**No. 24-872**

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

## BRIEF IN OPPOSITION

CHRISTINE FREEMAN, EXECUTIVE DIRECTOR
KACEY L. KEETON *
*Counsel for Respondent*
Assistant Federal Defender
Federal Defenders for the
Middle District of Alabama
817 S. Court St.
Montgomery, AL 36106
Kacey_Keeton@fd.org

*Counsel of Record

April 16, 2025

## QUESTION PRESENTED

During an extensive *Atkins v. Virginia*, 536 U.S. 304 (2002), hearing in district court, Mr. Smith presented pre-18 IQ scores of 74 and 75, and post-18 scores of 72, 74, and 78. Consistent with this Court's precedent, the district court then considered additional evidence of Mr. Smith's intellectual disability, including adaptive deficits, after which it concluded Mr. Smith was entitled to habeas relief under *Atkins*. The Eleventh Circuit affirmed.

The question presented is:

> Whether, under *Atkins* and its progeny, a court is precluded from considering "additional evidence of intellectual disability, including adaptive deficits" when a petitioner presents valid IQ scores within the 70 to 75 range.

## LIST OF PARTIES

The respondent is Joseph Smith. The petitioner is the Commissioner of the Alabama Department of Corrections, John Hamm. Because no party is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities



### Rules

## INTRODUCTION

Respondent Joseph Clifton Smith is a man with intellectually disability. From the time he was a little boy, he struggled with academics and social interactions with other children. In seventh grade, he was placed in "educable mentally retarded" classes—a label that Alabama assigned to students with IQ scores below 75 and documented deficits in adaptive behavior. Prior to age 18, Mr. Smith was administered IQ tests, receiving scores of 74 and 75. Testing at the time of the crime (age 28), resulted in an IQ score of 72 and also revealed he performed math at the level of a kindergarten-aged child, spelled at a third-grade level, and read at a fourth-grade level. He was sentenced to death before this Court decided *Atkins v. Virginia*, which bans states from executing individuals with intellectual disability.

During his federal habeas proceedings, Mr. Smith received a hearing on his *Atkins* claim. The district court, acting as fact-finder, observed live testimony of both parties' experts and made credibility findings. *See* Pet. App. 91a. After a thorough review of the evidence, the district court concluded Mr. Smith was intellectually disabled under *Atkins*. The Commissioner does not like the result and asks this Court to reverse that finding. However, given the fact-intensive nature of the district court's inquiry and the clearly erroneous standard of review, this case does not merit certiorari.

Moreover, the question the Commissioner ultimately poses is whether a court may consider prong two under *Atkins* when an individual's IQ scores fall in the 70 to 75 range. This Court has answered that question twice in the last decade. *Moore*

*v. Texas*, 581 U.S. 1, 14 (2017); *Hall v. Florida*, 572 U.S. 701, 723 (2014). In asking this Court to grant the writ, the Commissioner distorts the facts and law.

**First**, contrary to the Commissioner's mischaracterizations, neither the district nor circuit court deemed prong one satisfied solely because of a single IQ score, much less the mere "'possibility' of a 70 IQ." Pet. 12. The district court considered Mr. Smith's multiple IQ score**s**. Pet. App. 60a ("This Court reviewed the evidence regarding Petitioner's *scores* and after considering the standard error inherent in IQ tests, this Court found that it must consider additional evidence, including testimony on Petitioner's adaptive deficits, to determine whether Petitioner falls at the low end of the Borderline range of intelligence or at the high end of the required significantly subaverage intellectual functioning.") (emphasis added). Acknowledging this was a "close case," *id.* at 74a, 91a, 96a, the court, following *Hall*'s requirements, reasoned "that whether [Mr.] Smith is intellectually disabled will fall largely on whether [Mr.] Smith suffers from significant or substantial deficits in adaptive behavior, as well as whether his problems occurred during [Mr.] Smith's developmental years," *id.* at 52. Adhering to this analytical framework, the district court concluded Mr. Smith was intellectually disabled under *Atkins*. The Eleventh Circuit found no clear error in the district court's fact-finding or credibility determinations (and the Commissioner offered none). The Eleventh Circuit further determined the district court correctly applied the law.

**Second**, this Court's precedent is clear. What the Commissioner seeks is a precise math equation where, as this Court previously determined, none can exist.

While the general formula may be stated simplistically as "IQ measure + adaptive functioning + developmental period = *Atkins* relief," *Hall*, *Moore*, and other precedent, relying—as this Court required in *Atkins*—on the guidance of mental health professionals, establish that a legal intellectual disability determination is not precise math. In *Hall*, this Court held, "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment." *Hall*, 572 U.S. at 723. Here, as Florida did in *Hall*, the Commissioner seeks license to use Mr. Smith's IQ scores "on [his] own terms; and . . ., in turn, [force the Courts to ignore] evidence that must be considered in determining whether a defendant in a capital case has intellectual disability," *id.*, violating this Court's precedent. As this Court acknowledged, "[t]he death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724. The Commissioner's argument to overrule *Hall* and *Moore*, Pet. 24, means foreclosing that "fair opportunity" for intellectually disabled individuals. And in Mr. Smith's case, this foreclosure would be retroactive.

**Third**, there is no circuit split. While the Commissioner claims the Eleventh Circuit's decision broadens a split in how the circuits interpret *Hall* and *Moore*, even a cursory reading of the cases cited shows otherwise. Each circuit appears to follow *Hall* and *Moore* in a similar fashion. Of course, *Atkins* decisions are fact-intensive and turn on credibility determinations (especially in those rare instances,

like here, where AEDPA deference does not apply), so reasonable courts will differ when confronted with different facts.

This case is simply not what the Commissioner presents in his petition. It is neither an instance where the lower courts failed to follow the law nor an issue on which the circuits are split. Rather, this case involves a factual dispute about a factfinder's credibility determinations. Because the lower courts resolved the dispute in Mr. Smith's favor, the Commissioner now attempts to use this Court as a forum to relitigate it.

## STATEMENT OF THE CASE

### Procedural History

Joseph Clifton Smith was indicted in Mobile County on one count of capital murder, Ala. Code § 13A-5-40(2) (1975) (intentional murder during a robbery), for the death of Durk Van Dam. Four months later, a jury convicted him of capital murder and recommended a death sentence. A month later, the trial court sentenced him to death.

Following state appeals, this Court denied certiorari. *Smith v. Alabama*, 534 U.S. 872 (2001). Mr. Smith pursued state post-conviction relief, raising an *Atkins* claim for which the state circuit court refused to allow discovery or an evidentiary hearing and relied solely on information presented at the pre-*Atkins* trial to support summary dismissal. *Smith v. State*, 71 So. 3d 12, 19 (Ala. Crim. App. 2008).

Mr. Smith filed a timely § 2254 petition. *Smith v. Thomas*, No. CIV.A. 05-0474-CG-M, 2013 WL 5446032, at *1 (S.D. Ala. Sept. 30, 2013). The district court entered a stay for the duration of state proceedings. *Id.* at *3. Mr. Smith filed an

amended § 2254 petition, *id.*; later, the district court simultaneously denied relief and a Certificate of Appealability ("COA"), *id.* at *38.

Mr. Smith moved for reconsideration and a stay pending this Court's decision in *Hall*. After granting a COA, the Eleventh Circuit reversed and remanded to allow Mr. Smith to present an expert, while leaving it to the district court's discretion whether to permit discovery and hold an evidentiary hearing. *Smith v. Campbell*, 620 F. App'x 734 (11th Cir. 2015). Opining on Mr. Smith's intellectual functioning, the Eleventh Circuit held:

> Despite [the] trial evidence pointing to significant deficits in Mr. Smith's intellectual functioning, and even though the state trial court had not conducted an evidentiary hearing, the Alabama Court of Criminal Appeals held that the record conclusively established Mr. Smith was not [intellectually disabled] and could never meet *Perkins'*s intellectual functioning requirement. Considering the record evidence before the Alabama Court of Criminal Appeals and the fact that Alabama does not employ a strict IQ cut-off score of 70, the factual determination that [Mr.] Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts.

*Id.* at 751.

As for adaptive functioning, the Court held:

> [T]he Alabama Court of Criminal Appeals' finding that there was "no indication that [Mr.] Smith had significant defects in adaptive behavior" is unsupported (and, in fact, contradicted) by the record and therefore unreasonable. Accordingly, its merits determination (at the early dismissal stage) as to [Mr.] Smith's adaptive behavior functioning was based on an unreasonable determination of the facts.

*Id.*

The district court held an evidentiary hearing at which both parties presented witnesses and evidence. Following post-hearing briefing, the district

court entered an order finding Mr. Smith intellectually disabled under *Atkins* and vacating his death sentence. Pet. App. 63a-97a. The district court found Mr. Smith had proven, by a preponderance of the evidence, that he possessed significant intellectual deficits and significant deficits in several areas of adaptive functioning—social/interpersonal skills, self-direction, independent home living, and functional academics—during the developmental period. *Id.* at 91a-92a, 96a. Following an unsuccessful Rule 59 Motion, the Commissioner appealed.

The Eleventh Circuit heard oral argument on the Commissioner's claims, which differed from the claims he now presents to this Court. Applying the clearly erroneous standard, it determined in 2023 that "the record supports the district court's conclusion that [Mr.] Smith's deficits in intellectual and adaptive functioning 'were present at an early age,'" *id.* at 56a, and upheld the judgment vacating Mr. Smith's death sentence, *id.* at 57a.

The State sought certiorari, and this Court entered a judgment granting the Petition, vacating the decision below, and remanding for specific findings as to whether the Eleventh Circuit's 2023 opinion was based on a finding that "the lower end of the standard-error range for an offender's lowest score is dispositive" in an *Atkins* inquiry or "a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." *Id.* at 12a-13a. The Eleventh Circuit responded: both it and the district court employed

the holistic approach, and none of the district court's findings were clearly erroneous. *Id*. at 9a.

**Factual Background**

Mr. Smith attended school through the eighth grade. The district court observed Dr. Dan Reschly testify that Mr. Smith's earliest available school records reflect he did "okay in first grade but made no progress in reading in second or third grade. That prompted the referral by the school district to special services which led to evaluation of his intellectual abilities as well as other areas of functioning." Appellee's App., *Smith v. Comm'r*, No. 21-14519 (11th Cir. May 23, 2022), Vol. 1 at 80, ECF No. 21 (hereinafter "Doc. 21, Vol. ___ at ___"). It was during the testing related to this referral that Mr. Smith obtained a full-scale IQ score of 75 on the Wechsler Intelligence Scale for Children ("WISC-R"). Appellant's App., *Smith v. Comm'r*, No. 21-14519 (11th Cir. May 23, 2022), Vol. 3 at 147, ECF No. 14 (hereinafter "Doc. 14, Vol. ___ at ___"). Following that testing, the school psychometrist recommended additional testing to determine whether "LD [Learning Disabled] class placement" was appropriate. *Id.* at 148. Because of the referral and testing, the ultimate recommendation placed Mr. Smith in "EC [Emotionally

Conflicted[1]] Resource classes," requiring 10 to 20 hours in classes for emotional conflict issues and special education. Pet. App. 93a.

In 1982, at age 12, Mr. Smith's teacher referred him for testing "because it was time for a reevaluation." Doc. 14, Vol. 3 at 173. This reevaluation resulted in a full-scale IQ score of 74 on the WISC-R. *Id.* At the age of 12 and still in the sixth grade (having been held back), Mr. Smith's testing on the Wide Range Achievement Test ("WRAT") established he was functioning at "fourth grade in reading—fourth grade, fifth month, in reading. Third grade, sixth month, in spelling. And third grade, ninth month, in arithmetic." Pet. App. 93a. The recommendation following these tests indicates regular classes, but records show some special education documentation stating goals and objectives set for Mr. Smith during his repeated sixth grade year. Doc. 14, Vol. 3 at 178-182. A document prepared while Mr. Smith was in seventh grade indicates he remained in the EC resource classes during his second sixth grade year. Pet. App. 93a.

Mr. Smith was enrolled in "educable mentally retarded" ("EMR") classes in the seventh and eighth grades. *Id*. During the late 1970s and early 1980s in Alabama, the term EMR was assigned to students during the developmental period with IQ scores below 75, accompanied by documented deficits in adaptive behavior. *Id*. Thus, an EMR diagnosis equates to a mild intellectual disability diagnosis now.

---

[1] According to Dr. Reschly's testimony, "[In] the later years that he attended school, [the diagnosis] was called or identified as emotionally conflicted, but that disability identification evolved over time and he was clearly identified as a person with educable mental retardation." Doc. 21, Vol. 1 at 102.

*Id*. During his seventh-grade year, Mr. Smith struggled in low-level classes and transferred from resource classes to self-contained EMR classes. Doc. 21, Vol. 2 at 146.

Mr. Smith's school performance, which paralleled his low IQ scores, corroborates their accuracy as to his intellectual functioning. The district court observed, from Dr. Reschly's testimony and the records relied on:

> [T]he school records show the kinds of behaviors that are associated with and denote mild intellectual disability, or what was then called educable mental retardation. [The records] indicated toward the later years that he attended school, [the diagnosis] was called or identified as emotionally conflicted, but that disability identification evolved over time and he was clearly identified as a person with educable mental retardation and placed in a special class, typically with other children who had similar achievement deficits and disability designations.

Doc. 21, Vol. 1 at 102.

The district court found that Mr. Smith's earliest school records indicate he made little progress between the first and third grades. Pet. App. 92a. In the third grade, Mr. Smith took the California Achievement Test and scored at or below first grade levels in reading and language and at the second-grade level in math. Doc. 14, Vol. 3 at 143. Also during the third grade, Mr. Smith was administered the WRAT, on which he again demonstrated first-grade level skills in reading and spelling and third-grade skills in math. Pet. App. 93a. Based on contemporaneous IQ testing, the tester concluded Mr. Smith demonstrated below-average ability in the areas of general information, arithmetic reasoning, language development, social insight and practical ideas, visual observation, the ability to comprehend a total situation

in relation to its parts, visual-motor coordination, and psychomotor speed. Doc. 14, Vol. 3 at 148.

Mr. Smith's scores on the Walker Problem Behavior Identification Checklist, which covered social functioning, and notations in his school file reflect significant behavioral problems with acting out, peer relations, and maturity. Pet. App. 94a; Doc. 21, Vol. 1 at 87-88. Elsewhere in the school records, Mr. Smith's "peer relations were rated as being very low, very poor, and some of the descriptions of his behavior—of not complying and making in this one case a very inappropriate comment about a teacher that was observing him, reflect social domain deficits in adaptive behavior." Doc. 21, Vol. 1 at 101.

In discussing examples of social domain deficits, the district court cited the testimony of Dr. John Fabian, a neuropsychologist who evaluated Mr. Smith:

> We're starting to see global impairment, where he's academically behind two years, he's acting out, low frustration tolerance, aggression, behavioral problems, and that's often consistent when someone has those adaptive behavioral deficits and the intellectual functioning deficits. So that would be consistent with intellectual disability.

Pet. App. 95a.

Mr. Smith, tried before *Atkins*, was evaluated by Dr. James Chudy at the time of trial. Dr. Chudy testified that Mr. Smith "was found to have a full-scale IQ of 72, which placed him at the third percentile in comparison to the general population," explaining "[i]f you had normally distributed a hundred people in this

room, ninety-seven would function higher than [Mr. Smith] would." Doc. 21, Vol. 5 at 229. On the standard error of measure ("SEM"), Dr. Chudy testified:

> [T]here actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could — on the one hand he could be as high as maybe a 75. On the other hand he could be as low as a 69. 69 is considered clearly [intellectually disabled].

*Id.*

Dr. Chudy's observations support the findings within the school records showing deficits in adaptive functioning in both the conceptual and social domains.

Dr. Chudy's testing, records review, and interview with Mr. Smith's mother, establish Mr. Smith struggled with social interactions from elementary school forward. *See* Doc. 14, Vol. 4 at 8-17 (Dr. Chudy notes specifically that Mr. Smith "scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations[;]" that "he has never learned how to incorporate successfully into societies norms[;]" and that he displayed "a major deficiency in his ability to predict social sequences of action."). Supported by school records and testing, Dr. Chudy also found significant deficits in functional academics—testing at age 28 showed Mr. Smith reading at a fourth-grade level, spelling at a third-grade level, and performing math at the level of a kindergarten-aged child. *Id.* at 14. Dr. Chudy reported that Mr. Smith's relationships were "typically troublesome," he was "socially ill-suited to sustain a relationship," and his emotional and personality functioning were significantly dysfunctional. *Id.* at 8-17.

In fact, the trial record showed Mr. Smith's "girlfriend" at the time of the crime was a 15-year-old girl–12 years Mr. Smith's junior. *Id.* at 152.

Dr. Chudy observed that Mr. Smith "does not seem to learn from experience," and his "thinking is vague, easily confused and he is often overwhelmed with incomprehensible feelings or impulses that he does not understand." *Id.* at 14. He found Mr. Smith's deficiencies affected his ability to reason abstractly and minimized his ability to appreciate consequences. *Id.* at 8-17. Further, the presentence investigation report noted those who knew Mr. Smith reported he had mental problems.

Current testing by Dr. Fabian resulted in a full-scale IQ score of 78 on the Stanford-Binet Intelligence Scale, Fifth Edition. *Id.* at 155. Current testing by the State's expert, Dr. Glen King, resulted in a full-scale IQ score of 74 on the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"). *Id.* at 83.

The district court referenced Dr. Fabian's interviews with Mr. Smith's mother and Melissa and Melanie Espinal, teenage friends Mr. Smith knew in his mid-20s, about his pre-incarceration behavior. It noted that these interviews "indicated that [Mr.] Smith had deficits in communication, reading, writing, functional academics, self-direction, and social skills." Pet. App. 87a. Further, the district court observed

> Melanie and Melissa were mid-teenagers when they knew Smith, who was about 10 years older. They reported that Smith, though much older, was easily led and wanted to fit in. They indicated that Smith did not think about what he wanted to do in the future and was more impulsive, living day by day in a hotel without a lot of goals. He was really "gullible, naïve, wasn't really self sufficient or independent in living. Didn't seem to cook food, buy groceries, was often hanging around them." Smith "was

> a grown man trying to impress me, as a kid" and had difficulties understanding things.

*Id*.

Mrs. Smith indicated Mr. Smith "was a follower, he did not work consistently, had difficulties in school, was in special education classes, did not have insurance or a bank account and had problems with frustration tolerance and attention." *Id.* The district court observed that Mr. Smith's "social security records do not show regular or consistent employment or income." Pet. App. 82a. It also noted that other facts supported this, including information from Mr. Smith's mother and Melissa Espinal. *Id*. Further, Mr. Smith was incarcerated for much of his young adult life and had few employment opportunities. *Id*. at 83a; *see also* Doc. 21, Vol. 1 at 167 (Mr. Smith testifying that he was incarcerated from 19 to 26, re-incarcerated at 27, and released only 3 days before being arrested for his current offense). Dr. Fabian found that the jobs Mr. Smith could work were consistent with those that can be held by individuals who are intellectually disabled. Pet App. 86a.

Dr. Fabian administered multiple tests from which he gleaned information for the adaptive functioning prong of the intellectual disability diagnosis. The Independent Living Scales ("ILS") test is a practical test in which the tester observes an individual attempt to demonstrate multiple adaptive skills. The district court cited to Dr. Fabian's testimony noting:

> The ILS assesses "one-on-one functional adaptive function":
>
> > So basically I bring in a phone book, I'm bringing in a watch, or I'm asking him what the purpose of a will is, what would he do if he had a pain in his chest, things like that. How he feels about himself relative to

> his self-esteem, how many friends he has. So it gets at a number of areas of adaptive functioning – memory, managing money, health/safety needs – where I assessed him one on one.

*Id.* at 88a. While Dr. King testified that the ILS was "not a recommended device for assessing adaptive behavior," the district court questioned the "veracity" of his testimony, noting he had used the ILS for assessing adaptive behavior in other cases. *Id.* at 89a.

Mr. Smith's score of 59 was consistent with the average scores for those in the mildly intellectually disabled category. *Id.* at 89a. Dr. Fabian testified that Mr. Smith's results indicated significant deficits:

> [Mr. Smith] had difficulties with memory orientation, giving him some different information that he had to recall over time. His ability to use money, to understand how money works was impaired. I mean, he had, I mean, deficits in every area. So we look at the areas of memory orientation, money management, managing home transportation, those questions, you know, that home and transportation would be related to, you know, how he gets things fixed in his home versus using a map, you know, to drive from point A to point B. . . . He also had significant difficulties or deficits with social adjustment. This is more how he feels about himself, his emotional perception of himself. Granted, he's on death row and his relationships and interpersonal functioning is, you know, altered. But some of these questions had to do with values of self/others, for example.

*Id.* at 88a-89a.

Other tests, while not specifically geared toward adaptive functioning, demonstrated adaptive functioning deficits, including the Neuropsychological Assessment Battery, which showed Mr. Smith's "verbal abstract reasoning skills 'were mildly to moderately impaired . . . that he had a difficulty with abstract reasoning when given information about different people and he had put them

together in different groups.'" *Id.* at 90a. The Expressive and Receptive One-Word Picture Vocabulary Test assesses "intelligence but also relate[s] to functional academics or conceptual areas of adaptive functioning and academic achievement." *Id.* at 90a-91a. Mr. Smith's scores indicate his "ability to express and receive language is significantly impaired, on the first percentile for expressive and the third percentile for receptive [and] those scores are consistent with someone who is intellectually disabled." *Id.* at 91a.

While the Green Emotional Perception Test correlates more to intelligence levels, the district court noted:

> [T]here is also 'an emotional, intellectual, and a perception and an adaptive component to it essentially assessing his ability to not really focus on what is said but how it's said for emotional tones: angry, sad, happy, what tone is this person saying?' According to Dr. Fabian, [Mr.] Smith had some significant impairments on that test regarding 'emotional perception, which is very adaptive as well.

*Id.* at 90a. Like the Green Emotional Perception Test, Mr. Smith's results on the Social Cognition Test showed areas of severe impairment relevant to the social functioning prong of intellectual disability. *Id.* at 91a.

Drs. Fabian and Reschly both testified that Mr. Smith's scores are consistent across the years and with other evidence of his intellectual ability based on academic skills testing. Having reviewed the records and observed the testimony of Mr. Smith, Drs. Fabian, Reschly, and King, and other witnesses, the district court found that Mr. Smith's scores, combined with additional evidence, supported a finding he possessed significant intellectual deficits. *Id*. at 91a-92a. The district court also adopted the conclusions of Drs. Reschly and Fabian that Mr. Smith met

the requirements for the adaptive functioning prong of intellectual disability during his developmental period. *Id*. The district court accepted the testimony of the experts it observed and found Mr. Smith had deficits in "social/interpersonal skills, self-direction, independent home living, and functional academics." *Id*.

## REASONS FOR DENYING THE WRIT

*Atkins* categorically bars the execution of intellectually disabled individuals, while leaving it to States to enforce its holding. 536 U.S. at 317. This Court has provided significant post-*Atkins* guidance, including clarifying that States do not have unfettered discretion and any determination of intellectual disability "must be 'informed by the medical community's diagnostic framework.'" *Moore*, 581 U.S. at 10 (citing *Hall*, 572 U.S. at 721). In Alabama, an individual is entitled to *Atkins* relief upon establishing: (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).

In *Hall*, this Court rejected a bright line cutoff IQ score of 70, ruling states must consider IQ scores as a range rather than a fixed number. *Hall*, 572 U.S. at 712. In doing so, this Court concluded, in accord with medical experts, that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin

of error, the defendant must be able to present additional evidence of intellectual disability, including adaptive deficits." *Id*. at 723.

In the present case, the district court complied with these requirements and found Mr. Smith to be intellectually disabled. This was a fact-intensive review that involved credibility determinations. The Eleventh Circuit, applying this Court's precedent consistently with other circuits, concluded the record below supported the district court's determination and found no clear error. The Commissioner fails to demonstrate or even discuss any suggestion of clear error in the decisions below that would warrant review, much less reversal. The Commissioner's petition for certiorari should be denied.

## I. The Commissioner attempts to create an error that does not exist.

The Commissioner's first Question Presented asks whether a state can require proof of an IQ score at or below 70. Pet. i. The Commissioner's question is misplaced and has no bearing on this case. As the Commissioner acknowledges, this Court has held that a "strict cutoff" for an IQ score is improper. *Id*. at 14 (citing *Hall*, 572 U.S. at 707). And, this Court has made clear that someone with a score above 70 can be properly diagnosed with intellectual disability "if significant limitations in adaptive functioning also exist." *Hall*, 572 U.S. at 712. This is precisely the situation the district court encountered, resulting in its intellectual disability finding and the Eleventh Circuit's opinion approving its analysis.

The district court considered testimony and records related to prong one of *Atkins*, declaring it a "close case" as to whether Mr. Smith possessed significant

intellectual deficits. Pet. App. 74a. Considering the full range of Mr. Smith's IQ scores, the court observed, "[A]t best [Mr. Smith's] intelligence falls at the low end of the Borderline range of intelligence and at worst at the high end of the required significantly subaverage intellectual functioning." *Id.* Given this finding, the court acknowledged that the question of whether Mr. Smith was intellectually disabled would "fall largely" on the other two prongs. *Id.* Following a thorough analysis, the district court held that Mr. Smith's "intelligence and adaptive functioning has been deficient throughout his life." *Id.* at 96a. The district court specifically noted that "evidence regarding Petitioner's adaptive deficits persuaded this Court that Petitioner's actual functioning is comparable to that of an individual with significantly subaverage intellectual functioning. Although Petitioner has scored above 70 on many of his IQ tests, his adaptive behavior problems are severe enough that his actual functioning is lower." *Id.* at 61a.

The Eleventh Circuit twice found the district court complied with this Court's rulings, noting that, after evaluating evidence related to Mr. Smith's IQ scores, it considered additional evidence including his adaptive deficits. *Id*. at 4a-6a, 38a.

The Commissioner misstates the Eleventh Circuit's holding, arguing the ruling below means "an offender needs to show only that his IQ '*could be*' 70 or less." Pet. 15 (citing Pet. App. 5a). In fact, the Eleventh Circuit made clear it considered the district court's ruling under the clearly erroneous standard and recognized that the district court's decision was tied to its credibility findings related to expert testimony. Pet App. 6a-9a. In both its decision on appeal and on

remand, the Eleventh Circuit followed this Court's opinions, which dictated that once the district court found Mr. Smith's IQ score range placed his true IQ at or below 70, it must consider his adaptive functioning. *Id*. at 4a and 45a (citing *Moore*, 581 U.S. at 14 (requiring the Texas courts "to move on" and "consider Moore's adaptive functioning" when his lowest score, "adjusted for the standard error of measurement, yield[ed] a range of 69 to 79"); *Hall*, 572 U.S. at 724 (requiring that Hall have an "opportunity to present evidence" about his "adaptive functioning" when his lowest score was 71)).

The Commissioner seeks certiorari based on a non-occurring event: neither court below found intellectual functioning deficits solely because an IQ score fell within the margin of error. The district court summarized its decision-making on the first prong as follows:

> This Court reviewed the evidence regarding Petitioner's *scores* and after considering the standard error inherent in IQ tests, this Court found that it must consider additional evidence, including testimony on Petitioner's adaptive deficits, to determine whether Petitioner falls at the low end of the Borderline range of intelligence or at the high end of the required significantly subaverage intellectual functioning. *This Court could not determine solely by Petitioner's scores whether he had significantly subaverage intellectual functioning [because] "a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score*."

Pet. App. 60a-61a (emphasis added) (citation omitted).

Even a cursory reading of the opinions below demonstrates the IQ scores were not the sole basis for the courts' resolution of prong one. The Eleventh Circuit found similarities between this case and *Hall*, noting, "Just as [Mr.] Smith scored between

72 and 78 on five IQ tests, Freddie Lee Hall scored between 71 and 80 on seven IQ tests." Pet. App. 41a. Similarly, *Moore* featured IQ scores of 74 and 78. *Id.* at 39a. In full accord with *Hall* and *Moore*, the courts below found that because Mr. Smith's IQ scores placed him in the standard-error range for intellectual deficits, they had to consider adaptive functioning evidence. The clinical community and this Court's precedent required this because "intellectual disability is a condition, not a number." *Hall*, 572 U.S. at 723 (citation omitted). Nothing about the decision below merits this Court's intervention in the proper application of binding precedent to factual findings that are not erroneous, much less clearly so.

## II. This Court's precedent requires courts to consider additional evidence related to intellectual disability when IQ scores fall within the range of 70 to 75, as occurred here.

"The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*." *Id.* at 720. This holding acknowledges that "treating the IQ with some flexibility permits inclusion in the Mental Retardation category of people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior." *Id.* (citation omitted). And this is precisely what occurred below. The district court found that whether Mr. Smith was intellectually disabled required consideration of his adaptive functioning, before ultimately ruling Mr. Smith fell "in the upper end of the required significantly subaverage intellectual functioning and that he has significant deficits in adaptive behavior." Pet. App. 96a. Specifically, the district court "found Petitioner had significant deficits in at least four areas:

social/interpersonal skills, self-direction, independent home living, and functional academics." *Id.* at 61a. The "evidence regarding [Mr. Smith]'s adaptive deficits persuaded th[e district c]ourt that [his] actual functioning is comparable to that of an individual with significantly subaverage intellectual functioning." *Id.* The district court also found that, although Mr. Smith "has scored above 70 on many of his IQ tests, his adaptive behavior problems are severe enough that his actual functioning is lower." *Id.*

This Court's precedent built the framework the courts below followed. In *Atkins*, this Court "acknowledged the inherent error in IQ testing." *Hall*, 572 U.S. at 718-19. Further, *Atkins* referenced clinical standards and "twice cited definitions of intellectual disability which, by their express terms, rejected a strict IQ test score cutoff at 70." *Id.* at 719. In *Hall*, this Court agreed with "medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. Specifically, this Court noted that enforcing a strict IQ cutoff of 70 prevented courts from considering "even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Id.* at 712. This Court acknowledged in *Hall* that "the medical community accepts that all of this evidence can be probative of intellectual

disability, including for individuals who have an IQ test score above 70." *Id*. (citing APA Br. at 15–16 ("[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist"); DSM–5 at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score")).

In *Brumfield v. Cain*, 576 U.S. 305 (2015), this Court again recognized that "an IQ test result cannot be assessed in a vacuum." *Brumfield*, 576 U.S. at 314. This Court noted in *Moore* that while "*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide . . . neither does our precedent license disregard of current medical standards." *Moore*, 581 U.S. at 13. Following precedent, this Court held, "[W]e do not end the intellectual-disability inquiry, one way or the other, based on [an] IQ score." *Id*. at 15. *Hall* "require[s] that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the

test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Id*.

*Atkins* and its progeny mandate the procedures followed by the courts below. The Commissioner's contention otherwise misapprehends the decisions of the courts and precedent.

## III. Certiorari is not necessary to resolve a circuit split because none exists.

The Commissioner manufactures a circuit split in the lower federal courts' application of *Hall* and *Moore* arguing the cases are so confusing that this Court must intervene. A review of the cases cited, however, belies the Commissioner's assertion. The Petition is a clear attempt to overturn this Court's decades of painstakingly crafted *Atkins* precedent. Making this case a particularly bad vehicle for such an attempt, the Petition also asks this Court to disregard the district court's fact-finding in favor of suggestions made by the Commissioner's expert—while ignoring the district court's credibility concerns regarding that expert. The Commissioner's suggestion of a circuit split is a false flag, and there is no support for his proposition that the lower courts are unable to consistently apply this Court's clear *Atkins* precedent.

The Commissioner proclaims that the Eleventh Circuit has aligned itself with the Eighth and Ninth Circuits in their application of *Hall* and *Moore*, thereby deepening a circuit split with the Fifth, Sixth, and Tenth Circuits. In support, he cites *Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014), *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), and *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012). These

cases fail to demonstrate the Fifth, Sixth, or Tenth Circuits apply this Court's precedent any differently than the Eleventh.

The Commissioner's reliance on *Garcia* is misplaced. He argues that, in *Garcia*, the court "did not end the inquiry with the *possibility* that [the petitioner's] IQ may be 70" when he had a score of 75 that was "just within the margin . . . of error," Pet. 17,[2] while completely ignoring two important points. First, procedurally, *Garcia,* involved denial of a COA, which hinged on the fact that the petitioner submitted no IQ scores in his state post-conviction petition before attempting to submit new evidence in the federal petition. *Garcia*, 757 F.3d at 226. By contrast, Mr. Smith's case involved a full evidentiary hearing in the federal court.

Second, the Commissioner ignores the Fifth Circuit's interpretation of *Hall.* Quoting *Hall*'s conclusion that "'an individual with an IQ test score between 70 and 75 or lower, may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning," *Hall*, 572 U.S. at 722, the court then announced, "Texas does not preclude individuals with an IQ score between 70 and 75 from presenting additional evidence of difficulties in adaptive functioning in support of an intellectual disability claim," *Garcia*, 757 F.3d at 226. Instead of

[2] Further, for purposes of comparison, in *Garcia*, the petitioner had a range of scores like Mr. Smith, but only one was in the 70 to 75 range. The other four scores were 83, 83, 91, and 100. *Garcia*, 757 F.3d at 224.

supporting the existence of a circuit split, this clearly establishes the Fifth Circuit—like the Eleventh Circuit—follows *Hall*.

Moving to the Sixth Circuit, the Commissioner argues that *Black* is "[s]quarely opposed to the decision below." Pet. 16. Once again, the Commissioner ignores the full context of the cited decision. In *Black*, the Sixth Circuit reviewed a district court's denial of *Atkins* relief following a state court hearing to which AEDPA deference was owed. As a fact question, a finding of clear error was necessary to reverse the decision. *Black*, 86 F.3d at 743-44. The Sixth Circuit refused to consider adaptive functioning deficits after concluding that the district court did not err by "relying strongly" on childhood group tests [with scores ranging from 83 to 97] as "most probative" of the petitioner's intellectual functioning. *Id*. at 745, 750. Mr. Black's pre-18 IQ scores, obtained between ages seven to thirteen, ranged from 83 to 97. *Id.* at 744-45. At the time of trial, Mr. Black scored 76 on an IQ test. *Id*. During his first state post-conviction proceeding, he scored 73 and 76 on the WAIS–R. *Id*. Only during federal habeas proceedings, in which no evidentiary hearing was held, did he score 69 on the WAIS–III and 57 on the Stanford-Binet-IV. *Id*. The Sixth Circuit noted that, while *Hall* instructs "an individual's score is best understood as a range of scores on either side of the recorded score," it does not require sentencing courts "to make a downward variation based on the SEM of every IQ score." *Id*. at 746. This determination does not differ from the process the courts employed here. In *Black*, the Sixth Circuit found the IQ scores in the developmental period—none of which was within the clinical range for intellectual

disability determination—more persuasive. Here, Mr. Smith's pre-18 scores, assessed by the district court as factfinder, were all within the clinical range. His only score falling outside the clinical range was on a test administered as an adult.

Other decisions, not mentioned by the Commissioner, also show the Sixth Circuit follows *Hall* and *Moore* in the same manner as the Eleventh Circuit. In *Williams v. Mitchell*, 792 F.3d 606 (6th Cir. 2015), the Sixth Circuit reversed and remanded for further inquiry because the lower court failed to follow *Hall*. The court noted that *Hall* "addressed 'how intellectual disability must be defined'" in order to implement *Atkins* and recognized the importance of "'consult[ing] the medical community's opinions'" as to who qualifies as intellectually disabled. *Id*. at 619-21. The court found that *Hall* "requires courts to consider all relevant evidence bearing on an individual's intellectual functioning and to apply clinical principles of intellectual disability adopted by federal precedent." *Id*. at 624. The Sixth Circuit also remanded for further inquiry in *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014), noting that *Hall* held "the Constitution requires the courts and legislatures to follow clinical practices in defining intellectual disability." *Id*. at 612. In *Van Tran*, the lower court had failed to properly consider expert testimony. *Id*. at 615-18. Here, the district court appropriately considered expert testimony it observed and found the Commissioner's expert less credible.[3]

The Commissioner suggests that in *Hooks*, the Tenth Circuit held that multiple scores above and below 70 fall "into a 'gray area' in which a rational trier

[3] As the district court noted,

or fact could find the first prong *satisfied or not*." Pet. 17 (citing *Hooks*, 689 F.3d at 1170-71) (emphasis added). Besides being decided prior to *Hall* and *Moore*, this case fails to support the Commissioner's contention of a circuit split because the Tenth Circuit's finding is in line with what occurred here.

Citing another Tenth Circuit case, the Commissioner argues that "[e]ven after *Hall*, [the Tenth Circuit] found no error in denying a claim premised on scores of 76, 79, and 71." Pet. 17 (citing *Michael Smith v. Duckworth*, 824 F.3d 1233, 1244 (10th Cir. 2016). The Commissioner again ignores the procedural differences to suggest the Tenth Circuit applies *Hall* and *Moore* differently than the Eleventh Circuit. First, *Michael Smith* involved the denial of *Atkins* relief based on the application of an Oklahoma statute *requiring* courts to deny *Atkins* relief if there are IQ scores above 76. Second, as the Tenth Circuit noted in its ruling, because "*Hall* was decided more than three years after the OCCA ruled against Mr. Smith on this issue, *Hall* provides no basis for us to disturb the OCCA's decision." *Michael Smith*, 824 F.3d at 1245. Nonetheless, the Tenth Circuit considered the SEM

---

> Dr. King testified that the ILS test "is not a recommended device for assessing adaptive behavior." But Dr. King uses the ILS test to evaluate whether someone "can manage themselves personally." "That really is what the device was designed to do." Of course, whether a person "can manage themselves" is at the very core of adaptive functioning. So, Dr. King's own testimony contradicts his criticism of the ILS test. In fact, the district court "question[ed] the veracity of Dr. King's criticism" of the ILS test—not because his testimony in this case contradicted his criticism of the ILS test, but because his testimony in another case also contradicted his criticism of the ILS test.

Pet. App. 47a (citations omitted).

pursuant to *Hall*, and found that Smith "failed to demonstrate the OCCA's decision is contrary to or an unreasonable application of *Hall* due to a failure to account for the SEM" because the Oklahoma statute accounted for the SEM. *Id*. Considering a later case from the Tenth Circuit, *Roderick Smith v. Sharp*, 935 F.3d 1064 (10th Cir. 2019), it is clear that the Tenth Circuit complies with *Atkins* and its progeny in the same manner as the Eleventh Circuit did here. In *Roderick Smith*, the Tenth Circuit held that "clinical definitions of intellectual disability . . . were a fundamental premise of *Atkins*." 935 F.3d at 1084 (citing *Michael Smith*, 824 F.3d at 1243).

The Commissioner warns this Court it should grant certiorari to "resolve the split and clarify that *Hall* and its progeny did not command courts to ignore the import of multiple IQ scores." Pet. 31. But review of the cases he cites demonstrates neither a circuit split nor any indication of non-uniformity or difficulty in applying this Court's precedent. The State seeks a reversal of the decision in this case because Mr. Smith's IQ test scores—without applying the SEM—are above 70. Such a ruling would not comport with *Atkins* or the decisions that followed, including *Moore*, in which this Court explained:

> we do not end the intellectual-disability inquiry, one way or the other, based on Moore's IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard

> error, falls within the clinically established range for intellectual-functioning deficits.

*Moore*, 581 at 15.

The Commissioner seeks to manufacture confusion where there is none—just as he tries to paint a picture of a circuit split that does not exist. The real relief sought by the Commissioner is for this Court to disregard the standard of review and invade the district court's fact-finding and credibility decisions. Mr. Smith presented substantial testimony and evidence below that support the district court's factual determinations and the Eleventh Circuit's affirmance of its finding he is intellectually disabled.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ Kacey L. Keeton
Kacey L. Keeton
ASSISTANT FEDERAL DEFENDERS
FEDERAL DEFENDERS FOR THE
MIDDLE DISTRICT OF ALABAMA
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099
*Counsel of Record*

April 16, 2025