No. 24-872

In the Supreme Court of the United States

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

Petitioner,

v.

JOSEPH CLIFTON SMITH,

Respondent.

(CAPITAL CASE)

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

BRIEF OF THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE SUPPORTING PETITIONER

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INTERESTS OF AMICUS CURIAE AND INTRODUCTION

The Commonwealth of Kentucky has been litigating intellectual-disability claims under *Atkins v. Virginia*, 536 U.S. 304 (2002), for over two decades. This brief tells the story of those cases, which have been marked by confusion, delay, and attempted gamesmanship. Although the Commonwealth does not weigh in directly on the question presented, it is nevertheless important for the Court to appreciate the real-world impact of *Atkins* as it prepares to interpret that case for the first time in several years. The Commonwealth submits that its experience under *Atkins* illustrates the need for clearer rules grounded in constitutional text and history.

Without clear standards, the rule of law suffers. The citizens of Kentucky, through their elected representatives in the General Assembly, have authorized the imposition of the death penalty for the most heinous crimes. Yet despite there being 24 individuals on Kentucky's death row, the Commonwealth has not conducted an execution since 2008. *Atkins* is by no means the only reason for this state of affairs. But it is a major contributing factor.

As the Court well knows, *Atkins* created a new constitutional prohibition against executing intellectually disabled inmates. But the constitutional standard for determining whether someone is intellectually disabled has proved frustratingly unclear in the time since. As a result, state courts like the Kentucky Supreme Court (the "SCOKY") have been left to resolve *Atkins* claims in a sort of jurisprudential twilight zone. The SCOKY has tried its level best to faithfully

apply *Atkins* and its progeny. But this Court's elastic and evolving *Atkins* standard has made it all but impossible to consistently and promptly resolve these claims.

These claims have been brought by some of the Commonwealth's worst criminal offenders. They include Thomas Bowling, who in December 1990, murdered two parents and seriously injured their two-year-old child; Larry Lamont White, who raped and murdered Pamela Armstrong back in 1983; Robert Woodall, who raped and murdered a 16-year-old high school cheerleader, Sarah Hansen, in 1997; and Karu Gene White, who "used a crowbar to beat a blind seventy-five-year-old and two other seniors to death while robbing them" in 1979. *White v. Plappert*, 131 F.4th 465, 471 (6th Cir. 2025). Although these individuals committed their crimes decades ago, they have avoided justice in part due to the ease with which they have been able to use *Atkins* to accomplish delay.

Given the narrow question presented, the Court cannot solve all of *Atkins*' many problems in this case. In the appropriate case, the Commonwealth urges the Court to engage in a more wholesale rethinking of its *Atkins* jurisprudence. But for now, the Court can start righting the ship that went off course in 2002. The Commonwealth urges the Court to reverse. And in doing so, it should begin establishing clear rules that will allow state courts to predictably and efficiently adjudicate intellectual-disability claims.

SUMMARY OF THE ARGUMENT

I. *Atkins* and its progeny created an inscrutable standard for intellectual-disability claims. Unmoored from constitutional text and history, the best that can

be said about *Atkins*' standard is that it currently floats with the "medical consensus." Powerful dissents presciently warned how state courts would struggle to apply this standard.

II. Kentucky is Exhibit A of the unworkability of *Atkins*. In particular, the *Atkins* claims brought by four death-sentenced inmates highlight how the Kentucky Supreme Court has struggled, through no fault of its own, to apply this Court's precedents. These inmates, who committed the most depraved crimes imaginable, have used *Atkins* to indefinitely delay the imposition of their lawfully imposed sentences.

ARGUMENT

The Commonwealth begins by reviewing this Court's decisions in *Atkins*, *Hall*, and *Moore*. It then discusses the Kentucky Supreme Court's experience applying these cases.

I. *Atkins* and its progeny provide an unintelligible standard for intellectual-disability claims.

In *Atkins v. Virginia*, the Court held that the Eighth Amendment forbids the States from executing intellectually disabled persons. But rather than ground its ruling in the text and history of the Eighth Amendment, the Court relied on a perceived "national consensus" that "ha[d] developed" against the practice.[1] *Atkins*, 536 U.S. at 316. Despite creating a new

[1] Kentucky was part of that asserted consensus, as *Atkins* noted. 536 U.S. at 314 (noting Kentucky's 1990 enactment of a statute restricting the death penalty for those with an intellectual disability). And in the time since *Atkins*, Kentucky has continued to

constitutional right, the Court "did not provide definitive procedural or substantive guides for determining when a person" is intellectually disabled. *Bobby v. Bies*, 556 U.S. 825, 831 (2009). It instead purported to "leave to the State[s] the task of developing appropriate ways to enforce" its decision. *Atkins*, 536 U.S. at 317 (citation omitted).

Justice Scalia vigorously dissented. He wrote that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members." *Id.* at 338 (Scalia, J., dissenting). He chided the majority for relying on the actions of a minority of state legislatures, opinion polls, and "the practices of the 'world community'" to ascertain the meaning of a constitutional provision. *Id.* at 339–48. And he warned about the problems that would ensue when lower courts tried to apply this new standard. *Atkins*, Justice Scalia warned, "promises to be more effective than any of the other[] [Eighth Amendment death-penalty cases] in turning the process of capital trial into a game." *Id.* at 353. That is because an intellectual disability "can readily be feigned" at no risk to the inmate. *Id*. Indeed, the "mere pendency of the present case . . . brought [the Court] petitions by death row inmates claiming for the first time, after multiple habeas petitions, that they are retarded." *Id.* at 353–54.

The Court's subsequent cases applying *Atkins* only underscored Justice Scalia's concerns. In *Hall v. Florida*, 572 U.S. 701 (2014), the Court held that a state cannot use a rigid IQ cutoff (in that case, 70) to deter-

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refine its relevant statutes. *See* 2022 Ky. Acts ch. 109. Kentucky's ongoing attention to this issue illustrates that constitutionalizing matters as *Atkins* did is not the only way to address this issue.

mine whether an inmate is intellectually disabled. Instead, the Court directed courts to consider "the standard error of measurement" as well as, in some cases, other evidence that the defendant may present about "deficits in adaptive functioning over his lifetime." *Id.* at 724. And in *Moore v. Texas*, 581 U.S. 1 (2017), the Court directed courts to assess intellectual-disability claims based on the "medical community's current standards," as articulated, for example, in "the most recent . . . versions of the leading diagnostic manuals." *Id.* at 13, 20.

Like *Atkins*, these opinions were issued over strong dissents. On top of criticizing these decisions for being unmoored from the text and history of the Eighth Amendment, the dissents highlighted the "serious practical problems" that would result. *Hall*, 572 U.S. at 731 (Alito, J., dissenting). At bottom, these cases are plagued by the "lack of guidance [they] offer[] to States seeking to enforce the holding of *Atkins*." *Moore*, 581 U.S. at 29 (Roberts, C.J., dissenting).

As Justice Alito noted in *Hall*, "the views of professional [medical] associations often change," making the Court's Eighth Amendment jurisprudence a moving target. 572 U.S. at 731–32 (Alito, J., dissenting). Courts will be forced out of their familiar role of interpreting the law and must instead "judge the validity" of an alleged medical consensus and "determine which professional organizations are entitled to special deference." *Id.* at 732–33.

Moreover, as Chief Justice Roberts recognized in dissent in *Moore*, these decisions effectively "constitutionalize[] rules for which there is not even clinical

consensus." 581 U.S. at 31 (Roberts, C.J., dissenting). And even where there is a "medical consensus," "it is not at all clear when a State's deviation from [it] becomes so great as to 'diminish the force' of that consensus and thereby violate the Constitution." *Id.* (citation omitted).

II. Kentucky's experience with *Atkins*, *Hall*, and *Moore*.

Numerous death-sentenced inmates in Kentucky have raised intellectual-disability claims in the wake of *Atkins*. The Kentucky Supreme Court's experience adjudicating these claims shows just how inadministrable *Atkins'* standard has become.

A. Thomas Bowling: Kentucky's first attempt at applying *Atkins*.

Death-sentenced inmates began filing intellectual-disability claims shortly after *Atkins*. Thomas Bowling's was the first to reach the Kentucky Supreme Court. *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005).

Applying *Atkins* was no easy task. In the SCOKY's view, this Court left numerous important questions unanswered. The court listed six of them and did its best to supply answers. That Kentucky's high court needed to answer so many key questions about *Atkins* is proof positive how far the decision veered from normal constitutional law. The questions answered in *Bowling* were:

- Question one: "whether [*Atkins'*] holding was retroactive." *Id.* at 369. Answer: Yes. *Id.* at 370.

- Question two: "whether the issue can be procedurally defaulted (waived) by a failure to timely assert it." *Id.* at 369. Answer: Yes. *Id.* at 371–73.

- Question three: "the time frame, if any, at which a finding of mental retardation is relevant, *i.e.,* time of offense, time of trial, or time of execution." *Id.* at 369. Answer: Because "mental retardation is a development disability that becomes apparent before adulthood," the difference between assessing IQ before trial or at the time of execution "is more semantical than real." *Id.* at 377. Accordingly, the court upheld Kentucky's statutory requirement to assess IQ before trial. *Id.*

- Question four: "whether the [*Atkins*] issue is to be resolved by judge or jury." *Id.* at 369. Answer: The judge. *Id.* at 381.

- Question five: what is the proper "allocation of the burden of proof and the standard of proof applicable to that burden, *e.g.,* preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt." *Id.* at 369. Answer: It is constitutional for the Commonwealth to place the burden on the defendant to prove his intellectual disability by a preponderance of the evidence. *Id.* at 381–82.

- Question six: "what showing, if any, is required to trigger entitlement to a trial or evidentiary hearing on the issue." *Id.* at 369.

The last question proved to be the most disputed in hindsight. The court first determined that *Atkins*

allowed for a "bright-line cutoff ceiling of an IQ of 70" to determine the existence of an intellectual disability. *Id.* at 375. The court reasoned that *Atkins* favorably cited "the DSM-IV's recognition that a 'mildly mentally retarded' person typically has an IQ of 50–55 to approximately 70" and that "Kentucky's already existing statutory scheme" set the cutoff at 70. *Id.* at 369. In its view, *Atkins* left it to the States to decide whether to "expand the mental retardation ceiling by requiring consideration of" the standard error of measurement and the so-called Flynn effect. *Id.* at 375. Accordingly, Bowling's three IQ test scores above 70 did not provide any "evidence that creates a doubt as to whether he is mentally retarded." *Id.* at 384. The court therefore refused Bowling's request for an evidentiary hearing without considering whether he had substantial deficits in adaptive behavior. *Id.*

What jumps off the page of *Bowling* is the SCOKY's belief that the Commonwealth had significant leeway to develop rules for determining whether a death-sentenced inmate is intellectually disabled. Indeed, *Bowling* stated that *Atkins* "specifically assigned to the states the authority to resolve" "'which offenders are, in fact, retarded.'" *Id.* at 367 (citing *Atkins*, 536 U.S. at 317). Even if that was right under *Atkins*, this Court would disabuse the States of this belief in *Hall* and *Moore*.[2]

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[2] Denying an intellectual-disability claim is not always the end of the matter. After losing in the SCOKY, Bowling tried to bring the same claim again. The court rejected this gambit on law-of-the-case grounds seven years after it rendered *Bowling*. *See Bowling v. Commonwealth*, 377 S.W.3d 529, 539–40 (Ky. 2012). Bowling died of natural causes before his death sentence could be carried

B. Larry Lamont White: Confusion over IQ score adjustments and waiver.

Larry Lamont White is another repeat player in the SCOKY. He has had two appeals before Kentucky's high court that implicate *Atkins*.

1. Larry White first raised an *Atkins* claim on direct appeal. Specifically, he "urge[d] the Court to reverse his death sentence on the grounds that the trial court refused to hold a hearing to explore the existence of an intellectual disability." *White v. Commonwealth*, 544 S.W.3d 125, 152 (Ky. 2017) (*Larry White I*).

Larry White submitted one IQ score at sentencing: a 1971 score of 76. *Id.* at 152. Applying *Hall*, the SCOKY considered what this Court suggested was a standard margin of error for IQ scores (plus or minus five) in determining that Larry White's IQ score had "a range of 71 to 81." *Id.* at 152. Because this adjusted score was above Kentucky's statutory cutoff of 70, the court concluded that "further investigation into [Larry White's] adaptive behavior was unnecessary." *Id.* In doing so, the SCOKY interpreted *Hall* as "render[ing] a strict 70-point cutoff as unconstitutional if the standard error of measurement is not taken into account." *Id.*

The SCOKY also declined to apply the so-called Flynn effect to Larry White's IQ scores. Named for intelligence researcher James Flynn, the Flynn effect

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out. Karla Ward, *Kentucky Death Row Inmate Thomas Clyde Bowling Dies at Hospital*, Lexington Herald-Leader (Mar. 22, 2015), https://tinyurl.com/4fyhv9e2.

takes into account an alleged rise in IQ scores of approximately 3 points per decade. James R. Flynn, *Massive IQ Gains in 14 Nations: What IQ Tests Really Measure*, 101 Psych. Bull. 171-91 (1987 No. 2). Under this theory, therefore, Larry White's "1971 IQ score of 76, would actually be 59" when SCOKY issued its 2017 opinion. *Id.* at 153. The court noted that there was no "precedential or statutory authority indicating that trial courts must take into account the Flynn Effect." *Id.*

2. After *Larry White I*, this Court GVR'd the Kentucky Supreme Court's judgment "for further consideration in light of *Moore v. Texas*." *White v. Kentucky*, 586 U.S. 1113 (2019). Larry White's *Atkins* claim was therefore back in the SCOKY. *White v. Commonwealth*, 600 S.W.3d 176, 178 (Ky. 2020) (*Larry White II*). But this time there was a twist: he denied being intellectually disabled. He filed a pro se motion "objecting to the intellectual disability defense" and denying that he was "retarded." *Id.* at 179.

Despite this clear disavowal by the defendant about his intellectual capacity, the SCOKY held that "*Atkins* and its progeny . . . have placed an absolute bar against imposing the death penalty on the intellectually disabled." *Id.* (cleaned up). The upshot was that the Eighth Amendment did not "allow [Larry-White] to *pro so* waive this issue." *Id.* at 180. The court then determined that Larry White's two IQ scores of 76 and 73 were close enough to 70 to warrant an evidentiary hearing on his intellectual ability. *Id.* at 181.

The Commonwealth petitioned this Court for certiorari on whether an *Atkins* claim can be waived. *See* Pet. for Writ of Cert., *Kentucky v. White*, 141 S. Ct. 895

(2020) (No. 20-240), 2020 WL 5110612 (*Larry White* Pet. for Writ of Cert.). It explained how, quoting Larry White, he wanted to "move past the 'intellectual disability foolishness' and focus on proving his innocence in post-conviction proceedings." *Id.* at *2. And it discussed how Larry White had proved to be an "effective jailhouse lawyer." *Id.* In short, both the Commonwealth and Larry White agreed that his *Atkins* claim should not go forward. But this Court denied certiorari. *Kentucky v. White*, 141 S. Ct. 895 (2020).

In its petition for certiorari, the Commonwealth emphasized that the Kentucky Supreme Court's waiver ruling will cause "delay, maybe much more delay" in Larry White's case. *Larry White* Pet. for Writ of Cert. at *25. That prediction proved true. In the almost five years since the Court denied certiorari, Larry White's case has been pending in a Kentucky trial court. The Commonwealth is currently awaiting a ruling after an evidentiary hearing. In sum, Larry White's *Atkins* claim has now been pending for more than eight years.

C. Robert Woodall: Striking down Kentucky's intellectual-disability statute.

Robert Woodall's *Atkins* claim is the first time the SCOKY specifically addressed *Moore*. *See Woodall v. Commonwealth*, 563 S.W.3d 1 (Ky. 2018) (*Woodall I*).

Kentucky's high court noted that *Moore* "g[ave] better, but not much clearer, guidance as to how courts should evaluate this issue." *Id.* at 4; *see also id.* at 4–5 ("Admittedly, the U.S. Supreme Court has not provided crystal-clear guidance as to what exactly constitutes a constitutional violation regarding the determination of whether a defendant is intellectually

disabled to preclude the imposition of the death penalty."). The SCOKY observed that this Court "seems to suggest that a defendant's IQ score, after adjusting for statistical error, acts as the preliminary inquiry that could foreclose consideration of other evidence of intellectual disability, depending on the score." *Id.* at 5. But it suggested that "the prevailing tone" of this Court's decisions weighed against making "a determination based solely on IQ score" and that "prevailing medical standards" must be considered. *Id.*

Given this reasoning, the SCOKY felt "constrained to conclude that" Kentucky's law prohibiting the execution of intellectually disabled inmates was "simply outdated." *Id.* at 6. Even though a "bright-line rule promotes straightforward application and facilitates appellate review," Kentucky's intellectual-disability statute could no longer be squared with this Court's precedents. *Id.* The court therefore struck down Kentucky's bright-line statute. *Id.* at 6–7.

In its place, the court directed lower courts to judge intellectual-disability claims in light of "prevailing medical standards." *Id.* at 6. The court acknowledged that these standards "change as new medical discoveries are made." *Id.* But Kentucky's justices nevertheless concluded that they had no other choice under this Court's precedents.

In dissent, Justice Wright noted that "the statute the majority overturns as unconstitutional currently complies with the DSM-5," which is "published by the American Psychiatric Association." *Id.* at 7 (Wright, J., dissenting). Justice Wright noted the difficulty of trial courts determining what the prevailing medical consensus is at any given time. *Id.* And he criticized

the majority for rejecting a statutory regime that complies with "established diagnostic standards" simply because "it may not comply with *future* medical or scientific discoveries." *Id.*

On remand, the state trial court held an evidentiary hearing and rejected Woodall's intellectual-disability claim. Woodall appealed to the SCOKY. And six years after *Woodall I*, the court issued its opinion in *Woodall II*, affirming the denial of Woodall's *Atkins* claim. *Woodall v. Commonwealth*, 709 S.W.3d 71 (Ky. 2024) (*Woodall II*). A petition for a writ of certiorari is likely forthcoming. Order, *Woodall v. Kentucky*, No. 24A1239 (June 15, 2025) (extending the time for Woodall to file a petition for certiorari until August 17, 2025).

D. Karu White: delay, delay, delay.

The prize for the most effective delay under *Atkins* likely goes to Karu Gene White. After exhausting his avenues for direct appeal and state post-conviction relief, Karu White sought federal habeas relief. But after this Court decided *Atkins*, Karu White asked the district court to "stay[] proceedings so he could pursue an intellectual-disability claim in state court." *White v. Plappert*, 131 F.4th 465, 475 (6th Cir. 2025). The district court obliged.

With a stay of his habeas proceedings in hand, Karu White "then 'refused' to present the merits of [his intellectual-disability] claim in state court for the next nine years." *Id.* He argued that the Commonwealth "had to first pay for an independent expert to perform a mental evaluation of him." *Id.* After the trial court ordered the state to pony up for the evaluation, the SCOKY issued a writ overruling that order.

Commonwealth v. Paisley, 201 S.W.3d 34, 37 (Ky. 2006).

Two years later, the trial court "ordered [Karu] White to undergo a psychiatric evaluation at a state-run facility." *Plappert*, 131 F.4th at 475. But Karu White "flatly refused to cooperate, and he petitioned the Kentucky Supreme Court to prohibit the lower court from ordering him to submit to the evaluation." *Id.* (citation omitted). The SCOKY denied his writ petition. *White v. Payne*, 332 S.W.3d 45, 51 (Ky. 2010).

Despite the SCOKY's order, the state-run facility was never able to conduct the evaluation. The trial judge's retirement led to additional delays. But in 2013, a new judge held that Karu White's refusal to be evaluated constituted a waiver of his intellectual-disability claim. *White v. Commonwealth*, 500 S.W.3d 208, 212 (Ky. 2016). And in 2016, over a decade after he first asserted his claim, the SCOKY held that "[b]y continuing to refuse to be examined, to his great risk of not being spared, [Karu White] simply fails in proving his ineligibility for the death sentence." *Id.* at 215.

The court was careful to note, however, that "he does not waive such a claim in the normal sense that we know that term." *Id.* Karu White's intellectual-disability claim therefore remains pending in the trial court over two decades after he filed it, even though he has an IQ score of 81 in the record. *Id.* at 210.

E. Other litigation.

The four cases discussed above are not the only ones involving *Atkins* in Kentucky.

Other death row inmates, including Victor Taylor and Mitchell Willougby, have also raised *Atkins*

claims. Taylor "murdered two high-school students in 1984." *Taylor v. Jordan*, 10 F.4th 625, 628 (6th Cir. 2021) (en banc). And Willoughby committed a triple murder in 1983. *Willoughby v. White*, 786 F. App'x 506, 507 (6th Cir. 2019). The Commonwealth does not discuss their cases in depth here as neither have reached the SCOKY on the merits of their *Atkins* claims. But their *Atkins* claims have still resulted in lengthy delays. Taylor waited until after his federal habeas case was final to raise his *Atkins* claims. And Willoughby filed a second intellectual-disability claim last month despite the trial court rejecting an earlier claim in 2016 that he did not appeal. Both individuals are therefore still sitting on death row approximately four decades after their crimes.

Kentucky's administrative regulations for processing intellectual-disability claims prior to an execution are also under attack in a civil suit brought by several death-sentenced inmates. *Baze v. Ky. Dep't of Corr.*, No. 06-CI-00574 (Franklin Cir. Ct.). To be clear, this Court has already upheld part of Kentucky's execution protocol against an Eighth Amendment challenge. *Baze v. Rees*, 553 U.S. 35 (2008). But that ruling has not stopped the plaintiffs from alleging, among many other things, that Kentucky's execution protocol violates *Atkins*. On two separate occasions (once in 2019 and a second time in 2025), a state trial court has ordered Kentucky's Department of Corrections to revise its administrative regulations to comply with *Atkins* (as the trial court understands the decision). *See* Order, *Baze v. Ky. Dep't of Corr.*, (Franklin Cir. Ct. July 2, 2019); Opinion & Order, *Baze v. Ky. Dep't of Corr.*, No. 06-CI-00574 (Franklin Cir. Ct. Apr. 24, 2025). These two regulatory amendments to allegedly comply with *Atkins*, the latter of which is currently in

process, have led to several years of delay in this civil case reaching finality. That this civil case, which was filed in 2006, remains ongoing is in large part a testament to how malleable *Atkins* is.

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This Court has emphasized that "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Largely because of *Atkins*, that "real finality" has proved elusive for the families and friends of the victims of some of the worst crimes committed in the Commonwealth in recent memory. This case gives the Court a chance to begin setting things right.

CONCLUSION

The Commonwealth supports Petitioner in seeking reversal. But just as important to getting this case right is how the opinion is written. The Commonwealth urges the Court to write its opinion in a way that begins pointing its Eighth Amendment jurisprudence back towards the constitutional text and history and that provides clear rules for deciding intellectual-disability claims.

Respectfully submitted,

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