No. 24-872

IN THE

Supreme Court of the United States

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

vs.

JOSEPH CLIFTON SMITH,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In the present case, the federal district court and court of appeals have overturned a well-deserved death sentence for a horrific crime for a murderer who is almost certainly not intellectually disabled as defined by state case law within the latitude that this Court provided the states in *Atkins*. To reach this result, the court of appeals virtually ignored the well-established principle of aggregation that multiple tests provide a greater precision and a smaller interval of confidence than a single test. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In October 1997, Joseph Smith was nearing the end of a prison sentence for burglary and receiving stolen property when he was released on a community-custody program. See *Smith* v. *State*, 795 So. 2d 788, 797, n. 1 (Ala. Crim. App. 2000) (*per curiam*) (*Smith I*). Two days later, he and an accomplice killed Durk Van Dam in order to rob him, brutally beating him and cutting him with a power saw. Smith confessed to the crime, asking

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1. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

to speak to officers while they were questioning the accomplice. See *id*., at 796–797.

The trial was after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), but before *Atkins* v. *Virginia*, 536 U. S. 304 (2002). Smith was provided funds for a mental health expert, Dr. James Chudy, who administered an intelligence test and testified at trial. *Smith I*, 795 So. 2d, at 838; *Smith* v. *State*, 71 So. 3d 12, 23 (Ala. Crim. App. 2008) (*Smith II*); J. A. 354–379. The jury convicted Smith and voted 11-1 to recommend a sentence of death. The trial court imposed that sentence after considering the mitigating evidence, as *Penry* required at the time. *Smith I*, *supra*, at 796, 838–839. The Alabama Court of Criminal Appeals affirmed. *Id*., at 842. The Alabama Supreme Court and this Court denied certiorari. *Ex parte Smith*, 795 So. 2d 842 (Ala. 2001); *Smith* v. *Alabama*, 534 U. S. 872 (2001).

After *Atkins* but before *Hall* v. *Florida*, 572 U. S. 701 (2014), the state courts considered Smith's case on collateral review. The court noted Dr. Chudy's test score of 72 and the earlier scores of 74 and 75 on school-administered tests. *Smith II*, 71 So. 3d, at 19–20. The Court of Criminal Appeals rejected the *Atkins* claim, among other reasons, because it understood Alabama Supreme Court precedent to require a score of 70 or below, without adjustment for a "margin of error." *Id*., at 20.[2] The Alabama Supreme Court denied discretionary review in 2011. Pet. Brief 18.

Although this case had received two full rounds of review in the state courts 14 years ago, it remains pending on federal habeas corpus today. Cf. *Bucklew* v. *Precythe*, 587 U. S. 119, 149 (2019) (people of the states

2. This holding was overruled after *Hall*. See *Lane* v. *State*, 286 So. 3d 61, 65 (Ala. 2018).

and surviving victims deserve better). The tangled web of this Court's precedents in *Atkins* and its progeny is responsible in substantial part. Ten years ago, the court of appeals brushed aside AEDPA deference with no discussion as to whether *Hall* is retroactive on habeas corpus or whether the state court's understanding of the law was a reasonable application of this Court's precedents at the time. *Smith* v. *Campbell*, 620 Fed. Appx. 734, 751 (CA11 2015). This holding cited *Brumfield* v. *Cain*, 576 U. S. 305 (2015), which itself "oversteps [AEDPA's] limits in a decision that fails to respect the Louisiana state courts and our precedents." *Id*., at 324 (Thomas, J., dissenting).

On remand, the district court took further testimony from experts on both sides. The evidence included two further intelligence tests, with scores of 75 and 78, described in further detail later in this brief. In its first opinion in the present round, the court of appeals held that the lower range of the confidence interval of the lowest of five was sufficient to meet the petitioner's burden of proof on the first prong of the definition of intellectual disability.

> "We disagree, though, because Smith carried his burden under the intellectual prong through Dr. Chudy's testimony. To satisfy the intellectual-functioning prong, as we have observed, Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70." App. to Pet. for Cert. 44a.

This statement, in combination with other possibly conflicting statements, prompted a vacate-and-remand order from this Court. *Hamm* v. *Smith*, 604 U. S. 1 (2024). On remand, the court of appeals "unambiguously reject[ed]" what it plainly said in the above passage and denied it had ever said it. See App. to Pet. for Cert. 2a. Citing language from *Hall*, the court of

appeals continued to consider each score with its separate standard error of measurement, *id*., at 4a-5a, taking no account of the reality that multiple consistent scores are more precise than individual scores, as discussed below.

SUMMARY OF ARGUMENT

The principle of aggregation is well-established. Multiple measurements provide greater precision and confidence than a single measurement. Given that most of the individual measurements just barely include 70 within their confidence intervals, the conclusion that five such measurements are no better is not credible. There is not yet a consensus on how to combine multiple measurements, but the ones that have been suggested all reach the same result in this case. That is, the possibility that Smith has a true IQ of 70 or below is so remote that the State is well within its authority to proceed with execution of the sentence.

The State's authority, as provided in *Atkins* v. *Virginia*, extends to defining who is intellectually disabled within the range of reasonable disagreement. This includes excluding any defendant whose true IQ is unlikely, by a substantial margin, to be less than 70, and it includes any reasonable method for considering multiple scores through the principle of aggregation.

ARGUMENT

The question presented in this case is "[w]hether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim." Order Granting Certiorari (June 6, 2025). The answer to "whether" is "yes," as explained below. "How" is more

complex due to diverse opinions among statisticians as well as uncertainty in the rule of *Atkins* v. *Virginia*, 536 U. S. 304 (2002), and its progeny.

A useful discussion of how to find the answer requires a clear understanding of the question. *Hall* v. *Florida*, 572 U. S. 701, 704 (2014), posed its question as whether a state's approach posed "an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." The constitutional category of intellectual disability, furthermore, is limited to "mentally retarded[3] offenders about whom there is a national consensus." *Atkins*, 536 U. S., at 317. Absent a national consensus of a single right way to make a calculation, powerful enough to override the reserved power of states to make their own criminal laws, a state capital sentence is not in violation if it is justified by any reasonable definition of intellectual disability as determined by any reasonable method.

Part II of this brief will address the consensus requirements, but first we will "do the math" a few ways in Part I.

I. There are several ways to consider multiple IQ test scores, none of which was employed by the court of appeals.

"According to the principle of aggregation, the sum of a set of multiple measurements is a more stable and unbiased estimator than any single measurement from the set." Rushton, Brainerd, & Pressley, Behavioral Development and Construct Validity: The Principle of

3. "Mentally retarded" and "intellectually disabled" are merely earlier and later terms for the same concept. See *Hall*, 572 U. S., at 704–705. This brief will use the newer term but quote older authorities using the older one without alteration.

Aggregation, 94 Psych. Bull. 18, 18–19 (1983) (Rushton & Brainerd). "Uncertainty about the true score declines as more measurements are made." Kaye, Deadly Statistics: Quantifying an 'Unacceptable Risk' in Capital Punishment, 16 Law, Probability and Risk 7, 29 (2017) (Kaye, Unacceptable Risk).

Ignoring this principle is error just as much as ignoring the standard error of measurement (SEM) is error, yet it is common. See Rushton & Brainerd, *supra*, at 18. The court of appeals in the present case failed to recognize this principle, see Brief for Petitioner 37–41, and so, at least in *dicta*, did the majority in *Hall*. See Kaye, Unacceptable Risk, at 29.

A. Traditional (Frequentist) Statistics.

The simplest approach is to average the scores. Kaye gives a hypothetical example based on the scores in *Hall*. Assuming the tests were independent and further assuming that they all had an SEM of 2.16, the averaging method would yield a mean of 74 with a combined SEM of only 0.73, which would place the bottom of the 95% confidence interval at 73, well above the recognized range for intellectual disability. Kaye, Unacceptable Risk, at 29, and n. 142. In the present case, Smith's scores average a half point higher, and there are more of them, raising the range a bit further. Kaye acknowledges that this method may be oversimplified, as the assumption of independence may not be completely correct. *Id*., at 29–30; see also Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment

290 (D. Saklofske, C. Reynolds, V. Schwean eds. 2013) (Schneider, Principles) ("not quite right").[4]

If simple averaging will not do, then an alternative is needed that recognizes the principle of aggregation but avoids the statistical problems of simple averaging. Schneider, Principles proposed one,[5] and this book chapter was cited by both the majority and the dissent in *Hall*, 527 U. S., at 714 (majority), 739 (dissent).

There are at least three potential objections to the use of Schneider's method. The first, which *amicus* CJLF believes to be the least meritorious, is the comment of the *Hall* Court that it is "a complicated endeavor." *Hall*, 572 U. S., at 714. It is not all *that* complicated, and "analysis of multiple scores is hardly beyond the ken of statisticians." Kaye, Unacceptable Risk, *supra*, at 30. It is certainly better than just ignoring the principle of aggregation, an error every bit as erroneous as the error of ignoring the SEM that *Hall* denounced. "Does the [*Hall*] majority really believe that the Constitution requires the state to treat a defendant with 10 successive, carefully administered IQ scores of 71 the

4. Schneider further explained the problem with averaging on his blog, Why Averaging Multiple IQ Scores Is Incorrect in Death Penalty Cases, in Assessing Psyche, Engaging Gauss, Seeking Sophia (Jan. 29, 2014), https://assessingpsyche.wordpress.com/2014/01/29/why-averaging-multiple-iq-scores-is-incorrect-in-death-penalty-cases/ (as visited June 12, 2025).

5. The method is also on Schneider's blog in an excerpt from the book chapter. See Schneider, Can't Decide Which IQ Is Best? Make a Composite Score, in Assessing Psyche, Engaging Gauss, Seeking Sophia (Dec. 29, 2013), https://assessingpsyche.wordpress.com/2013/12/29/cant-decide-which-iq-is-best-make-a-composite-score/. He has also posted a spreadsheet for the method: https://github.com/wjschne/assessingpsyche_resources/raw/refs/heads/main/CompositeIQFlynn.xlsx (as visited June 12, 2025).

same as a defendant with but a single score of 71?" *Ibid*. One would hope not, but that is largely what the court of appeals did in this case. See Brief for Petitioner 38–39.

The second potential objection is the lack of a substantial explanation for the method. Schneider simply states, "Perhaps the fairest solution is to treat each IQ test as a subtest of a much larger 'Mega-IQ Test.' That is, perhaps the best that can be done is to combine the four IQ scores into a single score and then construct a confidence interval around it." He then goes on to employ the subtest/composite score math. Schneider, Principles, *supra*, at 290. One would expect a more thorough explanation of why this is appropriate. It is not self-evident. *Amicus* has not found any discussion in the literature explaining, confirming, or disputing the appropriateness of the method. To borrow this Court's term on certiorari petitions, the proposal needs to "percolate" some more before it is ruled to be permitted, required, or forbidden.

The third problem is a practical one. The method requires established correlation coefficients between the tests. This is particularly a problem in cases such as this one where the tests are widely spaced in time. Test publishers often determine correlations with other tests in common use at the time the new test is developed, often including the immediately prior edition of the same test, but correlations that skip generations of tests may not be available. The correlation between the Wechsler Intelligence Scale for Children—Revised (WISC-R),[6] used for the school tests in 1979 and 1982, and the Wechsler Adult Intelligence Scale—Revised (WAIS-R), used by Dr. Chudy for the post-arrest assess-

6. In the Wechsler tests, the "Revised" editions are the second, followed by Roman numeral-designated editions.

ment in 1998, has been reported as 0.88. Russell et al., Schizophrenia and the Myth of Intellectual Decline, 154 Am. J. Psych. 635, 636 (1997), citing D. Wechsler, Manual for the Wechsler Adult Intelligence Scale—Revised (1981).[7] For the two tests used by the experts in the present habeas corpus case, the correlation between the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV) and the Stanford-Binet 5 has been reported as 0.90. See Salekin et al., Convergent Validity: Use of WAIS-IV vs. SB5 in Intellectual Functioning Assessment, American Psychology-Law Society Conference Paper 2 (2014), https://www.researchgate.net/publication/273575324. However, between the two later tests and the earlier ones, *Amicus* CJLF has been unable to find published correlation coefficients.

Given the lack of an essential data point connecting the old and new tests, counsel for *Amicus* CJLF calculated two composite scores with the Schneider method, one for the 1979, 1982, and 1989 tests and a second for the 2014 and 2017 tests. The results are offered as illustration, not evidence. CJLF does not pretend to expertise in this area, and the proceedings in this Court do not include an evidentiary hearing. From the results, we can calculate a probability of the hypothesis that Smith has a true IQ in the qualifying range and confidence intervals at various percentages of confidence, as probabilities and confidence intervals were understood in both opinions in *Hall*, overlooking for now the common misunderstanding in this area. See Kaye, Unacceptable Risk, *supra*, at 22–24. On this [mis]understanding, "there is no reason to compute a [confidence interval]." *Id*., at 24. The probability tells us what we

7. Access to the IQ test manuals is restricted, so we cite "hearsay" sources.

need to know. See also Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Hall* v. *Florida*, No. 12-10882, pp. 13–15.

CJLF computed the composite scores using Schneider's spreadsheet and also "from scratch" using Schneider's directions. The latter was not simple, as the *Hall* majority said, but it was simpler than computing last year's personal tax return. Both methods produced the same results.[8] The estimated true scores were 73.3 for the old and 75.7 for the new, with composite SEMs of 1.84 and 1.71, respectively. The 95% confidence intervals rounded to integers were 70–77 for the old and 72–79 for the new. The one-SEM confidence intervals, see *Hall*, 572 U. S., at 738–739 (dissent), are 72–75 old and 74–77 new.

Even if a confidence interval touching 70 is a sufficient gateway to "move on" to adaptive deficits, that condition exists only for the old tests and only if we use the 95% intervals. In this case, there is good reason to prefer the composite score for the new tests. The old school tests may not have been given in adequate conditions. See J.A. 65. Dr. Chudy's test was given after Smith had committed murder, been arrested for it, and was facing prosecution and trial for a capital crime. See J. A. 372. Stress can depress performance on IQ tests, and Smith's circumstances at the time were surely very stressful. See J.A. 286.

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8. Details of the calculation are posted on CJLF's blog. See Scheidegger, Combining IQ Score in *Atkins* Cases, Crime & Consequences Blog (Aug. 8, 2025), https://www.crimeandconsequences.blog.

The probability that Smith has a true IQ less than 70.5[9] is 6.07% for the old and 0.12% for the new. This figure is more directly meaningful for answering *Hall*'s question of "unacceptable risk." See *Hall*, 572 U. S., at 704 (majority); *id*., at 741 (dissent). The probability of 0.12% for the more reliable new scores is easily acceptable. Even using the shakier old scores, a 6% probability is insufficient to make petitioner's case. See Brief for Petitioner 9; *infra*, at 19.

B. The Bayesian Approach.

The discussions in *Hall* and in the previous part of this brief deal with the "frequentist" or "classical" approach to these problems. An alternative way of looking at them is the Bayesian approach. See Kaye & Friedman, Reference Guide on Statistics, in Federal Judicial Center, Reference Manual on Scientific Evidence 258, 273 (3d ed. 2011) ("FJC Stats").

The Bayesian approach has two advantages for the present problem. First, it directly addresses the probability that given a hypothesis is true (i.e., that the defendant has a true IQ of 70 or below), rather than the related but different question of the probability that the observed data could occur if a hypothesis were true (i.e., the probability that the defendant could have scored as he did on the test if his true IQ were 70 or below). See FJC Stats, at 258, n. 119; Cohen, The Earth Is Round ($p < .05$), 49 Am. Psych. 997, 998–999 (1994). Second, the refinement of a prior probability estimate with additional information forms the core of

9. IQ scores are traditionally rounded to integers. According to Kaye, the question is whether the true score is one that rounds to 70 or less, i.e., less than 70.5. See Kaye, Unacceptable Risk, at 31, n. 158. *Amicus* will assume that to be correct for the purpose of this illustration.

the approach, not something added on, making it more readily suitable for dealing with multiple measurements. Bayes' rule is a "mathematical recipe for blending the prior distribution of true scores with a newly observed score." Kaye, Unacceptable Risk, at 32.

In the present problem, we are dealing with a single parameter (i.e., the unknown quantity we wish to estimate as precisely as possible) and probability distributions following the bell-shaped normal curve. For such problems, a useful formula is given in A. Gelman et al., Bayesian Data Analysis, 40, equation 2.10 (3d ed. 2013). In this formula, μ_0 is the mean and τ_0 is the standard deviation of the prior distribution, i.e., the bell-shaped probability curve based on knowledge before the new information. The new information, i.e., the test result, has value y and standard deviation σ. The result is a new normal curve (called the posterior distribution) with mean μ_1 and standard deviation τ_1. The formula is:

$$\mu_1 = [\mu_0/\tau_0^2 + y/\sigma^2]\tau_1^2 \text{ and } 1/\tau_1^2 = 1/\tau_0^2 + 1/\sigma^2$$

Given the mean and standard deviation of a normal distribution, calculating the probability that the parameter (i.e., true IQ) is less than any given value is elementary. See Kaye, Unacceptable Risk, at 15 (distribution exactly specified with these two numbers).

One more requirement to do the Bayesian calculation is to decide on the prior distribution. Here there is a schism among Bayesian statistians. "Objective Bayesians" seek to assume as little as possible to "avoid the charge of subjectivism at the cost of departing from a fully Bayesian framework." FJC Stats, at 259, n. 123. The subjective approach is to take a stab at a prior distribution based on other information.

Doing the calculation both ways shows little difference in the end, as shown below.

For the objective approach, assuming nothing at all about Smith individually means that the prior distribution before any test is the bell-shaped IQ curve of the whole population, which by definition has mean 100 and standard deviation 15. Applying the formula above repeatedly, using each result as the prior for the next line, gives this table:

Test	μ_0	τ_0	y	σ	μ_1	τ_1	$Pr(H_D \mid y)$
A	100	15	75	3.19	76.1	3.12	3.68%
B	76.1	3.12	74	3.19	75.1	2.23	2.04%
C	75.1	2.23	72	2.53	73.7	1.67	2.70%
D	73.7	1.67	78	2.30	75.2	1.35	0.03%
E	75.2	1.35	74	2.16	74.9	1.15	0.01%

In this table, tests A through E are five tests in chronological order. See Brief for Petitioner 16. The score are column y. Sigma is the SEM. $Pr(H_D \mid y)$ means the probability that Smith meets the first criterion for intellectual disability, true IQ less than 70.5. The probability is quite small after the first two tests, rises slightly with the lower (but still above 70) 1998 test, and then shrinks to nearly zero with the last two tests. This is what we would expect from the principle of aggregation and common sense.

For the subjective approach, we can start with a prior distribution more favorable to Smith's case. Before any testing, he was known to be slow in school but not hopeless. He did reach the third grade, although he was functioning below that level, "prompting his teacher to label him an underachiever and refer him for an 'intellectual evaluation.' " App. to Pet. for Cert. 20a. A prior distribution with a mean of 70 and standard deviation of 10, meaning a 2/3 chance he was

between 60 and 80, is a fair estimate of the limited knowledge available before any testing. The same procedure with this prior distribution yields this table:

Test	μ_0	τ_0	y	σ	μ_1	τ_1	$Pr(H_D \mid y)$
A	70	10	75	3.19	74.5	3.04	9.20%
B	74.5	3.04	74	3.19	74.3	2.20	4.28%
C	74.3	2.20	72	2.53	73.3	1.66	4.59%
D	73.3	1.66	78	2.30	74.9	1.35	0.05%
E	74.9	1.35	74	2.16	74.7	1.14	0.01%

The early rows show a higher, though still low, probability of a true IQ of 70 or less, but the effect of the different prior distribution fades until the end probability is the same. Both approaches conclude with a near zero probability that Smith has a true IQ of 70 or less.

Again, *Amicus* emphasizes that this is illustration, not testimony. Others may find fault with the calculations presented here, offer different methods, and reach different results. The point is that methods do exist that take the principle of aggregation into account. The court of appeals did not do so. It treated the aggregation of five scores no differently than it would have treated a single score of 74. Compare App. to Pet. for Cert. 7a with Kaye, Unacceptable Risk, at 30; see Brief for Petitioner 37–41. It did so despite qualitative statements from experts on both sides that multiple tests narrow the range of uncertainty. See J. A. 271, App. to Pet. for Cert. 70a. That is not sufficient to hold that the state violated the Constitution by sentencing this murderer to death. It is not sufficient to take the drastic action of nullifying an otherwise deserved and properly imposed sentence for an atrocious crime.

II. States should be permitted to use any reasonable definition of intellectual disability and any reasonable method of determining whether a given defendant qualifies for the *Atkins* exclusion.

In *Atkins* v. *Virginia*, 536 U. S. 304 (2002), the opinion of the Court made two important findings about the national consensus or lack of one regarding intellectual disability. The first was the hotly disputed assertion that "a national consensus has developed against" execution of "offenders possessing a known IQ less than 70." *Id*., at 316; but see *id*., at 337–338 (Scalia, J., dissenting). This finding was immediately followed by one that is central to the present case. There was not a consensus "in determining which offenders are in fact retarded." *Id*., at 317. "Not all people who claim to be mentally retarded *will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus*." *Ibid*. (emphasis added).

Unless and until this latter holding is overruled, the *Atkins* rule is *not* a prohibition against executing any murderer who can be diagnosed as intellectually disabled in the opinion of any expert whom a federal court deems to be more persuasive than an expert who opines to the contrary. Cf. App. to Pet. for Cert. 8a–9a. Because of the lack of consensus on the definition and determination of intellectual disability, the *Atkins* Court decided to " 'leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " *Atkins*, 536 U. S., at 317, quoting *Ford* v. *Wainwright*, 477 U. S. 399, 416–417 (1986).

Imposing rigid conformity on states in an area where there is widespread disagreement would run contrary to other important values. First, our federal system intentionally leaves the bulk of decisions to the states,

limits the federal government to defined functions, and imposes only a few fundamental limitations on the states. See U. S. Const., Amdt. 10. Allowing states to take positions different from those of other states is a central feature of the system. See *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U. S. 787, 817 (2015). It should go without saying that private organizations, which are not accountable to the people and may have agendas of their own, have no authority to alter the scope of the Eighth Amendment. See *Moore* v. *Texas*, 581 U. S. 1, 13 (2017) ("not demand adherence"); *id*., at 27–32 (Roberts, C.J., dissenting); Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Moore* v. *Texas*, No. 15-797, 14–24.

Second, categorical exclusions such as *Atkins* run contrary to the very large body of capital sentencing law created by this Court that generally demands individual evaluation of culpability and forbids using any one factor to preclude consideration of the others.

For nearly half a century now, this Court has insisted that individualized sentencing is a constitutional imperative in capital cases. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (lead opinion). States have been constitutionally forbidden from identifying a single factor and deciding in advance that the presence of this factor requires a death sentence without that individualized consideration. Even in the exceptionally compelling circumstance of a life-sentenced murderer who kills again within prison, the Court insisted that the Constitution requires consideration of the individual circumstances of the particular case. See *Sumner* v. *Shuman*, 483 U. S. 66, 80–82 (1987).

In *Penry* v. *Lynaugh*, 492 U. S. 302, 322–323 (1989), this Court recognized that intellectual disability was a powerful mitigating factor with regard to a defendant's

culpability, and it deserved to be weighed in the balance with the other factors. Giving it conclusive weight by itself, however, was not warranted, in part because of the wide variations in abilities among persons who might qualify for the "retarded" label. See *id*., at 338 (opinion of O'Connor, J.) (quoting AAMR Manual).[10] Both holdings were consistent with the theme of individualized sentencing that has been a central pillar of this Court's capital sentencing jurisprudence from *Woodson* forward.

In *Atkins*, the Court changed course, in part by accepting as if universally true of all intellectually disabled persons the sweeping generalities rejected in *Penry*. See 536 U. S., at 318–321. The *Atkins* opinion notwithstanding, it surely is not true that *all* persons diagnosable as intellectually disabled *always* act on impulse rather than premediation, *always* follow others rather than lead or act alone, and are *necessarily* so cognitively deficient as to be undeterrable. See Mossman, *Atkins v. Virginia*, A Psychiatric Can of Worms, 33 N. M. L. Rev. 255, 273 (2003). In essence, the *Atkins* Court engaged in the same kind of sweeping generality in disregard of the facts of individual cases that this Court forbade the states to employ in *Sumner*. In the present case, the trial judge specifically found that Smith did plan and was not just a passive follower. *Smith I*, 795 So. 2d, at 839.

There is no need in this case to reconsider the holdings of *Atkins* or *Hall* v. *Florida*, 572 U. S. 701 (2014), but in assessing what is an "unacceptable risk" for *Hall*, at 704, it is important to remember that *Atkins* is layered on top of a body of law that requires

10. Part IV–C of the opinion is not the opinion of the Court, but it is the opinion concurring in the judgment on the narrowest grounds. See *Marks* v. *United States*, 430 U. S. 188, 193 (1977).

consideration of all mitigating circumstances, specifically including the defendant's intellectual impairment. A capital defendant in the gray zone, with an IQ within a point or two of 70, still has *Penry*. He is entitled to representation by a competent attorney who will present the jury with the evidence of his cognitive impairment—whether it be intellectual disability or borderline intellectual function—and argue to the jury the mitigating force of that condition. Only when a properly instructed jury rejects the argument of competent counsel and determines that the aggravating circumstances of the crime outweigh the defendant's condition does an *Atkins* issue even arise on review of the judgment.

The *Hall* Court engaged in a regrettable bit of hyperbole when it said, "Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test." 572 U. S., at 724. That gratuitous insult to the State was uncalled for. The State of Florida sought to execute Hall because he "kidnaped, beat, raped, and murdered Karol Hurst, a pregnant, 21-year-old newlywed" and also killed the deputy sheriff who tried to arrest him. *Id*., at 704. The question in an *Atkins* case is whether a murderer should be let off with a penalty less than the crime and its aggravating circumstances, properly weighed against the mitigating circumstances including mental condition, have been determined by a jury to warrant.

In accordance with the "leave to the States" holding of *Atkins*, *supra*, States should be allowed wide latitude in answering that question, encompassing the full range of reasonable disagreement. *Hall* precludes using a test score of 70 as a cut-off, but it does not preclude the use of cut-offs completely, and no such prohibition would be constitutionally defensible. See Kaye, Unacceptable Risk, at 12–14. Indeed, the Social Security Administra-

tion uses a cut-off for Supplemental Security Income benefits. It requires a test with either a full-scale IQ of 70 or below or a full-scale IQ in the range of 71–75 with either a verbal or performance scale of 70 or below. See *Cox* v. *Kijakazi*, 77 F. 4th 983 (CADC 2023).

For the purpose of this case, the State should be permitted to determine whether Smith is intellectually disabled with any reasonable definition of the condition, including the definitions that were widely used when *Atkins* was decided. A determination that the probability that Smith's true IQ is 70 or below is remote would suffice. Given that there is a consensus that the principle of aggregation is real but no consensus on precisely how to consider multiple scores, the State should be allowed to use any reasonable method.

Amicus CJLF will leave to the parties the precise form this Court's disposition should take. One result is clearly off the table, though. The decision of the court of appeals vacating the sentence of a murderer under *Atkins* with no plausible consideration of the aggregate effect of five tests all over 70 must not stand.

CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be reversed or vacated.

August, 2025

Respectfully submitted,

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