No. _____

In the

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

PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Attorney General

STATE OF ALABAMA
Office of the Att'y Gen.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov

Edmund G. LaCour, Jr.
Solicitor General
Counsel of Record

Robert M. Overing*
Deputy Solicitor General

Beth Jackson Hughes
Ass't Attorney General

*Admitted to the California bar; Supervised by members of the Alabama bar.

Counsel for Petitioner

August 17, 2023

CAPITAL CASE
QUESTIONS PRESENTED

According to *Atkins v. Virginia*, 536 U.S. 304 (2003), the Eighth Amendment exempts intellectually disabled offenders from capital punishment. The Court adopted from "the medical community" a three-pronged definition of intellectual disability: "[1] significantly subaverage intellectual functioning, [2] deficits in adaptive functioning …, and [3] onset of these deficits during the developmental period." *Hall v. Florida*, 572 U.S. 701, 710 (2014). When assessing intellectual functioning, courts must account for an IQ test's "standard error of measurement" (SEM) and "move on" to the second prong when "the lower end of [the offender's] score range falls at or below 70." *Moore v. Texas*, 581 U.S. 1, 13–14 (2017).

Smith scored 78, 75, 74, 74, and 72 on five IQ tests. He did not prove his IQ was 70 or below, so his *Atkins* claim seemed to fail at step one. But the Eleventh Circuit "moved on" anyway because Smith had a score of 72 with an error range of ± 3. Thus, it sufficed that Smith's IQ "*could be* as low as 69" based on his lowest score alone and on the *possibility* that the test erred maximally in his favor. The questions presented are:

1. Whether *Hall* and *Moore* mandate that courts deem the intellectual-functioning prong satisfied when an offender's lowest IQ score, decreased by one standard error of measurement, is 70 or below.

2. Whether the Court should overrule *Hall* and *Moore* or at least clarify that they permit courts to consider multiple IQ scores and the probability that an offender's IQ does not fall at the bottom of the lowest IQ score's error range.

PARTIES AND RULE 29.6 STATEMENT

Petitioner (appellant below) is the Commissioner of the Alabama Department of Corrections (ADOC).

Respondent (appellee below) is Joseph Clifton Smith.

No party is a corporation.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

Supreme Court of the United States, No. 22A1111, *Commissioner, Alabama Department of Corrections v. Smith*, judgment entered June 23, 2023 (denying stay).

United States Court of Appeals for the Eleventh Circuit, No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered June 9, 2023 (denying stay).

United States Court of Appeals for the Eleventh Circuit, No. 21-14519, *Smith v. Commissioner, Alabama Department of Corrections*, judgment entered May 19, 2023 (affirming merits determination).

United States District Court for the Southern District of Alabama, No. 1:05-cv-00474-CG-M, *Smith v. Dunn*, judgment entered Nov. 30, 2021 (denying Rule 59(e) motion to alter or amend the judgment; granting motion for reconsideration to the extent the instant order clarifies).

United States District Court for the Southern District of Alabama, No. 1:05-cv-00474-CG-M, *Smith v. Dunn*, judgment entered Aug. 17, 2021 (granting petition for writ of habeas corpus).

United States Court of Appeals for the Eleventh Circuit, No. 14-10721, *Smith v. Campbell*, judgment entered Aug. 3, 2015 (reversing denial of petition for writ of habeas corpus).

United States District Court for the Southern District of Alabama, No. 05-0474-CG-M, *Smith v.*

Thomas, judgment entered Sept. 30, 2013 (denying petition for writ of habeas corpus).

Supreme Court of Alabama, No. 1080589, *Smith v. State*, judgment entered Apr. 15, 2011 (quashing petition for writ of certiorari).

Supreme Court of Alabama, No. 1080589, *Smith v. State*, judgment entered Jan. 20, 2010 (granting petition for writ of certiorari as to one claim).

Court of Criminal Appeals of Alabama, No. CR-05-0561, *Smith v. State*, judgment entered Sept. 26, 2008 (affirming dismissal in out-of-time appeal from denial of petition for writ of habeas corpus), rehearing denied Feb. 13, 2009.

Circuit Court of Mobile, No. CC-98-2064.60, *Smith v. State*, judgment entered Nov. 21, 2005 (granting out-of-time appeal of dismissal of second amended petition for writ of habeas corpus).

Supreme Court of Alabama, No. 1041432, *Ex parte Smith*, judgment entered Aug. 12, 2005 (denying petition for writ of certiorari).

Court of Criminal Appeals of Alabama, No. CR-04-1491, *Smith v. State*, judgment entered June 29, 2005 (dismissing appeal as untimely).

Circuit Court of Mobile, No. CC-98-2064.60, *Smith v. State*, judgment entered Mar. 18, 2005 (granting State's motion to dismiss amended petition for writ of habeas corpus).

Court of Criminal Appeals of Alabama, No. CR-02-0319, *Smith v. State*, judgment entered May 28, 2004 (reversing dismissal and remanding).

Supreme Court of Alabama, No. 1030608, *Ex parte Smith*, judgment entered Mar. 5, 2004 (reversing dismissal of petition for writ of habeas corpus as untimely).

Court of Criminal Appeals of Alabama, No. CR-02-0319, *Smith v. State*, judgment entered Dec. 19, 2003 (affirming dismissal of petition for writ of habeas corpus as untimely), rehearing denied Jan. 16, 2004.

Circuit Court of Mobile, No. CC-98-2064.60, *Smith v. State*, judgment entered Oct. 9, 2002 (dismissing petition for writ of habeas corpus as untimely).

Supreme Court of the United States, No. 00-10675, *Smith v. Alabama*, judgment entered Oct. 1, 2001 (denying petition for writ of certiorari).

Alabama Supreme Court, No. 1992220, *Ex parte Smith*, judgment entered Mar. 16, 2001 (denying petition for writ of certiorari).

Court of Criminal Appeals of Alabama, CR-98-0206, *Smith v. State*, judgment entered Aug. 25, 2000 (denying rehearing).

Court of Criminal Appeals of Alabama, CR-98-0206, *Smith v. State*, judgment entered May 26, 2000 (affirming conviction and death sentence).

Circuit Court of Mobile, No. CC-98-2064.60, *State v. Smith*, judgment entered Oct. 16, 1998 (entering conviction and death sentence).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Commissioner of the Alabama Department of Corrections, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Eleventh Circuit in this case.

DECISIONS BELOW

The Eleventh Circuit's 2023 opinion is reported at 67 F.4th 1335 and reproduced at App.1–40. The circuit court's 2023 order on motion to stay is reproduced at App.392–95.

The district court's opinion is available at 2021 WL 3666808 and reproduced at App.41–75. The district court's order on motion to alter or amend the judgment is reproduced at App.76–80.

The Eleventh Circuit's 2015 opinion is reported at 620 F.App'x 734 and reproduced at App.81–120.

JURISDICTION

The Eleventh Circuit entered judgment on May 19, 2023. Petitioner timely invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

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

Rule 32.3 of the Alabama Rules of Criminal Procedure provides, in pertinent part:

> The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.

INTRODUCTION

Joseph Smith was convicted and sentenced to death for a brutal murder in 1997. In 2023, the panel below erroneously affirmed vacatur of that sentence on the ground that Smith is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2003). First and foremost, an *Atkins* claimant must show "significantly subaverage intellectual functioning," which Alabama, like many States, understands to mean "an IQ of 70 or below." *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002).

Smith is not intellectually disabled. His five valid IQ scores—78, 75, 74, 74, and 72—would seem to make it impossible for him to show, by a preponderance of the evidence, that his IQ was 70 or below. Not impossible for the Eleventh Circuit, however, which bent law and logic to find Smith had satisfied his burden. Attributing its reasoning to *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 581 U.S. 1 (2017), the Eleventh Circuit made two flagrant errors.

First, only the offender's lowest IQ score counts, according to the Eleventh Circuit. Courts are not to compute an average or find the median or compare the strengths of different IQ tests. Rather, *Hall* and *Moore* "command" that "an offender's lowest IQ score" should be taken alone as the whole of the intellectual-functioning inquiry. 67 F.4th at 1346–48. By ignoring Smith's four other valid IQ scores, the Eleventh

Circuit split with decisions from the Fifth and Sixth Circuits, *see, e.g.*, *Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014); *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), and joined the approach of the Eighth and Ninth Circuits, *see, e.g.*, *Sasser v. Payne*, 999 F.3d 609 (8th Cir. 2021); *Ochoa v. Davis*, 50 F.4th 865 (9th Cir. 2022).

Hall and *Moore* did focus on a single IQ score in each case, but neither decision instructed that courts should *ignore* other valid scores in the record. Such an arbitrary and myopic analysis runs headlong into the State's power to set burdens of proof. In Alabama, as in most States, offenders must prove each *Atkins* prong by a preponderance of the evidence. *See Morrow v. State*, 928 So. 2d 315, 322–23 (Ala. Crim. App. 2004). Reviewing under a preponderance standard, courts must consider "the totality of the evidence." *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010). The Court should grant certiorari to clarify that *Hall* and *Moore* did not jettison these familiar evidentiary schemes. Alternatively, if *Hall* and *Moore* do require courts to throw out all but the lowest IQ score, the Court should grant certiorari to reconsider.

Second, only the lowest end of the lowest IQ score's error range counts, according to the Eleventh Circuit. Even after isolating the lowest score, courts are not to consider the possibility that it accurately represents (let alone underrepresents) the offender's true IQ. The panel below rejected the notion that "[SEM] is a bi-directional concept," tacitly endorsing "a presumption that an individual's IQ falls at the bottom his range." 67 F.4th at 1348 (citation omitted). *Hall* and *Moore* "require" courts to deem the first prong satisfied (citation omitted). By reading *Hall* and *Moore* to create an

irrebuttable presumption—that the first prong is met "if even one valid IQ test score generates a range that falls to 70 or below," *id.*—the Eleventh Circuit split with the Fifth and Sixth Circuits, *see, e.g.*, *Mays v. Stephens*, 757 F.3d 211 (5th Cir. 2014); *Black*, 866 F.3d 734, and joined the Eighth and Ninth Circuits, *see, e.g.*, *Jackson v. Payne*, 9 F.4th 646 (8th Cir. 2021); *Pizzuto v. Yordy*, 947 F.3d 510 (9th Cir. 2019).

Hall and *Moore* did emphasize the lower end of error range, but their reasons for doing so were unique to the circumstances of each case. At issue in *Hall*, Florida had employed a strict IQ score cutoff at 70, "refusing to recognize that [a] score is … imprecise." 572 U.S. at 712. In *Moore*, the Texas court "disregard[ed] the lower end of the standard-error range." 581 U.S. at 14. Here, the State is not urging that courts should ignore the SEM or half the SEM—only that the SEM is "best understood as a range of scores on *either side* of the recorded score." *Hall*, 572 U.S. at 713 (emphasis added). The Court should grant certiorari to clarify that courts may consider the whole probability distribution generated by a test score. Alternatively, if *Hall* and *Moore* require adjusting downward every IQ score to the bottom of the error range, the Court should grant certiorari to reconsider.

Combining these two errors, the panel below held that Smith had satisfied his *preponderance* burden with a single test score, a 72 (± 3)—despite all the other evidence of his higher intellectual functioning. The Eleventh Circuit's decision was not required by the Eighth Amendment to the Constitution nor this Court's precedents.

The Court should grant certiorari and reverse.

STATEMENT

A. Smith's Crime and Sentence

In 1997, Appellee Joseph Clifton Smith brutally beat Durk Van Dam to death with a hammer and saw—inflicting thirty-five blunt-force injuries including brain bleeding, rib fractures, and a collapsed lung—in order to steal $140, the man's boots, and some tools. Smith was convicted of capital murder during a robbery.

At sentencing, Smith attempted to raise the mitigating factor of extreme mental or emotional disturbance. To that end, Smith called a psychologist who testified that his IQ "could be as high as 75 or as low as 69." *Smith v. State* ("*Smith I*"), 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. After hearing all the evidence, the jury recommended a death sentence, which the trial court entered. *Id.* at 14. On direct appeal, the Alabama Court of Criminal Appeals ("ACCA") affirmed Smith's conviction and death sentence. *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000). The Alabama Supreme Court denied Smith's petition for a writ of certiorari, *Ex parte Smith*, 795 So. 2d 842 (Ala. 2001) (mem.), and so did this Court, *Smith v. Alabama*, 534 U.S. 872 (2001).

B. Smith's Postconviction *Atkins* Claim

Smith raised an *Atkins* claim in postconviction relief proceedings in the state courts and in his federal habeas petition.

Under Alabama law, Smith had the burden "[1] to show significant subaverage intellectual functioning

at the time the crime was committed, [2] to show significant deficits in adaptive behavior at the time the crime was committed, and [3] to show that these problems manifested themselves before the defendant reached the age of 18." *Smith v. State*, 213 So. 3d 239, 249 (Ala. 2007) (citing *Perkins*, 851 So. 2d at 456). As the petitioner, Smith had to prove each prong by a preponderance of the evidence. *See Morrow*, 928 So. 2d at 322–23.

Because Smith could not show an intellectual disability by a preponderance of the evidence, the circuit court denied his petition, the ACCA affirmed, *Smith I*, 71 So. 3d 12, and the Alabama Supreme Court declined to hear the case. Smith then filed an amended habeas petition, including an *Atkins* claim, in federal district court. The district court denied his petition, *Smith v. Thomas* ("*Smith II*"), No. 05-0474-CG-M, 2013 WL 5446032, at *29 (S.D. Ala. 2013), and Smith appealed.

C. The Eleventh Circuit's Erroneous Reversal in Violation of AEDPA

The Eleventh Circuit reversed and remanded, *Smith v. Campbell* ("*Smith III*"), 620 F. App'x 734, 736 (11th Cir. 2015). Without mentioning Smith's scores of 74 and 75 in its merits review, the court held it was an unreasonable determination of the facts for the ACCA to find "that Smith conclusively did not possess significantly subaverage intellectual functioning." *Id.* at 749–50 (citing Smith's score of 72 and "other trial evidence of deficits in intellectual functioning").

D. The Evidentiary Hearing on Smith's IQ

Evidence taken on remand *worsened* Smith's case. The district court held an evidentiary hearing that produced even higher IQ scores for Smith than the 72 on which *Smith III* relied. On a test administered by the State's witness Dr. King, Smith scored a 74. *Smith v. Dunn* ("*Smith IV*"), No. 05-00474-CG, 2021 WL 3666808, at *3 (S.D. Ala. Aug. 17, 2021). That score, the district court found, was "above what is considered significant subaverage intellectual functioning." *Id.* And on a test administered by his witness Dr. Fabian, Smith scored a 78. *Smith v. Comm'r, Ala. Dep't of Corrs.* ("*Smith V*"), 67 F.4th 1335, 1341 (11th Cir. 2023). In all, Smith has obtained five valid IQ scores in his lifetime—78, 75, 74, 74, and 72. *Id.*

But according to the district court, the new IQ evidence counted for nothing: Because Smith had scored a 72 in 1998, that score (taken alone) "could mean his IQ is actually as low as 69." *Smith IV*, 2021 WL 3666808, at *2. Based on that one test, which the court presumed was inaccurate in Smith's favor, Smith carried his burden to show an IQ of 70 or below by a preponderance of the evidence.

The State had repeatedly urged the district court to consider the totality of the evidence, including all five of Smith's IQ test scores. Dr. King testified that "multiple sources of IQ over a long period of time contributes to the construct of validity indicating what a true IQ score is for an individual." *Smith IV*, 2021 WL 36666808, at *2. He explained that the "five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions … are

all in the borderline range of intellectual functioning." *Id.* at *3. While the district court admitted that Dr. King's assessment "lean[ed] in favor of finding that Smith does not have significant subaverage intellectual functioning," it was not "strong enough to conclude that Smith is not intellectually disabled." *Id.* The district court concluded its findings regarding Smith's intellectual functioning as follows:

> [T]he Court finds *it is not clear whether Smith qualifies as having significantly subaverage intellectual function*. … [A]dditional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled. *This is a close case*…. As such, the Court finds that whether Smith is intellectually disabled will fall largely on whether Smith suffers from significant or substantial deficits in adaptive behavior, as well as whether his problems occurred during Smith's developmental years.

Id. at *4 (emphasis added). Analyzing the second prong, the court again characterized this as "a close case" but found "significant deficits in [Smith's] adaptive behavior." *Id.* at *11. The third prong was deemed satisfied based on expert testimony and Smith's school records. *Id.* at *11–12. The court granted Smith's petition and declared that he "cannot constitutionally be executed." *Id.* at *13.

E. The Eleventh Circuit's Erroneous Judgment Affirming That Smith Proved Significantly Subaverage Intellectual Functioning by a Preponderance of the Evidence

The State appealed, and on May 19, 2023, the Eleventh Circuit affirmed. *Smith V*, 67 F.4th 1335. Although the first prong "turn[ed] on whether he has an IQ equal to or less than 70," *id.* at 1345 (citing *Perkins*, 851 So. 2d at 456), the court held that it was proper to "move on"—*i.e.*, deem the requirement satisfied—without a showing that the Smith's IQ is likely 70 or lower. *Id.* at 1345–49. Instead, according to the panel, "Smith needed to prove only that the lower end of his [lowest IQ score's] standard-error range ["SEM"] is equal to or less than 70." *Id.* at 1349. On this view, the intellectual-functioning prong is satisfied "if even one valid IQ test score generates a range that falls to 70 or below." *Id.* at 1348. The court also held that it would be improper to "consider *anything* other than the lower end of an offender's standard-error range." *Id.* at 1348 (emphasis added). In the Eleventh Circuit, there is now a "presumption that an individual's IQ falls at the bottom of his IQ range." *Id.* (citation omitted). "Smith carried his burden" under the first prong because "the lower end of the [error] range was 69" for Smith's lowest score. *Id.* at 1349.

F. The Eleventh Circuit's Stay Order Embracing and Illuminating Its Error

The State moved the Eleventh Circuit to stay its mandate, but the court declined in a short order, App.392–95, and the mandate issued on June 20,

2023. The panel resisted the characterization of its holding as "a presumption that an individual's IQ falls at the bottom of his IQ range." App.394. But the Eleventh Circuit plainly adopted a presumption when it disavowed its precedent that there is no presumption:

> And to the extent that *Ledford* holds otherwise, see *Ledford*, 818 F.3d at 641 (suggesting that "the standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls at the bottom of his IQ range"), *Ledford* is no longer good law.

Smith V, 67 F.4th at 1348. The panel would rather characterize its holding as a "presum[ption] that an individual's IQ score *could* fall at the bottom of his range," and if so, "the district court [must] move on" from the intellectual-functioning prong of *Atkins*. App.394–95. The result is the same—the first prong does not bar an *Atkins* claim, according to the Eleventh Circuit, where the very bottom of the error range of an offender's lowest test score is 70 or below.

REASONS FOR GRANTING THE WRIT

I. The Eighth Amendment Does Not Require Courts to Ignore Every IQ Score but the Lowest and to Subtract One Standard Error to Determine Intellectual Functioning.

The Court should grant Alabama's petition for a writ of certiorari and reverse. The Eleventh Circuit committed two egregious errors: (1) the court exclusively relied on Smith's lowest IQ score, and (2) the court presumed that Smith's true IQ lies at the bottom

of that score's error range. Both errors wrongly distort the *Atkins* inquiry by placing a thumb on the scale in favor of capital offenders. Both errors trample over the State's discretion to define intellectual disability and set burdens of proof in capital punishment cases. And both errors must be reversed because "federal habeas review overrides the States' core power to enforce criminal law [and] 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'" *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

Purporting to clarify *Atkins*, this Court's decisions in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017), have sown confusion and circuit splits over the proper role of IQ test scores in determining intellectual disability. While the Eleventh Circuit held that *Hall* and *Moore* require exclusive reliance on the offender's lowest IQ score and its error range's bottom end, the Fifth and Sixth Circuits have rejected both moves. Accordingly, *Hall* and *Moore* must be reconsidered or at least clarified, and this case is a perfect vehicle for doing so.

A. This Court Did Not Command Exclusive Reliance on the Lowest IQ Score, Yet the Circuits Are Split.

The evaluation of IQ test scores has "considerable significance," *Hall*, 572 U.S. at 723, and can be dispositive of an *Atkins* claim. *See, e.g.*, *Busby v. Davis*, 925 F.3d 699, 717–18 (5th Cir. 2019). But courts have struggled to assess intellectual functioning when

presented with multiple IQ scores in the same case. Especially when an offender's IQ scores straddle the line for significantly subaverage intellectual functioning, the court's computation method—the way it weighs multiple scores—may make all the difference.

The weighing of IQ scores should be left to state discretion, *Atkins*, 536 U.S. at 317, but *Hall* and *Moore* muddied the waters. In *Hall*, the Court acknowledged that "each separate score must be assessed using the SEM" but gave no further guidance, remarking only that "the analysis of multiple IQ scores jointly is a complicated endeavor." 572 U.S. at 714. While rebuking Florida for relying on a single IQ score "as final and conclusive," *id.* at 712, "[t]he Court never explain[ed] why its criticisms … apply when a defendant consistently scores above 70 on *multiple* tests," *id.* at 742 (Alito, J., dissenting); *see also 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…."); *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….").

In *Brumfield v. Cain*, the Court shed some light when it hypothesized that "evidence of a higher IQ test score … could [have] render[ed] the state court's determination reasonable." 576 U.S. 305, 316 (2015). But there was no higher score and thus no opportunity to pass on the question. And while *Moore* did note the average of six scores, 581 U.S. at 8, the Court

ultimately focused on the offender's lowest IQ score—as it had in *Hall*. *Id.* at 14; *but see id.* at 34 n.1 (Roberts, C.J., dissenting) (describing *Moore*'s emphasis on one score as "dicta [that] cannot be read to call into question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores").

Predictably, the lower courts have split over how to handle multiple IQ scores. In *Garcia v. Stephens*, the Fifth Circuit considered a petitioner with five IQ test scores. 757 F.3d 220 (5th Cir. 2014). Rather than adopt the offender's lowest score of 75 as his true IQ, the court noted "the fact that his four other, pre-conviction IQ scores ranged from 83 to 100 indicated that his actual IQ is likely higher than 75." *Id.* at 226; *see also Smith v. Sharp*, 935 F.3d 1064, 1081–82 (10th Cir. 2019) (granting relief based on the "average[]" and "consistency" of multiple IQ scores); *McManus v. Neal*, 779 F.3d 634, 652 (7th Cir. 2015); *but see Ochoa*, 50 F.4th at 903; *Sasser*, 999 F.3d at 618–19.

Likewise, in *Black v. Carpenter*, the Sixth Circuit did not ignore all but the lowest of ten IQ scores ranging from 57 to 92. 866 F.3d 734 (6th Cir. 2017). Instead, the court found a metric implicit in "the requirement that mental retardation manifest itself before age 18." *Id.* at 747. For the purpose of satisfying that element, the court said, the petitioner's two scores obtained at age 45 (despite being his lowest) had "far less probative value." *Id.*

In contrast, the Eleventh Circuit panel here relied solely on Smith's score of 72, not because his other

scores were less reliable or less probative, but simply because 72 was the lowest. To the extent that Eighth Amendment jurisprudence should be "informed by the views of medical experts," *Hall*, 572 U.S. at 721, the panel's arbitrary winnowing of the evidence failed the test. It flouted *Hall*'s express teaching not to deem one score "final and conclusive … when experts in the field would consider other evidence." 572 U.S. at 712. In this case, experts in the field *did* consider evidence other than Smith's score of 72; indeed, they considered all five of his scores in tandem. Dr. King testified that having "multiple sources of IQ over a long period of time" enhances "construct [] validity"—*i.e.*, the strength of the inference from Smith's scores to a conclusion about his true IQ. *Smith IV*, 2021 WL 36666808, at *3; *accord Ledford v. Warden*, 818 F.3d 600, 641 (11th Cir. 2016). No expert furnished the contrary opinion that intellectual functioning is wholly determined by one's lowest IQ score.

As is its prerogative, Alabama permits courts to count every valid IQ score. "[T]he 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 v. State*, 226 So. 3d 711, 729 (Ala. Crim. App. 2016) (emphasis added). Alabama thereby avoids Florida's error in *Hall*: "There is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an *Atkins* claim…." *Thomas*, 607 F.3d at 757. Instead, Alabama courts contemplate

whether "the totality of the evidence (scores) indicates … subaverage intellectual functioning." *Id.*

No court has ever suggested that Alabama's holistic approach to IQ test scores runs afoul of the Eighth Amendment. But that is the implied holding of *Smith V.* Needless to say, the Eleventh Circuit's new rule castigating Alabama's enforcement of its criminal laws finds no support in the text, history, or tradition of the Eighth Amendment. Nor "the standards of the American people." *Hall*, 572 U.S. at 731 (Alito, J., dissenting).

The lower courts are deeply confused about the application of *Hall*, *Moore*, and medical expertise when offenders present multiple IQ scores. The Court should step in to correct the Eleventh Circuit's error and provide much-needed instruction amid a burgeoning split on this vital issue.

B. This Court Did Not Command Courts to Subtract One Standard Error of Measurement from the Lowest IQ Score, Yet the Circuits Are Split.

Like any other test of human ability, an IQ test "is, on its own terms, imprecise." *Hall*, 572 U.S. at 712. A given IQ test score may not reflect an individual's true IQ "for a variety of reasons." *Id.* Accounting for errors in measurement, the SEM for a given test provides a confidence interval, a range of possible scores in which the true IQ score falls with a certain probability. Typically, the test score ± one SEM creates a 68% confidence interval; the test score ± two SEMs creates a 95% confidence interval. For example, in this case,

the test on which Smith scored a 72 has an SEM of ± 3, so that test score (taken alone) generates a 68% probability that Smith's IQ lies between 69 and 75. *See Smith IV*, 2021 WL 36666808, at *1 n.1.

Hall and *Moore* made clear that courts must "account for [a] test's 'standard-error of measurement.'" *Moore*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 724). But they made very unclear how to do that. Indeed, "*Hall* provided no definitive guidance" on whether States can "recogniz[e] the inherent imprecision of IQ tests, but consider[] additional evidence to determine whether an SEM-generated range of scores accurately reflected a prisoner's actual IQ." *Moore*, 581 U.S. at 34 (Roberts, C.J., dissenting); *see also Hall* at 739 (Alito, J., dissenting) (predicting that *Hall* would "surely confuse States attempting to comply"); *accord Frazier v. Jenkins*, 770 F.3d 485, 498 (6th Cir. 2014) (sidestepping "the precise reach of *Hall*"); *United States v. Roland*, 281 F. Supp. 3d 470, 501 (D.N.J. 2017); *Wilson*, 170 F. Supp. 3d at 364 (describing *Hall*'s "apparent contradictions" leaving "vexing" questions for the lower courts).

In *Hall*'s wake, habeas petitioners have pressed courts to accept that their test scores overestimated their true IQs and should be "adjusted" downward. Accepting the invitation, the Eleventh Circuit held that *Hall* and *Moore* narrow the inquiry to the very bottom of the SEM range: "Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70." *Smith V*, 67 F.4th at 1349. In other words, the court accounted for the SEM of ± 3 by

simply subtracting three from Smith's score. To be sure, the score of 72 (± 3) represents the *possibility* that his true IQ is 69, but Smith's burden was to prove that it is *likely*, not merely possible, that his IQ is 70 or below.

Ruling on the State's stay motion, the panel below disputed the State's characterization of its holding as a "presumption that an individual's IQ score falls at the bottom of his IQ range." App.394. Instead, the panel repeated, the fact that "Smith's IQ *could* be as low as 69 … require[d] the district court to move on." App.395 (quotation marks omitted). Of course, that *is* a presumption. *Presumption*, *Black's Law Dictionary* 1376 (10th ed. 2014) ("A legal inference or assumption that a fact exists because of … some other fact."). The panel held that "Smith carried his burden under the intellectual prong," which "requires an IQ of 70 or below," because he scored a 72. *Smith V*, 67 F.4th at 1340, 1349. By reiterating that a court must "move on," the panel doubled down, making its new presumption irrebuttable.

Regardless of its label, the Eleventh Circuit's maneuver was wrong and deepened a split among the circuits. In the Fifth Circuit, "[t]he consideration of SEM … is not a one-way ratchet" in the offender's favor. *Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014). According to the Sixth Circuit, "the [Supreme] Court's decisions in no way *require* a reviewing court to *make a downward* variation based on the SEM in *every* IQ score." *Black*, 866 F.3d at 746. Prior to this case, the Eleventh Circuit also understood that the

SEM "may benefit or hurt [an] individual's *Atkins* claim" because it "is a bi-directional concept." *Ledford*, 818 F.3d at 640–41; *accord Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019); *Reeves*, 226 So. 3d at 740; *but see, e.g.*, *Jackson*, 9 F.4th at 653; *Pizzuto*, 947 F.3d at 520 n.8; *McManus*, 779 F.3d at 650 ("Accounting for the [SEM] … a full-scale IQ score of 70–75 or lower ordinarily will satisfy the first requirement."); *Roland*, 281 F. Supp. 3d at 499–502, 528; *Wilson*, 170 F. Supp. 3d at 366 (applying *two* SEMs to find intellectual functioning deficits based on IQ scores of 71 and 75).

The presumption that every IQ score errs upward by one or two SEMs is not scientific. It contradicts the very notion of SEM as a range that is distributed on either side of a measurement. It contradicts common sense because the test-taker's environment, luck, or breakfast might *help or hurt* his score on any given day. And it contradicts the basic *Atkins* framework, which has permitted Alabama and "most States" "to require defendants to prove each prong separately by a preponderance of the evidence." *Hall*, 572 U.S. at 736 n.12 (Alito, J., dissenting).

The court below acknowledged that Smith's burden meant "proving by a preponderance of the evidence that he … [had] significant subaverage intellectual functioning." *Smith V*, 67 F.4th at 1345. Indisputably, the "widespread and longstanding" preponderance standard requires "proof that persuades the trier of fact that a proposition 'is more likely true than not true.'" *United States v. Watkins*, 10 F.4th

1179, 1184–85 (11th Cir. 2021) (en banc) (quoting *United States v. Deleveaux*, 205 F.3d 1292, 1296 n.3 (11th Cir. 2000)). But the Eleventh Circuit let Smith off the hook. Rather than showing a 51% likelihood of an IQ 70 or below, it was enough for Smith that his true IQ "*could be*" as low as 69, *Smith V*, 2023 WL 3555565, at *2, 3, 7, 8 (emphasis added); App.395. "This totally transforms the allocation and nature of the burden of proof." *Hall*, 572 U.S. at 741 (Alito, J., dissenting).

Not only did the Eleventh Circuit lighten Smith's burden; it also spared him the need to grapple with any opposing evidence. Under a preponderance standard, Smith was required to show "evidence which is more convincing than the evidence offered in opposition." *Watkins*, 10 F.4th at 1184. He was required to demonstrate the likelihood an IQ 70 or below "in light of *all* the evidence." *Id.* at 1185 (emphasis added). But on the court's view, Smith's IQ score of 72 ± 3 automatically trumped every other piece of evidence of his intellectual functioning. *See Smith V*, 67 F.4th at 1349 ("[Smith's 72] could mean his IQ is actually as low as 69" despite "that all of Smith's IQ scores are higher than 70" and "that the consistency with which Smith scored above 70 makes it more likely that his true IQ is higher than 70"). Consequently, Smith did not satisfy the first prong by a preponderance of the evidence, but by a thumb on the scale "unhinged from legal logic" that "override[s] valid state laws." *Hall*, 752 U.S. at 741–42 (Alito, J., dissenting).

State courts should be permitted to treat SEM as a bi-directional concept, not a one-way ratchet. But *Hall* and *Moore* have sown doubt, allowing federal courts to manipulate the evidence while claiming their hands are tied. Only the Fifth and Sixth Circuits have explicitly rejected the presumption applied here. *See Mays*, 757 F.3d at 218 n.17; *Black*, 866 F.3d at 746, 748–49. Because the Eleventh Circuit and others have invoked the SEM to stray from sound science and sound Eighth Amendment jurisprudence, the Court should grant certiorari to settle the split.

* * *

The Eleventh Circuit's twin errors constrict and distort the IQ evidence, succumbing to the same constitutional problems identified in *Hall*—but now in reverse. The lower court "bar[red] consideration of evidence that must be considered" (by excluding Smith's other IQ scores) and "misuse[d] IQ score on its own terms" (by ignoring at least half the SEM). *Hall*, 572 U.S. at 723. This Court plainly rejected a "rigid rule" that the absence of a score 70 or below defeats an *Atkins* claim at prong one. In its place, the Eleventh Circuit crafted a rule, no less rigid, that a single score of 75 (± 5) or 73 (± 3) *automatically satisfies* prong one. That evidentiary *per se* rule flies in the face of the offender's traditional and familiar burden to prove by a preponderance of the evidence—not *some* evidence artificially weighted in his favor—that he has significant subaverage intellectual functioning.

C. *Hall* and *Moore* Must Be Clarified or Overruled.

"Construing and applying the Eighth Amendment in light of our 'evolving standards of decency,'" *Atkins* expressly rejected "the standards that prevailed … when the Bill of Rights was adopted." 536 U.S. at 311, 321. The Court's dubious methodology subjects States not to the fixed and objective strictures of the Constitution's original meaning but to the "judgment" of other States about "the dignity of man" and to changing "clinical definitions" offered by professional organizations. *Id.* at 311, 317–18. Still, *Atkins* purported to "leave to the State[s] the task of developing appropriate ways to enforce" the new and evolving standards. *Id.* at 317 (citation omitted).

Hall removed some of that discretion by instructing States to follow "clinical definitions …, which take into account that IQ scores represent a range." 572 U.S. at 720; *see also id.* at 719 ("States play a critical role" but do not have "unfettered discretion to define the full scope of the constitutional protection."). *Moore* added that "[t]he medical community's current standards supply [a] constraint on States' leeway." 581 U.S. at 20. Under "current medical standards," courts must "move on" from intellectual functioning when the bottom of a "score range falls at or below 70." *Id.* at 14.

Given the evolving standards, it is little wonder that States and courts are uncertain, for example, about the scope of State discretion in weighing multiple IQ scores. Or dealing with the scenario where an offender has some scores well above 70 and some with

error ranges straddling 70. The Eleventh Circuit says there's very little discretion involved: Bowing to "the medical community" means plucking the single lowest IQ score in the record, applying the maximum standard error downward, and deeming the offender's burden satisfied (or excused) if the result is 70 or below. Against the will of the States and their citizens, the Eleventh Circuit will "relax the proof requirements for … the [very] prong that most directly relates to the concerns [animating] *Atkins*." 572 U.S. at 727 (Alito, J., dissenting).

Somehow, the Eleventh Circuit extracted an IQ of 69 from Smith's scores of 78, 75, 74, 74, and 72. If that move was not required by *Hall* and *Moore*—if the Court's focus on a single downward-adjusted IQ score was "dicta," 581 U.S. at 34 n.1 (Roberts, C.J., dissenting)—then the Court should grant certiorari to clarify, to guide the courts below, and to protect whatever discretion and flexibility the States have left. If *Hall* and *Moore* do require the Eleventh Circuit's approach, they should be reconsidered.

CONCLUSION

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

Respectfully submitted,

Steve Marshall
Attorney General
Edmund G. LaCour Jr.
Solicitor General
Counsel of Record
Robert M. Overing*
Deputy Solicitor General
Beth Jackson Hughes
Assistant Attorney General
OFFICE OF THE ATT'Y GEN.
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@
AlabamaAG.gov
*Admitted to the California bar; Supervised by members of the Alabama bar.

August 17, 2023