basically coming up with the same result." J.A.271; *see id.* at 279. Smith's expert Dr. Reschly agreed that the scores are "remarkably consistent and corroborate each other," J.A.104, and that "measurement error is … much reduced when you have more than one IQ score," J.A.105. And Smith's expert Dr. Fabian agreed that Smith's scores were "outside the range" without applying the Flynn effect. J.A.221-22.

The expert testimony was consistent with both Alabama law and what Alabama courts have done in similar cases. *See, e.g.*, *Reeves*, 226 So.3d at 737, 741; *Bush*, 92 So.3d at 151; *Clemons*, 55 So.3d at 329. When assessing an *Atkins* claim in Alabama, therefore, a court should consider evidence or inferences about the cumulative effect of an offender's IQ scores, rather than rely on each score in isolation.

The courts below could have simply credited the record evidence about the joint effect of Smith's five IQ scores. No more precision was needed to decide the case, for Smith had no rebuttal to the scores on their own terms. Instead, he pressed the Flynn effect, "a controversial theory," *Reeves*, 594 U.S. at 736, that could be applied to deflate his scores. But the district court rejected the Flynn effect, Pet.App.71a, forcing Smith to argue that having some "scores within the 70 to 75 range" satisfies his burden. BIO.i; *see also* BIO.1,

20. The court below endorsed that approach, stating that "four out of [the] five IQ scores" helped Smith because they were "about 65 to 75" and therefore not "so high" as to "rule out the possibility" of an IQ of 70. Pet.App.6a-7a.

But no precedent authorizes that rule for cases involving multiple IQ scores. Beyond citing two definitions of intellectual disability, *Atkins* said very little about the scope of the class it protects. While *Hall* instructed that States must account for error, having multiple IQ scores *is* a way to account for error. *Cf.* DSM-5-TR at 41 ("[U]sing multiple IQ scores or other cognitive tests" is "more useful for understanding intellectual abilities than a single IQ score."). *Hall* held only that Florida could not treat a single IQ score above 70 as "final and conclusive" where the claimant also proved that his score's error range reaches 70. 572 U.S. at 712; *see id.* at 723-24. Thus, *Hall* would be instructive if Smith's sole IQ score were the 72.

But Smith had "evidence of [a] higher IQ test score." *Brumfield*, 576 U.S. at 316. He had four of them. And *Hall* said nothing about how to assess consistent or cumulative evidence of an offender's IQ. *See 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[.]"); *Hamm*, 604 U.S. at 2. So the precedent is not "clear." *Contra* BIO.2.

While applying a SEM is one way to "reflect[] the reality" of intellectual functioning, *Hall*, 572 U.S. at 713, it is an open question under federal law whether and how courts may evaluate the cumulative effect of multiple scores. In the absence of precedent on point, this Court must interpret and apply the Eighth

Amendment. Smith has not carried his "heavy burden" to prove a constitutional violation, *Gregg*, 428 U.S. at 175, for two reasons. First, there is no objective evidence of a nationwide consensus barring capital punishment for someone in Smith's position. Second, the text and history of the Eighth Amendment give the Court ample "reason" to decline to constitutionalize a new rule for multiple IQ scores that would override presumptively valid state sentences. *Enmund*, 458 U.S. at 801.

A. No nationwide consensus mandates a rule denying the cumulative effect of IQ scores.

To justify expanding the scope of *Atkins*, Smith first must prove the existence of a national consensus of state legislation, the "clearest and most reliable objective evidence of contemporary values." *Penry*, 492 U.S. at 331. He must identify a rule in state law that would suggest contemporary societal values deem cruel the capital punishment of a man whose IQ scores together make disability unlikely. He cannot. Even the "most casual review of the various criminal justice systems now in force," *Rummel*, 445 U.S. at 284, shows that the States have not coalesced around a single legislative approach to multiple IQ scores. And to the extent judicial resolution of claims reflects the people's moral judgment on the issue, the law "varies markedly from one State to another." *Id.*

If there is anything resembling a norm, it is one that rejects Smith's logic that "scores within the 70 to 75 range" satisfy prong one *simpliciter*—regardless of their cumulative effect. BIO.i. When States adopt or apply a preponderance burden, as most have done, *supra* Statement §B.2, they decline to circumscribe the IQ evidence that can impact a claim. Their approach

is truly holistic, whereas the court below invented constitutional rules that would *ex ante* diminish or eliminate the cumulative effect of multiple scores. For example, while the court conceded that "we'd expect consistent results to reflect a person's intellectual ability," it then held as a matter of law that "a consistent score is not conclusive." Pet.App.4a. And it shifted the IQ burden to the State to "foreclose" the chance of disability (*id.* at 5a) which is a rule absent from the democratic output of States and inconsistent with the offender's usual burden.[18] Even if Smith's scores could be characterized as "consistent evidence that Smith *may have* [SSIF]," Pet.App.7a (emphasis added), despite his score of 78, that fact would be constitutionally *irrelevant* because the States do not agree that a mere possibility satisfies prong one.

To be sure, *some* States have restricted the consideration of multiple IQ scores. But there is division over how it should be done. At least as many States have assigned greater weight to an offender's highest score (or testimony to that effect) as those that have focused on the lowest score (Ohio) or asked whether each score individually could satisfy the offender's burden under *Hall* if it were the only score (Kentucky). *Supra* Statement §B.2.

Complicating matters for Smith is that the state high-court decisions most favorable to him rely on a misinterpretation of *Hall*. Their judgments do not reflect social values but an "erroneous understanding" of the doctrine, *Kennedy*, 554 U.S. at 426, for *Hall*

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[18] Two States, Arizona and Arkansas, shift the burden to the State after the offender presents evidence of an IQ of 65 or below. *Supra*, Statement §B.2. Even so, they do not require the State to "rule out the possibility" of intellectual disability. Pet.App.6a.

never "specified how courts should evaluate multiple IQ scores," *Hamm*, 604 U.S. at 2; *cf. Jones*, 593 U.S. at 126 (Thomas, J., concurring in the judgment) (*Hall*'s application is neither "easy," "clear cut," nor "predictable."); *United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) ("*Hall* does not provide explicit guidance with respect to how courts should treat multiple IQ test results[.]"). State courts have not "been uniform" in their interpretation of *Hall*, *cf. Kennedy*, 554 U.S. at 430, because its import for cases with multiple IQ scores is "vexing" at best and "contradict[ory]" at worst, *Wilson*, 170 F. Supp. at 364. Most courts have appreciated "what *Hall* did not decide,"[19] *see infra* §II, but others "have misinterpreted" it as adopting a rule for multiple IQ scores. *Cf. Kennedy*, 554 U.S. at 431. Their incorrect extensions of recent Supreme Court precedent are not "relevant to determining whether there is a consensus." *Id.*

The absence of consensus over whether and how to evaluate the cumulative effect of multiple IQ scores is dispositive. Alabama's framework for enforcing *Atkins* is not "exceedingly rare." *Graham*, 560 U.S. at 67. Where States develop varying approaches on a matter near to their core sovereign power, "a constitutionally imposed uniformity [would be] inimical to traditional notions of federalism." *Rummel*, 445 U.S. at 282. At a minimum, such evolution must be democratically authorized before the Court adopts a rule that "cannot be reversed short of a constitutional amendment." *Gregg*, 428 U.S. at 176.

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[19] *See, e.g.*, *Pizzuto v. Blades*, 1:05-cv-00516, 2016 WL 6963030, at *6 (D. Idaho Nov. 28, 2016).

B. The Eighth Amendment's text and history do not mandate a rule denying the cumulative effect of IQ scores.

Whether or not a consensus exists, the Court can decline to expand the Eighth Amendment if it has "reason" not to constitutionalize prevailing standards. *Enmund*, 458 U.S. at 801. The Court may find such reason in precedent or in "the Eighth Amendment's text, history, meaning, and purpose." *Kennedy*, 554 U.S. at 421; *Ford*, 477 U.S. at 406 (considering "the barbarous methods generally outlawed in the 18th century" and "the common law").

The decision below lacks "historical credentials." *Ford*, 477 U.S. at 406; *cf. United States v. Rahimi*, 602 U.S. 680, 730 (2024) (Kavanaugh, J., concurring) ("Constitution's text and history" relevant "when determining whether to extend … a precedent"). The Eighth Amendment meant to proscribe punishments "calculated to superadd terror, pain, or disgrace." *City of Grants Pass v. Johnson*, 603 U.S. 520, 542 (2024) (cleaned up); *Bucklew*, 587 U.S. at 130. But the point of considering IQ scores together is not to inflict suffering without penological reason, but to decide whether Smith qualifies for *Atkins* relief. Smith does not claim that his sentence—imposed after judge and jury weighed aggravating and mitigating evidence, including his "intelligence," *Smith*, 795 So.2d at 839, 841—offends the Constitution's original meaning.

The Court's insanity cases have drawn on history as a guide, *see, e.g.*, *Kahler*, 589 U.S. at 283-84; *Ford*, 477 U.S. at 406-08, and intellectual disability should receive the same treatment. At common law, the closest historical analogue to *Atkins* was the rule that "'idiots' … were not subject to punishment for criminal

acts." *Penry*, 492 U.S. at 331; *see Atkins*, 536 U.S. at 340-41 (Scalia, J., dissenting). But that status was reserved for persons with "such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil." *Penry*, 492 U.S. at 333. That group, which has an "IQ of 25 or below," *id.*, is a small fraction of today's *Atkins*-eligible defendants. Indeed, *Atkins* does not apply to them at all, for it reaches only those who can "be tried and punished." 536 U.S. at 306. It should go without saying, then, that the rules devised by the court below for exempting a man with an IQ above 70 from capital punishment are far from any historical practice.

The Eighth Amendment also presumes that a state sentence is "valid[]," *Gregg*, 428 U.S. at 175, because federal courts are ill suited to decide "social policy" and "moral culpability" on their own, *cf. Kahler*, 589 U.S. at 280. They do better by taking guidance from state legislatures, but even then, there is real "danger" that capricious social mores become "frozen into constitutional law." *Thompson*, 487 U.S. at 854-55 (O'Connor, J., concurring). Because today's consensus may be tomorrow's abandoned social experiment, the rules of criminal law that "prevent a State from ever choosing another" must be "old and venerable." *Kahler*, 589 U.S. at 279.

Deference is especially warranted where, as here, "uncertainties about the human mind loom large." *Id.* at 280. For the courts below, even under their erroneous framework, the decision was so "close" that it turned on "which expert [to] believe[]," Pet.App.91a. The Court needs no reminder that "[p]sychiatry is not … an exact science." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985); *cf.* Br. of Ala. as *Amicus Curiae*, *United*

States v. Skrmetti, No. 23-477 (U.S. Oct. 15, 2024). Yet this field marked by discord, which on a good day may not yield a "single, accurate psychiatric conclusion" about a patient, *Ake*, 470 U.S. at 81, is supposed to divine Smith's moral desert for murder. If doctors using "clinical judgment" can reasonably disagree, *Hall*, 575 U.S. at 732, how can Smith's punishment be cruel and unusual? How can he be immune from his sentence "by definition"? *Atkins*, 536 U.S. at 318.

A new constitutional rule for IQ scores would be especially inappropriate because the standards "constantly evolve." *Bourgeois v. Watson*, 141 S. Ct. 507, 509 (2020) (Sotomayor, J., dissenting). Some say that change reflects "the scientific method at work." Br. of Am. Psychological Ass'n et al. as *Amici Curiae* at 14, *Moore v. Texas*, No. 18-443 (U.S. Aug. 4, 2016) ("APA *Moore* Br."). Yet the diagnostic criteria can evolve "inadvertently,"[20] after litigation,[21] or "in response to … new attitudes," *cf. Otto v. City of Boca Raton*, 981 F.3d 854, 869 (11th Cir. 2020). Such uncertainty, including on basic topics like an IQ test's error range, is all the more reason that medical groups and other "experts have no license to countermand" the people. *United States v. Skrmetti*, 145 S. Ct. 1816, 1840 (2025)

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[20] Am. Psychiatric Ass'n, *Text Updates: Intellectual Developmental Disorder* (2021), perma.cc/AN99-FKHN (removing sentence in diagnostic criteria at issue in *Moore*); *but see* APA *Moore* Br. 9 (defending same sentence as part of the "clinical judgment" in making a diagnosis).

[21] The 2022 revision to the DSM-5 struck the number "70" from a phrase on which *Hall* relied and replaced it with "65-75." *Compare* DSM-5-TR at 42 *with* DSM-5 at 37. Someone with an IQ score *above 75* can now be diagnosed based on "actual functioning," an undefined term used nowhere else in the manual. *Id.*

(Thomas, J., concurring). Expert opinion cannot "shed light on the meaning of the Constitution." *Id.*

Rather, the Court applies its "own understanding of the Constitution," *Kennedy*, 554 U.S. at 434, which does not conform to "everything stated in the latest medical guide," *Moore*, 581 U.S. at 13. The Court has already held that "differing opinions about how far, and in what ways, mental illness should excuse criminal conduct" are "best left to each State to decide on its own." *Kahler*, 589 U.S. at 280-81. And *Atkins* too made it "wholly inappropriate" for courts, "by judicial fiat, to tell the States how to conduct [the] inquiry." *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003). The Court should reaffirm that the Eighth Amendment does not sanction "micromanagement" of state justice systems. *Harris v. Alabama*, 513 U.S. 504, 512 (1995).

II. The Eleventh Circuit's Approach to Multiple IQ Scores Contravened *Atkins*.

The Eleventh Circuit departed from precedent when it nullified the state-law preponderance burden and counted all scores below 76 for Smith on the ground that *each* suggests a *possibility* of disability. That possibility even trumped Smith's score of 78. Erasing the discretion *Atkins* left for States, the court contradicted testimony in the record, basic "statistical fact[s]," and the views of experts "who design, administer, and interpret IQ tests," *Hall*, 572 U.S. at 712-13. For any of these reasons, the Court should reverse.

A. The Eleventh Circuit erred by requiring that the State "rule out the possibility" of intellectual disability.

According to the Eleventh Circuit, evaluating a set of IQ scores means asking whether the offender's true IQ "could be" or "may be" 70 or less. Pet.App.4a-7a. On

this view, the IQ scores must "foreclose" and "rule out the possibility" of significantly subaverage intellectual functioning, or the court must end the IQ inquiry. Pet.App.4a-6a.

Applying that framework to Smith's five scores, the courts below never found that Smith's true IQ is more likely than not to be 70 or less. *Contra Perkins*, 851 So.2d at 456. The district court admitted that Smith's "multiple sources of IQ over a long period of time … lean[] in favor of finding that Smith does not have [SSIF]." Pet.App.70a. And the Eleventh Circuit did not disagree. Pet.App.5a. Even Smith seems to concede that his true IQ is "somewhat higher than 70." BIO.20. Yet he easily carried his new burden because *some* of his scores "individually suggest [his] true IQ may be 70 or lower." Pet.App.6a.

This novel and extreme evidentiary framework, which Smith did not defend in his brief in opposition, tramples over the power *Atkins* reserved for the States. Federal courts cannot set the burden of proof because *Atkins* and its progeny addressed only "the *substantive* definition of intellectual disability," not the "*procedural* question of [the] standard of proof." *Young v. State*, 860 S.E.2d 746, 768-76 (Ga. 2021) (plurality), *cert. denied*, 142 S. Ct. 1206 (mem.); *accord Raulerson v. Warden*, 928 F.3d 987, 1001 (11th Cir. 2019) (W. Pryor, J.), *cert. denied*, 140 S. Ct. 2568 (mem.). The panel not only usurped the role of States; it made the absence of disability "equivalent [to] an element of capital murder which the state must prove beyond a reasonable doubt." *Cf. United States v. Webster*, 421 F.3d 308, 312 (5th Cir. 2005). The result is contrary to how *Atkins* has been enforced for twenty years. *See Hill v. Humphrey*, 662 F.3d 1335, 1348 n.13 (11th Cir. 2011) (noting variety of state standards).

To be sure, State discretion is not "unfettered," and *Hall* required courts to "take into account that IQ scores represent a range." 572 U.S. at 719-20; *see also Moore*, 581 U.S. at 12, 20. But assigning a preponderance burden does not conflict with attention to error. A court reviewing under this standard must consider the totality of the record, including any evidence about "the inherent imprecision of these tests," *Hall*, 572 U.S. at 723; *see, e.g.*, *Reeves,* 226 So.3d at 729. The panel's "possibility" burden is not necessary to account for error.

Worse, the Eleventh Circuit's approach to multiple scores contorts the basic "statistical fact" that an IQ test score is "best understood as a range of scores on *either side* of the recorded score." *Hall*, 572 U.S. at 713 (emphasis added); *see Black v. Carpenter*, 866 F.3d 734, 746 (6th Cir. 2017); *Mays v. Stephens,* 757 F.3d 211, 218 n.17 (5th Cir. 2014) ("not a one-way ratchet"). As the Eleventh Circuit first observed in *Ledford v. Warden*, measurement error is "bi-directional" and "does not carry with it a presumption that an individual's IQ falls at the bottom of his IQ range." 818 F.3d at 640. But in 2023, the *Smith* panel expressly rejected *Ledford*'s holding (Pet.App.43a) despite its application by Alabama courts[22] and other panels in the Eleventh Circuit.[23]

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[22] *Reeves*, 226 So.3d at 740-41; *cf. Callen*, 284 So.3d at 197.

[23] *Jenkins v. Commissioner*, 963 F.3d 1248, 1276 (11th Cir. 2020); *Raulerson*, 928 F.3d at 1008. Even after the 2023 *Smith* panel announced *Ledford*'s abrogation, the Eleventh Circuit again applied *Ledford*. *See Ferguson v. Commissioner*, 69 F.4th 1243, 1255 (11th Cir. 2023) ("But, importantly, the SEM 'is merely a factor … that may benefit or hurt [an] individual's *Atkins* claim[.]'") (quoting *Ledford*, 818 F.3d at 640-41).

The upper part of the range is relevant only if the inmate has a real burden. If the test is just a chance of disability, then the lowest number in the lowest range will dictate the outcome, as the district court held, Pet.App.68a, and the panel held in its initial opinion, Pet.App.42a-44a, and order on motion to stay, Pet.App.16a-17a. The 2024 opinion promised not to make the same mistake, Pet.App.2a, but still fixated on "the lowest score," Pet.App.6a, and the "lower end of [the] score range," Pet.App.4a (quoting *Moore*, 581 U.S. at 14). There was no reason to mention, let alone dwell on, the chance that Smith's "IQ could be as low as 69" (Pet.App.5a) while ignoring that it "could be an 83" (J.A.219) unless the former was dispositive. In effect, the panel doubled down on its "*per se* rule," *Hamm*, 604 U.S. at 2, supplanting state law.

Focusing on the lower part or lowest point on an error range is unsound for other reasons too. First, the "professionals" who make the gold-standard tests (*Hall*, 572 U.S. at 712) account for regression to the mean, so the reported error ranges for low scores are "stretched" upward. *See* SB-5 Manual 65-67; WAIS-IV Manual 46. As the State's expert illustrated with Smith's score of 74 on the WAIS-IV, a 95% confidence interval is about 70 to 79 (*not* 69 to 79). J.A.278.[24] More of the range lies above the observed score than below it, and a court simply subtracting SEMs from a score may end up concentrating on a number that's not even in the range. Second, there are more ways for a test score to err downward than upward. An offender

[24] *Accord, e.g.*, *Haliburton*, 331 So.3d at 643 n.3. These values appear to be rounded to the nearest whole number too, so it is not safe to say that a range of 70-79 represents a possibility that 70 falls within the 95% confidence interval.

can underperform on an IQ test for many reasons (*e.g.*, fatigue, stress, distraction, medical conditions), but there is generally no way to feign a higher intelligence on an objective IQ test.[25] Consequently, it is more likely that an offender's test score *underestimates* his true IQ. By reducing the IQ inquiry to possibilities, not probabilities, the Eleventh Circuit's framework renders these statistical facts irrelevant.

The possibility burden is not workable either. Because "no finite score" has "100% accuracy," there is always a theoretical *possibility* of an IQ of 70 or less. Br. of AAIDD et al. as *Amici Curiae* at 19 n.26, *Hall v. Florida*, No. 12-10882 (U.S. Dec. 23, 2013) ("AAIDD *Hall* Br."). For example, even for an IQ score of 87, an expert can compute odds of "1 in 500 million" that the offender's true IQ is 70 or less. *State v. Vela*, 777 N.W.2d 266, 296 (Neb. 2010). If that infinitesimal chance satisfies the IQ requirement, then the Eleventh Circuit's answer to the question presented is always no: regardless of the scores and regardless of the expert testimony, courts need not consider the cumulative effect of multiple IQ scores because a single score, however high, represents a *chance* that the offender has a disability. This reasoning has no limit, an *Atkins* claim will *never* fail at prong one, and the panel's "holistic" rhetoric was just window dressing. If all that matters is whether Smith's IQ "*could*" be 69, then the presence of multiple scores is legally meaningless. App.16a-17a.

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[25] *See, e.g.*, *Haliburton*, 331 So.3d at 647; *Nixon*, 327 So.3d at 782-83; *Pizzuto*, 2012 WL 73236, at *15.

B. The Eleventh Circuit erred by evaluating Smith's IQ scores "individually" rather than cumulatively.

The court below started with the premise that a score of "about 65 to 75" could "individually suggest" an IQ of 70 or less. Pet.App.6a. It then generalized that proposition to imply that *every* score in the range—even those above 70—suggests disability, Pet.App.7a, no matter how many there are. Smith carried his burden on the ground that "four out of [his] five IQ scores" between 72 and 75 "trump[ed]" the fifth score of 78. *Id.* The premise, the generalization, and the conclusion are all wrong.

1. While an IQ score can be read as a range, the panel's range of "about 65 to 75" was artificial. Even if it were proper to assume a universal range of ± 5, the line would be 75, not "about" 75.[26] More importantly, every score has a "test-specific standard-error range." *Moore*, 581 U.S. at 14; *supra* Statement §C.2. The Court recognized as much in *Hall*, so its reference to "a score of 65-75" cannot be read to cement that range in law. 572 U.S. at 713-14. The major IQ tests are all valid and reliable, but not equally so. Because test reliability is derived from "a particular group of examinees," Crocker & Algina, *supra* at 144, there can be no universal error range—even if the experts could agree "theoretically" on "a universal standard," Charter & Feldt, *supra* at 110. These concepts can only "apply to the specific test [or tests] being used." AAIDD *Hall* Br. 19 n.26.

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[26] The panel cited its own vacated opinion, which quoted a single sentence of expert testimony at Smith's *Atkins* hearing. Pet.App.26a. But the expert was wrong to rely on the APA, which opines about error ranges only in "general[]." DSM-5-TR at 41.

Assuming a range of ± 5 for every score betrayed the panel's "holistic approach to multiple IQ scores that considers the relevant evidence." Pet.App.2a. First, Smith adduced *no* evidence regarding the error range for two of his scores. The court had no authority to invent a margin of error for him. Second, for the remaining scores, there was relevant evidence of other error ranges. *See, e.g.*, Pet.App.5a (discussing Smith's 72 ± 3). The experts testified to specific ranges for several of Smith's scores. *Supra* Statement §C.2. And today's test manuals report extensive data; they do not advocate a blanket rule of ± 5; and they use ETS and SEE to produce ranges closer toward the mean, as the State's expert testified.[27] In sum, there was no basis in law or science to adopt a simplistic cutoff of "about …75." Pet.App.7a.

The proper error range may seem academic, but on the panel's logic, it was *dispositive* because Smith needed a margin of at least ± 4 for even a majority of his scores to yield a range that dips to 70. He also needed the panel to ignore regression to the mean, which on its own would put his 75 out of range. Without finding that Smith had proven the error range for each score (let alone proving an error range for their conjunction), the panel could not conclude that "four out of [his] five IQ scores" prove disability. Pet.App.7a.

2. The next step in the Eleventh Circuit's analysis erred as well. Counting every score below 76 for Smith nullified unrebutted testimony about their cumulative effect—testimony that his pattern of scores provide a

[27] The State's expert reported that Smith's WAIS-IV score of 74 has an asymmetric 95% confidence interval of 70-79, J.A.268; *cf., e.g.*, *Escalante-Orozco*, 386 P.3d at 834 (citing asymmetrical error ranges for scores on three different tests).

more reliable estimate of his IQ than one test alone. Pet.App.70a. The panel recognized that "consistent scores" reflect "ability" rather than "random chance." Pet.App.4a. That view is grounded in common sense, the record, and the science, but the panel abandoned it based on a misreading of *Hall*.

Hall held that the State could not "execute a man because he scored a 71 instead of 70 on an IQ test." 572 U.S. at 724. A single score cannot be "final and conclusive" where the claimant proved his score had an error range including 70. *Id.* at 712. But *Hall* said nothing about multiple scores. *Id.* at 734 (Alito, J., dissenting); *Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting); *Hamm*, 604 U.S. at 2. Because Florida had applied an unconstitutional cutoff, Hall did not posit a rule for multiple IQ scores, Tr. of Oral Arg. 24-25, and the Court did not announce one. So the Eleventh Circuit was wrong to claim that precedent had forced its hand.

If *Hall*'s rule applies to multiple scores, then it must be that like Hall's 71, the entire set of IQ scores cannot be treated as "final and conclusive." 572 U.S. at 712. But Hall's score yielded an error range that reached 70 and below. Do Smith's five IQ scores yield such a range? If that is the relevant question, then Smith's claim fails because he never proved that the IQ data remained ambiguous after weighing the joint effect of his five scores above 70. There is nothing in his expert evidence even close to a computation of the error range when these consistent scores are considered together.

In other words, to the extent that Smith would have satisfied his *Hall* burden with a 72 ± 3, the State rebutted his showing with multiple scores above 72.

Cf. Brumfield, 576 U.S. at 316. Smith then had the burden to show how *Hall*'s command to consider error could overcome the cumulative weight of his scores. He never did.

The Eleventh Circuit short-circuited the analysis by asking if each score is "individually" consistent with intellectual disability. Pet.App.6a. Dismissing the probative value of multiple scores, the court relied on the specter that a "test itself may be flawed, or administered in a consistently flawed manner." Pet.App.4a (quoting *Hall*, 572 U.S. at 714). But that line in *Hall* was pure *dicta* because *Hall* did not decide how to handle multiple scores. In any event, Hall had taken many different tests with different examiners. *See Hall* J.A.108. It is anyone's guess what kind of flaw the Court had in mind, and the courts below did not identify any flaw in any test that Smith took.

Nor did *Hall* cite any scientific authority that casts doubt on the value of repeated testing. In fact, the APA encourages professionals to "corroborate results from one testing session with results from other tests and testing sessions to address reliability/precision and validity of the inferences made about the test taker's performance across time and/or tests." *Standards for Educational and Psychological Testing*, Am. Educ. Research Ass'n, et al. 154 (2014); *accord* Crocker & Algina, *supra* at 233 (discussing how "correlations between measures of the same construct using different measurement methods" support the validity of "both the construct and the test[s] that measure[] it"); J.A.270-71 (State's expert).

Like "[t]he SEM," considering the weight of multiple IQ scores prevents intellectual functioning from being "reduced to a single numerical score." *Hall*,

572 U.S. at 713. The "possibility of measurement error is much reduced" when the defendant has multiple scores. J. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol., Pub. Pol'y, & L. 170, 186 (2006). And it "would be a mistake" to assume that the error range used for one score should apply to a cumulative assessment of scores.[28]

The Eleventh Circuit's rule would produce absurd results. If scores up to 75 are "consistent evidence" for Smith, Pet.App.7a, then a criminal could score 75 on *any number* of IQ tests and still satisfy his burden to prove an IQ of 70 or below. Similarly, a high score of 80, 90, or 100 would make *no difference* if the offender had more scores in the "range of about 65 to 75." *Id.* To permit relief in such scenarios would dramatically expand the set of *Atkins*-eligible offenders and make no sense as a matter of law or logic.

C. Smith's IQ score of 78 precludes relief.

Even if the Eleventh Circuit were right to draw the line at 75 *and* to count scores of 70 to 75 for Smith, it erred when deciding that those scores "trump[ed]" his score of 78. Pet.App.7a.

Brumfield makes clear that a high score above 75 can trump lower ones. There, the inmate had a full-scale score of 75 and a screening test score that was "a little bit higher." 576 U.S. at 316. If the second test had been "sufficiently rigorous," it could have

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[28] D. Kaye, *Deadly statistics: quantifying an 'unacceptable risk' in capital punishment*, 16 L., Probability, & Risk 7, 29 (2017). For example, Kaye illustrated how the average of four IQ scores with a SEM of ± 2.16 produces an error range of ± 0.73. *Id.* at 29 n.142. Even if the proper error range were ± 5 for *each* of Smith's five scores, the interval for any combination of them would be much smaller. Smith did not prove otherwise.

"preclude[d] definitively the possibility" of disability. *Id.* For support, the Court cited a case involving an "estimated IQ of 76," which could have been dispositive (despite another score of 71) if it had been the result of "formal IQ testing." *Id.* (quoting *State v. Dunn*, 831 So.2d 862, 886 n.9 (La. 2002)).

Here, the rigor of the SB-5 is undisputed. It is one of three IQ tests "generally accepted" in the field. APA *Hall* Br. 20. And Smith does not question the score's validity; in fact, his expert administered the SB-5 at the request of his lawyers. J.A.239. The result was well above any "clinically established range." BIO.23. His score has a SEM of ± 2.12, which yields a 68% confidence interval of 75.88 to 80.12 and a 95% confidence interval (1.96 SEMs) of 73.84 to 82.15. If one computes the ETS and SEE, the range would be higher. SB-5 Manual 67. Even Smith's expert conceded that the score was "definitively above" the diagnostic range. Pet.App.37a; *accord* Flynn, *supra* at 186 ("A score of 76 would be needed to be confident...").

That score of 78 alone should have ended this case years ago. The Eighth Amendment does not bar the execution of a murderer who has a valid IQ score with a 95% confidence interval wholly above 70. Nothing in *Hall* said otherwise. *See* 572 U.S. at 715 ("Petitioner does not question … a bright-line cutoff at 75 or greater."); Tr. of Oral Arg. 13-14, 25. The doctrine protects those with "diminished capacities," *Atkins*, 536 U.S. at 318, which is what IQ tests measure: "potential" or "capacity." A. Kaufman & E. Lichtenberger, *Assessing Adolescent and Adult Intelligence* 10 (3d ed. 2006). Smith's 78 revealed his capacity. He could have done worse on other tests for any number of reasons, but there is only one explanation in the record for how he scored a 78: Smith is not intellectually disabled.

CONCLUSION

The Court should reverse.

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