No. 24-872

IN THE

Supreme Court of the United States

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

Petitioner,

v.

JOSEPH CLIFTON SMITH,

Respondent.

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

BRIEF FOR RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

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

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BRIEF FOR RESPONDENT

INTRODUCTION

The parties agree on several things. There is no dispute, for example, that under Alabama law, intellectual disability is a question of fact to be proven by a preponderance of the evidence by an *Atkins* claimant. *See* Warden Br. ("Br.") 9; Pet.App.9a, 32a-33a; *accord* U.S.Br.19. There is also no dispute that that factual question consists of three separate inquiries: Whether the claimant has substantially subaverage intellectual functioning, whether the claimant has significant deficits in adaptive behavior, and whether those difficulties manifested in the developmental period. *See* Br.8; Pet.App.2a. And

everyone agrees that where a claimant has multiple IQ scores, resolving the intellectual-functioning inquiry requires that those scores be assessed "holistic[ally]" and without "*ex ante*" rules dictating their significance. Br.26-27; Pet.App.9a. And that "holistic" assessment should include expert interpretation of the relevant IQ scores, with the trial court acting as factfinder and making credibility determinations as needed. Br.24; Pet.App.2a; *accord* U.S.Br.19.

The undisputed answer to the question presented is thus that courts should assess multiple IQ scores holistically. The only dispute is whether that assessment should end, as the Warden suggests, with simply tallying up IQ scores above (and presumably also below) a certain threshold, or whether holistically assessing a person's intellectual functioning in light of multiple IQ scores requires considering those scores in light of other evidence—particularly expert testimony—regarding the scores' validity and meaning, and other evidence of the claimant's intellectual functioning. As a matter of Alabama law and Eighth Amendment doctrine, the answer is clear: Where IQ scores alone are not themselves conclusive, "defendants must be able to present additional evidence" bearing on their intellectual functioning, *Hall* v. *Florida*, 572 U.S. 701, 723 (2014); *Reeves* v. *State*, 226 So.3d 711, 729 (Ala. Crim. App. 2016) (A "court should look at all relevant evidence in assessing an intellectual-disability claim and … no one piece of evidence, such as an IQ test score, is conclusive as to intellectual disability.").

That is precisely the analysis adopted below. The district court held an evidentiary hearing and made credibility findings, ultimately crediting Smith's experts. Both the district court and the Eleventh Circuit concluded that whether Smith had substantially

subaverage intellectual functioning was "not clear" from his IQ scores alone, and so the courts went on to consider "additional evidence" relevant to his intellectual functioning—neuropsychological testing and other evidence bearing on intellectual functioning, including, for example, Smith's behavioral history, school records, and tests assessing verbal abstract reasoning skills, vocabulary, and other tests "correlated with intelligence." Pet.App.8a, 74a-75a, 84a-85a, 87a, 90a-91a. Based on that evidence, the courts concluded that Smith had proved by a preponderance of the evidence all three elements of intellectual disability. That is the kind of holistic analysis required under Alabama law and this Court's precedents and applied by the vast majority of courts around the country. The Warden's categorical score-based rule should be rejected and the lower courts' totality-of-the-evidence analysis affirmed.

STATEMENT

A. Constitutional Background

The Eighth Amendment prohibits executing a person with an intellectual disability. *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002). *Atkins* "le[ft] to the States the task of developing appropriate ways to enforce th[at] constitutional" prohibition. *Id.* at 317 (quotation marks and bracket omitted). But this Court has clarified that States' discretion is not "unfettered" and must be "informed by the medical community's diagnostic framework." *Moore* v. *Texas*, 581 U.S. 1, 13 (2017); *Hall v. Florida*, 572 U.S. 701, 719-721 (2014). That framework (which has been incorporated in all relevant statutes, *see infra* pp.6-10, 25-28) consists of "significantly subaverage intellectual function" (typically an IQ level at or below "approximately 70") and limitations in "adaptive

functioning," with onset in the developmental period. *Atkins*, 536 U.S. at 308 n.3, 317 n.22.

In *Hall* v. *Florida* this Court explained the limits of relying on IQ scores alone to assess intellectual functioning. *Hall* considered a Florida Supreme Court ruling that defined intellectual disability to require an IQ test score of 70 or less. 572 U.S. at 704. Hall had nine IQ scores, with two below 70 and seven between 71 and 80. *Id.* at 707. After excluding the two sub-70 scores for evidentiary reasons, the sentencing court concluded that Hall had failed to meet the 70-point threshold. *Id.* at 707. This Court rejected Florida's 70-point cutoff as "not sound" and "against unanimous professional consensus"—and thus inadequate to assess intellectual disability for Eighth Amendment purposes—in two key respects. First, the score cutoff treated "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id.* at 712. Evidence regarding "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances," for example, can all bear on whether a person with an IQ score above 70 has a level of "actual functioning [that] is comparable to that of an individual with a lower IQ score." *Id.* (quoting Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013)). Second, the score cutoff also failed to account for the fact that IQ tests have a "standard error of measurement" ("SEM") reflecting the "imprecision of the test," such that each "score is best understood as a range of scores on either side of the recorded score." *Id.* at 712-713.

Under *Hall*, "intellectual functioning cannot be reduced to a single numerical score." 572 U.S. at 713. Nor can it be reduced to some composite of multiple scores:

"each separate score must be assessed using the SEM." *Id.* at 714. And because tests "may be flawed, or administered in a consistently flawed manner, … even a consistent score" across "multiple examinations" "is not conclusive evidence of intellectual functioning." *Id.* Thus, though all of Hall's relevant scores exceeded 70, this Court reversed and remanded to give Hall a "fair opportunity" to "present [additional] evidence of his intellectual disability." *Id.* at 724.

Three years later, this Court reaffirmed in *Moore* v. *Texas* the importance of considering "the views of medical experts" in assessing intellectual disability for Eighth Amendment purposes. 581 U.S. at 20 (quotation marks omitted); *see also id.* at 32-33 (Roberts, C.J., dissenting) (factfinders should weigh "dueling expert opinions about how to evaluate" evidence regarding intellectual disability). Moore had seven IQ scores between 57 and 85. *Ex parte Moore*, 470 S.W.3d 481, 514 (Tex. Crim. App. 2015). Relying on expert testimony, the lower court rejected five of those scores as unreliable, leaving only scores of 74 and 78. *Id.* at 514-519. Although, accounting for the SEM, those scores represented a range from 69 to 83, the lower court failed to credit the lower end of the range based on evidence of Moore's circumstances which, the court reasoned, "might tend to place his actual IQ in a somewhat higher portion of that … range." *Id.* at 519. This Court rejected that speculative reasoning, reaffirming that "the [SEM] is 'a statistical fact'" and reflects the clinical "reality that an individual's intellectual functioning cannot be reduced to a single numerical score." 581 U.S. at 13-14 (quoting *Hall*, 572 U.S. at 713).

B. Clinical Guidelines For Intellectual Disability

The American Association on Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA") are the authoritative organizations for the definition and classification of intellectual disability. JA820-825, 856. The organizations' "current manuals offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Moore*, 581 U.S. at 20 (quotation marks omitted); *see also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., Text Revision 2022) (hereinafter DSM-5-TR); Am. Ass'n on Intell. & Dev. Disabilities, Intellectual Disability: Definition, Classification, and Systems of Support (12th ed. 2021) (hereinafter AAIDD-12). While courts determine the content of the Eighth Amendment, where that content turns on conditions like insanity or intellectual disability, courts inevitably look to expert clinical judgment about whether those requisite conditions exist. *See*, *e.g.*, *Moore*, 581 U.S. at 13-20; *Brumfield* v. *Cain*, 576 U.S. 305, 315 (2015); *Hall*, 572 U.S. at 710-714; *Atkins*, 536 U.S. at 308 n.3.

The two manuals define intellectual disability in "virtually identical" terms. JA17. Both describe intellectual disability as significant deficits in intellectual functioning and adaptive behavior with onset in the developmental period, matching the familiar 3-prong test adopted by the States and endorsed by *Atkins*. *See* AAIDD-12 1; DSM-5-TR 37. Both statistically define the relevant intellectual-functioning threshold as an IQ approximately two standard deviations below the population mean, which by most IQ-test metrics results in an IQ score of approximately 70. *See* AAIDD-12 29; DSM-5-TR 38; *see also Hall*, 572 U.S. at 711.

Both manuals further recognize that every test involves measurement error and imprecision, therefore requiring IQ scores to be expressed as a confidence interval—a statistical range within which the person's true score falls. AAIDD-12 35-36; DSM-5-TR 38; *Hall*, 572 U.S. at 713. The organizations recommend interpreting scores using a 95% confidence interval, which translates to a range of +/- 5 points. AAIDD-12 35-36; DSM-5-TR 38.

C. State-Law Treatment Of Multiple IQ Scores Under *Atkins*

When presented with multiple IQ scores for the purpose of *Atkins* claims, Alabama courts assess those scores holistically in light of all relevant evidence. That approach is consistent with how the vast majority of States interpret multiple IQ scores.

1. Alabama assesses multiple IQ scores holistically in light of all relevant evidence

Following *Atkins*, in the absence of state legislation, the Alabama Supreme Court set out to identify a "procedure for determining whether a capital defendant is [intellectually disabled]." *Ex parte Perkins*, 851 So.2d 453, 455 (Ala. 2002). The court adopted a definition of intellectual disability consistent with medical guidelines and other States' previously enacted legislation: (1) "significantly subaverage intellectual functioning (an IQ or 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) manifestation of "these problems … during the developmental period." *Id.* at 456. The defendant must prove all three factors by a preponderance of the evidence. *Ex parte Smith*, 213 So.3d 313, 319-20 (Ala. 2010).

Alabama courts assess the first *Perkins* prong holistically. To assess intellectual functioning, courts "look at all relevant evidence" and do not consider any "one piece of evidence, such as an IQ test score" conclusive. *Reeves*, 226 So.3d at 729. In *Callen* v. *State*, 284 So.3d 177 (Ala. Crim. App. 2017), for example, the court weighed Callen's two IQ test scores—69 and 75—alongside other evidence including school and behavioral records and testimony from Callen's expert stating that the SEM range for his IQ score of 75 was 71-80 and, separately, testimony from another expert asserting that the 69 score should be considered "with caution." *Id.* at 193-194. Taking all of this evidence together, the court concluded that Callen had failed to meet his burden on the intellectual functioning prong. *Id.* at 197.

2. Alabama's treatment of multiple IQ scores is consistent with how almost all states consider multiple IQ scores

a. *State Statutes*

State statutes universally require the same three factual determinations to meet the elements of the *Atkins* clinical test. Br.11-12. And with the exception of Oklahoma, those statutes do not require courts to apply categorical rules when faced with multiple IQ scores, instead delegating to the factfinder the task of weighing all relevant evidence. Oklahoma, the sole outlier, prohibits anyone "who has received an intelligence quotient of seventy-six (76) or above on any individually administered" IQ test from "be[ing] considered mentally retarded." Okla. Stat. tit. 21 §701.10b(B)-(C).

This is not to say that every State follows an identical approach as an evidentiary or procedural matter. For example, some statutes require the petitioner to prove intellectual disability by clear and convincing

evidence, *see, e.g.*, Ariz. Rev. Stat. §13-753(G), while others require the petitioner to prove the same by a preponderance of the evidence, *see, e.g.*, Cal. Penal Code §1376(c)(3). Still others provide for a court-appointed expert to administer an IQ test before every capital trial and dictate that a score below 65 creates a "rebuttable presumption" in the offender's favor. *See* Ariz. Rev. Stat. Ann. §3-753(B), (G); Ark. Code Ann. §5-4-618(a)(2). The key unifying characteristic for purposes of this case is that no State except Oklahoma mandates a categorical rule for the interpretation of multiple IQ scores.

b. *Case Adjudication*

Given the absence of categorical rules, the overwhelming majority of courts applying state law assess multiple IQ scores holistically based on the totality of the evidence presented. In 43 post-*Hall* cases involving multiple IQ scores,[1] courts in 32 cases followed a holistic approach, weighing multiple IQ tests alongside other expert testimony and evidence to make a determination regarding intellectual functioning. *See* App'x tbl. 1.

In one case, *Black* v. *Carpenter*, a petitioner submitted nine different scores—obtained between 1963 and

[1] A comprehensive accounting of post-*Hall Atkins* cases is presented in the Appendix to this brief. This analysis includes, for each defendant, the last reasoned opinion that involved the *Atkins* claim or the court's consideration of a defendant's IQ scores if an *Atkins* claim was not present. This approach ensures the analysis reflects only the ultimate resolution of the case. At times, the case involved a federal habeas court's decision reviewing a prior state court decision under AEDPA deference or, as in Smith's case, applying state law de novo. In addition to the 43 cases categorized, another 13 cases were either resolved on grounds unrelated to intellectual capability or arose in a procedural posture so distinct from the *Atkins* analysis that they shed no light on how the court would address multiple IQ scores and thus were excluded. *See* App'x tbl. 4.

2001 and ranging between 57 and 97—as part of his *Atkins* claim. 866 F.3d 734, 744-745 (6th Cir. 2017), *cert. denied*, 584 U.S. 1015 (2018). Analyzing this "series of IQ tests … taken over the course of his life," alongside both school records that indicated his IQ scores prior to age 18 ranged between 83 and 97, and expert testimony that suggested Black's later, lower scores should be given less weight, the district court concluded that Black did not have significantly subaverage intellectual functioning. *Id.* at 743-745. The Sixth Circuit affirmed the trial court's approach and conclusion. *Id.* at 748.

Likewise, in *Glover* v. *State*, the Florida Supreme Court affirmed the trial court's rejection of a petitioner's intellectual disability claim after it had performed a holistic analysis. 226 So.3d 795 (Fla. 2017). Glover challenged the trial court's finding on the ground that it improperly used his IQ score of 80 to end the intellectual disability inquiry, when he also had IQ scores of 67, 69, and 72. *Id.* at 809-810. The Florida Supreme Court explained that Glover's argument mischaracterized the trial court's reasoning. Instead, because Glover had presented three scores within the range of intellectual disability, the reviewing court held that the trial court had correctly permitted Glover to present additional evidence, which proved to be insufficient. *Id.* at 810.

Six cases applied a holistic approach to determining intellectual disability but did not squarely address how to assess multiple IQ scores. *See* App'x tbl. 2. Notably, only five cases analyzed multiple IQ scores in a non-holistic manner, and three involved application of Oklahoma's statute. *See* App'x tbl. 3.

D. Factual Background

1. Smith's history

Joseph Smith was born in 1970. JA795. According to his mother and sisters, Smith's father was a heavy drinker who physically abused the family, including Smith. JA797. After his parents divorced, Smith's mother married a man who also physically and verbally abused Smith. JA798.

Smith attended multiple schools before dropping out after seventh grade. JA799, 834. He struggled academically and emotionally throughout his school years, often functioning at least two grades below his placement. JA826. Smith was placed on an individualized education plan at age ten. JA830. In seventh grade, Smith's school classified him as "Educable Mentally Retarded" ("EMR"), JA848, a classification based on criteria that "largely parallel … the criteria used to identify mild intellectual disability today," JA58-59.

Smith had a "consistent history of social skill deficits," JA844, including being "gullible," a "follower," and acting "very young for his age," JA802-805. He also "had difficulties with following laws and with reckless behaviors that were impulsive and not thought out well." Pet.App.87a.

Smith "never consistently held a job." Pet.App.82a. He "never had a bank account" or paid taxes, "never saved money," he ran out of money to pay bills, and "lacked any insight as to" the importance of saving money for emergencies. JA800. Smith also never had a driver's license or insurance. JA207-208.

Altogether, Smith exhibited "deficits in communication, reading, writing, functional academics, self-direction, and social skills." Pet.App.87a.

2. Smith's IQ scores

Smith has received five IQ scores, two from before he turned 18. As established by clinical standards and recognized in this Court's precedent, each expert that administered an IQ test to Smith agreed the obtained score carried a margin of error.

In 1979, at age 9, Smith scored a 75 on the Weschler Intelligence Scale for Children, Revised ("WISC-R"). JA840. In 1982, he scored a 74 on the same test. JA888. As Smith's expert Dr. Reschly testified, both of these scores are "in the range of what would be considered mild intellectual disability," considering the SEM. JA111; *see also* JA244.

Smith took three IQ tests as an adult. At the time of sentencing in 1998, Smith scored a 72 on the Weschler Adult Intelligence Scale, Revised ("WAIS-R"). Pet.App.73a. Dr. James Chudy, who administered that test, testified that the WAIS-R had a margin of "three or four points," meaning that Smith's IQ could be as high as 75 or "as low as a 69" which "is considered clearly mentally retarded." JA387.

Smith took two additional IQ tests during his federal habeas proceedings. In 2015 at the age of 45, he scored a 78 on the Stanford-Binet Intelligence Scale, 5th Edition ("SB-5"). JA795, 809. The expert who administered that test, Dr. James Fabian, testified that applying a 95% confidence interval of "plus or minus five" points to Smith's 2015 score of 78 would yield a range of 72 to 83. JA219.

Smith then scored a 74 on the Weschler Adult Intelligence Scale, 4th Edition ("WAIS-IV"), in 2017 at the age of 46. JA584, 594. The Warden's expert, Dr. Glen

King, testified that the 95% confidence interval for Smith's WAIS-IV score was 70 to 79. JA268.

Tying all of the scores together, Dr. Reschly testified that that four out of five of Smith's scores were within range for intellectual disability. JA83. Dr. Fabian similarly testified that all of Smith's IQ scores other than the SB-5 test he administered were within range for intellectual disability. JA170-171; JA244.

E. Procedural Background

Smith was convicted of first-degree murder in September 1998. JA383-384. Dr. Chudy served as Smith's mitigation expert for the penalty phase of his trial. The jury returned an advisory verdict recommending a death sentence, JA389, which the trial judge imposed, JA393-394. The Alabama courts affirmed, and this Court denied Smith's petition for certiorari. JA395.

1. Alabama post-conviction relief and federal habeas AEDPA proceedings

In 2005, Smith petitioned for post-conviction relief pursuant to Alabama Rule of Criminal Procedure 32, alleging he was intellectually disabled and his execution would violate the Eighth Amendment. JA395-396, 428. The trial court denied Smith's request for an evidentiary hearing and dismissed his petition on the basis of his pre-*Atkins* trial evidence. JA395-396. The Alabama Court of Criminal Appeals affirmed, JA436-438, and the Alabama Supreme Court denied certiorari. *See* JA398.

Smith then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Alabama, pursuant to 28 U.S.C. §2254, alleging that his execution would violate the Eighth Amendment. JA398. The district court denied Smith's petition,

including his request for an evidentiary hearing. JA399-400.

The Eleventh Circuit reversed and remanded for an evidentiary hearing. JA410. The panel considered the evidence before the state court, including Dr. Chudy's testimony, which showed Smith's IQ could be as low as 69 based on the single IQ score then in the record, and other trial evidence showing "deficits in intellectual functioning." JA410-411. In light of that record, and because Alabama law "does not employ a strict IQ cut-off score of 70," the Eleventh Circuit held that the state court's determination that Smith's intellectual functioning was not significantly subaverage without affording him an evidentiary hearing was "an unreasonable determination of the facts." JA411. The court accordingly concluded that AEDPA deference was unwarranted and remanded for the district court to conduct a *de novo* analysis. JA414-415. The Warden did not petition this Court for review.

2. Federal habeas de novo proceedings

On remand, the district court conducted an evidentiary hearing and heard testimony on Smith's intellectual functioning from three experts: Dr. King for the Warden, and Drs. Fabian and Reschly for Smith. Drs. King and Fabian administered new IQ tests, and all three experts wrote reports and testified. Following the *Atkins* hearing, the court vacated Smith's death sentence.

In assessing Smith's intellectual disability, the court looked first to the IQ scores, considering "the standard error inherent in IQ tests." Pet.App.68a. The court acknowledged Dr. King's interpretation that Smith's IQ scores placed him "in the borderline range of intellectual functioning," but concluded that "Smith did not

consistently score so high that the Court is confident that the lowest score can be thrown out as an outlier or that the standard error for the tests can be disregarded." Pet.App.69-70.

The court acknowledged this was a "close case" because, based just on IQ scores, Smith's intelligence falls "at best … at the low end of the Borderline range of intelligence and at worst at the high end of the required significantly subaverage intellectual functioning." Pet.App.74a. The court thus concluded that whether Smith's intellectual functioning was significantly subaverage was "not clear" based on IQ scores alone, and that "additional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled." Pet.App.70a, 74a. With respect to additional evidence of intellectual function, the court considered Smith's results on a number of tests "correlated with intelligence," including tests assessing verbal abstract reasoning skills, vocabulary, and emotional perception. Pet.App.90a-91a. The court also credited evidence that Smith struggled with employment and finances, had difficulty coping with emotional problems, and had significant deficits in his academic functioning. *See* Pet.App.82a-87a.

Relying on the DSM-5-TR, the court explained that because IQ scores are only "approximations of conceptual functioning," evidence of adaptive deficits can be relevant to whether a "person's actual functioning is comparable to that of individuals with a lower IQ score," and thus relevant to "interpreting the results of IQ tests." Pet.App.75a. And regarding adaptive functioning specifically, the court also weighed conflicting expert testimony on the "Independent Living Scales" ("ILS") test conducted by Dr. Fabian, which "assesse[d] one-on-one functional adaptive function." Pet.App.88a. Smith

scored a standard score of 59 on the ILS, consistent with the mild intellectually disabled range of 57.4 to 78.4. Pet.App.89a. While Dr. King criticized the ILS as "not a recommended device for assessing adaptive behavior," JA293, the district court "question[ed] the veracity of Dr. King's criticism since [he] utilized the ILS in a prior *Atkins* case" and testified that it "measures adaptive functioning in a number of different domains," Pet.App.89a-90a (quoting *Tarver* v. *State*, 940 So. 2d 312, 324 (Ala. Crim. App. 2004)); *see* Pet.App.47a. In the end, the court explained that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed." Pet.App.91a.

Weighing all relevant evidence, the court concluded that Smith had proved by a preponderance of the evidence that he had both "significantly subaverage intellectual functioning and significant deficits in adaptive behavior" that arose in the developmental period. Pet.App.92a. The court granted Smith's petition and vacated his death sentence. Pet.App.96a-97a.

The Eleventh Circuit affirmed. The court began by observing that "[w]hether a capital offender suffers from an intellectual disability is a question of fact." Pet.App.33a. Thus, the panel reviewed the district court's finding of intellectual disability for clear error. *Id.* The court concluded that the district court did not err in considering the SEM or concluding that "additional evidence" of intellectual functioning beyond IQ scores "must be considered." Pet.App.38a, 43a. The panel also credited the district court's findings that Smith had significant adaptive deficits and that the onset of his intellectual disability was in the developmental period. *See* Pet.App.46a-56a. In doing so, it deferred to the trial court's credibility determinations. *Id.*

This Court granted the Warden's petition for certiorari, vacated, and remanded. Pet.App.12a-13a. The Court directed the Eleventh Circuit to clarify whether it "afford[ed] conclusive weight" to the fact that the lower end of Smith's IQ score range was 69, or whether it engaged in a "more holistic approach" and considered "the relevant evidence, including … any relevant expert testimony." *Id.*

On remand, the Eleventh Circuit clarified that it had applied a "holistic approach" and "unambiguously reject[ed] any suggestion" that a court may conclude a defendant suffers from significantly subaverage intellectual functioning "based solely on the fact that the lower end of the standard-error range for his lowest of multiple IQ scores is 69." Pet.App.2a. The court again stressed that "if a holistic review of a person's multiple IQ scores does not foreclose the conclusion that he has significantly subaverage intellectual functioning … the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." Pet.App.3a-5a (quotation marks omitted). That is, the Eleventh Circuit held, exactly the analysis the district court followed in Smith's case: The district court had "properly accounted for the standard-error range for IQ tests"; evaluated "the body of evidence that Smith's IQ scores represent," including expert testimony regarding Smith's scores; and appropriately "'move[d] on to consider' Smith's 'adaptive functioning.'" Pet.App.5a-6a (alteration in original).

The Warden again sought certiorari, and this Court granted the petition in part, limited to the question presented.

SUMMARY OF ARGUMENT

I. Under *Atkins*, whether the three criteria for intellectual disability are met are "factual determinations." *Brumfield*, 576 U.S. at 313. And while "States have some flexibility" in establishing how those determinations are to be made, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Moore*, 581 U.S. at 20. Clinical standards require holistic consideration of multiple IQ scores in connection with all other relevant evidence. And while this Court has not squarely addressed how courts should assess multiple IQ scores, its reasoning in *Atkins* cases supports the near-unanimous consensus of the States that multiple IQ scores must be assessed holistically in light of all relevant evidence.

"Intellectual disability is a condition, not a number." *Hall*, 572 U.S. at 723. Thus, "[i]t is not sound to view a single factor"—IQ score—"as dispositive of a conjunctive and interrelated assessment." *Id.* Using IQ scores to bar consideration of other "substantial and weighty evidence of intellectual disability"—including, for example, evidence of the "inability to adapt to … social and cultural environment[s], … medical histories, behavior records, school tests and reports, and testimony regarding past behavior and family circumstances"—impermissibly "risks executing a person who suffers from intellectual disability." *Id.* at 712, 723.

The existence of multiple IQ scores does not mean that IQ score alone can become dispositive of intellectual functioning if the range of those scores, taking into account the SEM, reaches 70 or below. Because tests "may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not

conclusive evidence of intellectual functioning." *Hall*, 572 U.S. at 714. Rather, "[e]ven when a person has taken multiple [IQ] tests, each separate score must be assessed using the SEM." *Id.* In sum, the Eighth Amendment requires a holistic assessment of all relevant evidence, such that where IQ scores (including multiple scores) alone are inconclusive, courts must consider other evidence of intellectual functioning.

Accordingly, where a State assigns to a claimant the burden to prove substantially subaverage intellectual functioning by a preponderance, and where an *Atkins* claimant has multiple scores with SEM ranges above and below 70, courts should not find that a claimant has failed to meet his burden based solely only on the presence of SEM ranges exceeding 70. By the same logic, courts also should not find that a claimant has met his burden based only on the presence of SEM ranges dipping below 70. Contrary to the Warden's assertion, it is thus not Smith's position that "'scores within the 70 to 75 range' satisfy prong one *simpliciter*," Br.26; *see also* U.S.Br.3. Where scores alone are inconclusive, courts must consider other evidence regarding intellectual functioning.

II. A national consensus of States adopts precisely this approach. Following medical guidelines, state statutes define intellectual disability similarly, aligning with the three *Atkins* clinical prongs. When it comes to the first prong, only Oklahoma provides a categorical rule dictating how to weigh multiple IQ scores. No other state legislation adopts a categorical rule, leaving intellectual disability a question of fact to be resolved through the factfinder's weighing of all relevant evidence, including expert testimony.

A comprehensive review of post-*Hall* cases involving multiple IQ test scores indicates that courts have coalesced around this approach. Trial courts overwhelmingly approach cases that involve multiple IQ test scores holistically, weighing the validity of each score, expert testimony, and additional evidence indicative of intellectual functioning to determine whether a defendant has carried his burden of proving intellectual disability. *See* App'x tbl. 1. In 43 post-*Hall* cases involving multiple IQ scores, only five applied a categorical rule, and three of those applied Oklahoma's outlier statute.

III. The consensus, holistic approach is also consistent with the standards employed by clinicians and diagnosticians. Those standards establish that multiple IQ tests should be analyzed exercising clinical judgment and in connection with other evidence, including evidence of adaptative functioning, where necessary. *See* AAIDD-12 38-43; DSM-5-TR 38, 42. They recognize that intellectual capability and adaptive functioning are "conjunctive and interrelated" factors of intellectual disability. *Hall*, 572 U.S. at 723; *see* AAIDD-12 25, 33; DSM-5-TR 42. And, contrary to the Warden's suggestion, clinical guidelines regarding the definition and classification of intellectual disability have remained stable over time. *See* AAIDD-12 xii-xiii.

IV. In accordance with clinical guidelines and the national consensus, Alabama law requires courts evaluating intellectual disability claims to review "all relevant evidence," stressing that "no one piece of evidence, such as an IQ test score, is conclusive." *Reeves*, 226 So.3d at 729. That is precisely the approach taken by the district court in this case and affirmed by the Eleventh Circuit. Despite the Warden's claim otherwise, neither court endorsed a single low score as sufficient to satisfy the first prong, as evidenced by the pages of analysis of all

Smith's scores, their respective SEM ranges, and expert testimony regarding both Smith's IQ scores, his behavior, and other evidence of his intellectual functioning. The courts found based on all of that relevant analysis that "Smith ha[d] shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning." Pet.App.92a; *accord* Pet.App.32a.

ARGUMENT

I. THE EIGHTH AMENDMENT REQUIRES HOLISTIC CONSIDERATION OF ALL THE EVIDENCE, INCLUDING MULTIPLE IQ SCORES

A. The Intellectual Functioning Prong Is A Question Of Fact To Be Assessed In Light Of All Of The Evidence And Informed By Clinical Standards

The Eighth Amendment forbids "execut[ing] anyone in 'the *entire category* of [intellectually disabled] offenders.'" *Moore*, 581 U.S. at 18 (quoting *Roper* v. *Simmons*, 543 U.S. 551, 563-564 (2005)) (emphasis and alteration provided in *Moore*). As this Court explained in *Atkins*, the clinically defined deficiencies associated with intellectual disability (in intellectual and adaptive functioning) both "diminish the[] personal culpability" of intellectually disabled offenders and "make it less likely that they can process" and "control their conduct based upon" the "possibility of execution as a penalty." 536 U.S. at 318-320. *Atkins* thus makes clear that "clinical definitions" of intellectual disability are central not only to how that concept is generally understood, *see*, *e.g.*, *id.* at 317 n.22, but also to how the category of the intellectually disabled is defined for purposes of the Eighth Amendment.

Under *Atkins*, whether the criteria for intellectual disability are met are "factual determinations." *Brumfield*, 576 U.S. at 313; *see also Moore*, 581 U.S. at 32 (Roberts, C.J., dissenting) (intellectual disability should be determined by the "factfinder[] … on the basis of the evidence offered by each party," including "expert opinions" (quotation marks omitted; alteration in original)). And while "States have some flexibility" in establishing how those determinations are to be made, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Id.* at 20. As explained in more detail below, *see infra* pp.29-36, clinical standards require holistic consideration of multiple IQ scores in connection with all other relevant evidence. And while this Court has not squarely addressed how courts should assess multiple IQ scores, its reasoning in *Atkins* cases supports the near-unanimous consensus of the States that multiple IQ scores must be assessed holistically in light of all relevant evidence.

First, "[i]ntellectual disability is a condition, not a number." *Hall*, 572 U.S. at 723; *see also Moore*, 581 U.S. at 32 (Roberts, C.J., dissenting) ("Psychiatry is not … an exact science" (quotation marks omitted; alteration in original)). Thus, "[i]t is not sound to view a single factor"—IQ scores—"as dispositive of a conjunctive and interrelated assessment." *Hall*, 572 U.S. at 723. Rather, where a given IQ score (accounting for the SEM) falls within the range associated with intellectual disability, courts cannot deny an *Atkins* claim without considering "additional evidence of intellectual disability." *Id.* at 723; *Moore*, 581 U.S. at 14. Using IQ scores to bar consideration of other "substantial and weighty evidence of intellectual disability"—including, for example, evidence of "neuropsychological testing as well as cross-battery intellectual assessment" probative of intellectual

functioning, DSM-5-TR 38 , and the "inability to adapt to … social and cultural environment[s], … medical histories, behavior records, school tests and reports, and testimony regarding past behavior and family circumstances"—impermissibly "risks executing a person who suffers from intellectual disability," *Hall*, 572 U.S. at 712, 723. That is because such evidence is "probative of intellectual disability, *including for individuals who have an IQ score above 70*." *Id.* at 712 (emphasis added).

Second, the existence of multiple IQ scores does not necessarily mean IQ scores alone become dispositive of intellectual functioning. Because tests "may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." *Id.* at 714. Rather, "[e]ven when a person has taken multiple [IQ] tests, each separate score must be assessed using the SEM." *Id.* In *Hall*, for example, the existence of seven scores between 71 and 80 did not preclude consideration of other "evidence of … intellectual disability." *Id.* at 707, 724. So, too, in *Moore*, where the Court held that scores of 74 and 78 could "not end the intellectual-disability inquiry, one way or the other." 581 U.S. at 15; *see also id.* at 32 (Roberts, C.J., dissenting) (noting that the court was "confronted with dueling expert opinions," and thus "made a credibility determination" "as factfinders often do in confronting conflicting evidence"); *Ex parte Moore*, 470 S.W.3d at 514-519 (explaining lower court's identification of 74 and 78 as the only two reliable scores). Instead, just as in *Hall*, because Moore's scores accounting for the SEM fell "within the clinically established range for intellectual-functioning deficits," the lower court was "require[d]" to "consider other evidence of intellectual disability." *Id.* at 15.

Finally, the requirement to carefully consider all relevant evidence is deeply entrenched in this Court's Eighth Amendment jurisprudence. "[I]f the Constitution renders the fact or timing of [one's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986). Thus, in the insanity context, courts likewise hear all the evidence relevant to a determination of sanity, including the expert testimony of clinicians and evidence of behavior, make credibility findings, and issue findings of fact and conclusions of law on the ultimate issue. *See id.* (stressing that "the adversary presentation of relevant information be as unrestricted as possible" and that expert testimony is "conductive to the formation of neutral, sound, and professional judgments as to the prisoner's ability").

In sum, the Eighth Amendment requires a holistic assessment of all relevant evidence, such that where IQ scores alone are inconclusive, courts must consider other evidence of intellectual functioning. Accordingly, where a State assigns to a claimant the burden to prove substantially subaverage intellectual functioning by a preponderance, and where an *Atkins* claimant has multiple scores with SEM ranges above and below 70, courts should not find that a claimant has failed to meet his burden based solely only on the presence of SEM ranges exceeding 70. The obverse is also true: Courts should not find that a claimant has met his burden based only on the presence of SEM ranges dipping below 70. Contrary to the Warden's assertion, it is thus not Smith's position that "'scores within the 70 to 75 range' satisfy prong one *simpliciter*," Br.26; *see also* U.S.Br.3—nor did the courts below so hold, *see infra* pp.36-47.

Rather, Smith's position is that, because IQ scores are best understood as estimates and "a person's intellectual functioning cannot be reduced to a single numerical score," *Hall*, 572 U.S. at 712, where multiple scores, accounting for the SEM, span 70, a court must consider all relevant evidence bearing both on how to interpret or weigh different scores, *see Hall*, 572 U.S. at 709-710, and on a claimant's intellectual functioning, *id.* at 723 (a "'person with a score above 70'" may nonetheless have a level of "'actual functioning … comparable to that of individuals with a lower IQ score'" (quoting DSM-5-TR 37)). And where, as here, such evidence conflicts, *see supra* pp.13-16; *infra* pp.37-45, it is for the factfinder to weigh that evidence.

B. The Warden Offers No Viable Alternative

The Warden agrees courts should assess multiple IQ scores "holistic[ally]," but the rule he propounds is anything but holistic. Instead, the Warden invents from whole cloth a rule focused narrowly, and impermissibly, only on IQ scores. Rather than considering all relevant evidence when assessing intellectual functioning in light of multiple IQ scores, the Warden suggests courts should look only to the "cumulative effect" of those scores. Br.23. Though the Warden never clearly explains what that means, the proffered rule seems to be that multiple scores above 70 categorically preclude relief under the intellectual-function prong regardless of any other relevant evidence. That rule has no support in this Court's precedent or Alabama law.

Indeed, the Warden does not even purport to ground his rule in precedent, arguing only (Br.25) that there is an "absence of precedent on point." But as the Warden is forced to concede, *see* Br.40, *Hall*'s reasoning (if not its holding) is plainly inconsistent with the

Warden's cumulative-score rule. *Hall*, after all, involved multiple scores above 70, observed that "each separate score must be assessed using the SEM," and held that the lower court erred in not considering other relevant evidence before denying relief. 572 U.S. at 707, 714, 723-724. As explained below, the Warden's chimeric rule also finds no support in the practice of the vast majority of States and courts across the country, *infra* pp.25-28, or medical guidelines, *infra* pp.29-36. And, perhaps most damning, his categorical cumulative-score rule is contrary to Alabama law, *infra* p.28.

In the end, the Warden offers little guidance other than repeating *Atkins*'s delegation to the States "the task of developing appropriate ways to enforce" the Eighth Amendment restriction. 536 U.S. at 306; *see, e.g.*, Br.6, U.S.Br.13. Current Eighth Amendment practice already respects this delegation, as evidenced by the myriad constitutional evidentiary burdens and procedural requirements that States apply to *Atkins* claims. *See supra* pp.3-6. What States cannot do is to substantively redefine the very concept of intellectual disability, a condition defined by "the medical community's current standards." *Moore*, 581 U.S. at 20. Indeed, if "the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity." *Hall*, 572 U.S. at 720; *see Moore*, 581 U.S. at 20.

II. THE HOLISTIC APPROACH REFLECTS PREVAILING SOCIETAL NORMS AND STATE STANDARDS REGARDING HOW TO APPROACH INTELLECTUAL DISABILITY

This Court's "decisions addressing capital punishment for the intellectually disabled recognize the central significance of state consensus." *Moore*, 581 U.S. at 27 (Roberts, C.J., dissenting). A review of both state

statutes and state-law adjudications reveals an overwhelming consensus in favor of holistic review of multiple IQ scores.

A. State Statutes Nearly Unanimously Delegate The Analysis Of Multiple IQ Scores Under *Atkins*'s Intellectual Functioning Prong To Case-By-Case Adjudication

State statutes generally do not prescribe how to assess multiple IQ scores under *Atkins*'s intellectual-functioning prong, instead leaving that determination to case-by-case adjudication as informed by expert testimony and clinical judgment. When it comes to *Atkins*'s first prong, only Oklahoma provides a categorical rule dictating how to weigh multiple IQ scores. *See supra* pp.8-10. No other State legislation adopts a categorical rule, leaving intellectual disability a question of fact to be resolved through the factfinder's weighing of all relevant evidence, including expert testimony.

B. Evaluating A National Consensus For Eighth Amendment Purposes Requires Consideration Of Both State Legislation As Well As Adjudications Under State Law

Were the Warden correct (Br.26) that only state legislation is relevant to defining the national consensus for Eighth Amendment purposes, that would resolve this case in Respondent's favor. The Warden asserts a categorical rule where an *Atkins* claimant has multiple scores above 70, but, as just discussed, the near-universal consensus is to leave the weighing of multiple scores, and other evidence relating to intellectual functioning, to factfinders.

As even the Warden seems to concede (Br.10, 24), however, state decisional law is essential to understand

how States do and do not impose the death penalty. "[T]he rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West* v. *AT&T Co.*, 311 U.S. 223, 237 (1940). Simply put, "whether the law of the state shall be declared by the Legislature in a statute or by its highest court is not a matter of federal concern." *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78-79 (1938).

Indeed, this Court regularly considers state-law judicial decisions alongside state statutes when assessing whether there exists a "national consensus" regarding questions of intellectual disability under *Atkins*. *See*, *e.g.*, *Hall*, 572 U.S. at 714-718; *Moore*, 581 U.S. at 19. In fact, the relevant state rule evaluated in *Hall* was established by the Florida Supreme Court, not by a Florida statute. 572 U.S. at 711. So too in *Moore*, where the Texas Court of Criminal Appeals applied the standards that it had previously announced in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). *Moore*, 581 U.S. at 8.

C. Courts Overwhelmingly Evaluate Multiple IQ Scores Holistically When Adjudicating *Atkins* Claims Under State Law

1. A comprehensive review of post-*Hall* cases involving multiple IQ test scores indicates that courts have coalesced around the very approach the district court applied in this case. Trial courts overwhelmingly approach cases that involve multiple IQ test scores holistically, weighing the validity of each score accounting for its SEM, expert testimony, and additional evidence indicative of intellectual functioning to determine whether a defendant has carried his burden of proving intellectual disability. *See* App'x tbl. 1; *see*, *e.g.*, *Black*, 866 F.3d at 734. This approach is consistently employed

across different circumstances, whether a defendant has two scores, *see, e.g.*, *Rankin* v. *Payne*, 141 F.4th 913 (8th Cir. 2025) (concluding that habeas relief was not warranted, even though the petitioner presented IQ scores of 66 and 72, because the lower court reasonably credited expert testimony that Rankin had "acceptable levels of adaptive functioning"), or nine scores, *see, e.g.*, *Webster* v. *Watson*, 975 F.3d 667 (7th Cir. 2020) (concluding that Webster had carried his burden of showing intellectual disability based on nine IQ scores, eight of which were below 70, and expert testimony that he had not malingered). Notably, Alabama courts employ this kind of totality-of-the-evidence approach to assessing multiple IQ scores. *See supra* pp.25-28.

Cases that proceed on this holistic basis turn upon factual particulars and credibility determinations. And the results vary widely; by Smith's count, petitioners in such cases prevailed only 31% of the time. The consensus methodology thus does not inherently favor petitioners; it simply permits courts to weigh all of the evidence before them in order to best assess whether a petitioner is intellectually disabled.

2. Of the 43 cases addressing multiple IQ scores, only five did not adopt a totality-of-the-evidence approach. *See* App'x tbl. 3. Three of those cases applied Oklahoma's statutory IQ-score cutoff. *Id.* One non-holistic case, *United States* v. *Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016), found a single score with an SEM range including or below 70 sufficient to satisfy *Atkins*'s first prong. In that case, the court concluded that "treatment of multiple test results" following *Hall* requires "lower courts to consider evidence of adaptive functioning if even one valid IQ test score generates a range that falls to 70 or below." *Id.* at 366. The court thus concluded *Hall* "require[s] a prong 2 analysis if any IQ test,

evaluated in the context of a 95% interval, reflects a range falling to 70 or below." *Id.* at 366. This approach is equally as out of step with the national consensus as the approach directed by Oklahoma's statute, as it likewise precludes consideration of other relevant evidence bearing on intellectual functioning.[2]

Finally, in *Commonwealth* v. *Bracey*, 117 A.3d 273 (Pa. 2015), the court simply averaged the obtained IQ scores. *Id.* at 283-284. This reductive approach, which even the Warden does not endorse, finds no support in the medical community or the practice of other States.

Of course, since neither the district court nor the Eleventh Circuit applied a categorical rule for the treatment of multiple IQ scores, the Court need not rule on the permissibility of these outlier approaches to affirm the judgment below. Similarly, while both the Warden and the United States muse about varied approaches States *could* take to determine intellectual disability, *see, e.g.*, Br.26-28; U.S.Br.19, Alabama has not adopted any of those approaches. Speculation regarding *other* approaches *other* States could take provides no reason to disturb the sound factual findings of the decisions below. As the Warden argues, "Alabama law is enforceable unless it violates the Eighth Amendment." Br.23.

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[2] *Wilson* involved a federal prosecution involving the Federal Death Penalty Act, 18 U.S.C. §§3591 *et seq.*, rather than a state prosecution. 170 F. Supp. 3d, at 350-351. It is included in the analysis as a non-holistic case for the avoidance of doubt, particularly considering the United States's extended discussion of the case, *see* U.S.Br.30.

III. A HOLISTIC APPROACH IS CONSISTENT WITH THE CONSENSUS APPROACH OF CLINICIANS AND DIAGNOSTICIANS IN EVALUATING INTELLECTUAL DISABILITY

"The legal determination of intellectual disability … is informed by the medical community's diagnostic framework" and thus both "this Court and the States have placed substantial reliance on the expertise of the medical community." *Hall*, 572 U.S. at 721-722; *see also Moore*, 581 U.S. at 20 ("The medical community's current standards supply one constraint on States' leeway in this area.").

It is no surprise, then, that States' near-universal practice is consistent with the standards employed by clinicians and diagnosticians. Those standards establish that multiple IQ tests should be analyzed holistically exercising clinical judgment and in connection with other evidence, including evidence of adaptative functioning, where necessary. They recognize that intellectual capability and adaptive functioning are "conjunctive and interrelated" factors of intellectual disability. *Hall*, 572 U.S. at 723. And, contrary to the Warden's suggestion otherwise, clinical guidelines regarding the definition and classification of intellectual disability have remained stable over time.

A. Clinical Judgment Is Needed To Interpret IQ Tests And Assess Intellectual Disability

Because "intellectual disability is a condition, not a number," "it must be stressed that the diagnosis of [intellectual disability] is intended to reflect a clinical judgment rather than an actuarial determination." *Hall*, 572 U.S. at 722-723 (quoting AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports 40 (11th ed. 2010)); *see also* DSM-5-TR 38 ("Clinical training and judgment are required to interpret test results

and assess intellectual performance."). Clinical judgment is a "special type of judgment" that "emerges from the clinician's training and experience, specific knowledge of the person and their contexts, analysis of extensive data, and the use of critical thinking skills." AAIDD-12 7. Among other things, it involves "clarifying and stating precisely the question at hand, conducting or accessing a thorough history, conducting or assessing broad-based assessments, and synthesizing obtained information." AAIDD-12 38. Because clinical judgment is bounded by rigorous standards and guidelines, it places strong constraints on the holistic analysis of intellectual function.

In the context of multiple IQ scores, clinical judgment plays two uniquely important roles:

1. Clinical judgment is required to evaluate the validity of the IQ scores and the relationship of the scores to one another—a "complicated endeavor" ill-suited to brightline, categorical rules, *Hall*, 572 U.S. at 714. Among other things, clinicians evaluate whether each test is "linguistically appropriate for the individual, as well as their communication, sensory and motor limitations." AAIDD-12 43. They consider whether the evaluation was conducted in "a comfortable environment free from extraneous noise, distractions and interruptions." AAIDD-12 39; *see, e.g.*, JA48 (Dr. Reschly explaining that tests need to be given in "standardized conditions … administered by a skilled examiner and interpreted by a skilled examiner"). Clinicians are further instructed to "[c]onsider any potential influence on test results including personal factors, environmental factors, and practice effects." AAIDD-12 43.

Clinicians are also tasked with investigating the possibility of false positives—instances in which an

individual obtains an IQ score below the intellectual disability threshold but does not in fact have such disability. False positives may occur "when a test is used whose norms and language are culturally or linguistically inappropriate for the individual assessed." AAIDD-12 39. They may also result from "poor effort, or malingering" by an individual "attempting to gain or benefit by deliberately faking a disability. AAIDD-12 40. Clinicians evaluate malingering in myriad ways, "synthesizing information from multiple sources, including a thorough social, medical and educational history," AAIDD-12 41, and offering memory malingering tests, as Dr. Fabian did here, JA819. *See also* JA166 (Dr. Fabian testifying that Smith's effort level was "really good" and that "no one had ever questioned his effort"); JA70 (Dr. Reschly relaying that during childhood IQ test, Smith "responded well to the attempt to establish rapport," was "cooperative, and seemed to be trying his best"); JA908 (Dr. Chudy reporting that Smith's "test results were valid" because Smith "seemed to put forth his best effort, showing fairly good persistence").

Both the Warden and the United States suggest, based on a few non-peer-reviewed articles, that multiple IQ scores either erase or diminish the SEM. *See* U.S.Br.18-19; Br.38-39. But again, both the AAIDD and the APA instruct that each individual IQ score should be interpreted "considering a 95% confidence interval based on the [SEM] for the *specific, individually administered, comprehensive, and standardized test used*." AAIDD-12 43 (emphasis added); *see also* DSM-5-TR 38. This Court too has indicated that SEMs should be calculated for each individual test. *See Hall*, 572 U.S. at 713. How to aggregate multiple IQ ranges "jointly" is a "complicated endeavor," which is why the task is properly left to expert testimony as informed by clinical judgment.

Id. at 714. There is no warrant for this Court to constitutionalize a single, mechanical rule across every State for aggregating multiple IQ scores. In the final analysis, even the United States and the Warden correctly acknowledge that "it would fall to the factfinder to assess and weigh this sort of expert analysis" and that "a government may fashion an evidentiary framework that places the burden of proof on a prisoner, and requires him to demonstrate—one way or another—that his collective IQ test scores betray deficient intellectually functioning." U.S.Br.19; *see* Br.34. That is the very approach Smith endorses and the lower courts applied.

2. Clinical judgment is also critical for determining when it is necessary to go beyond IQ scores to consider other evidence to evaluate intellectual capability and how to do so. *See Hall*, 572 U.S. at 712 (explaining that "all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70"). In certain cases, like Smith's, having several IQ tests inside and outside the range of intellectual disability does not conclusively resolve the first prong of the intellectual disability test. As the DSM explains, "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." DSM-5-TR 42. "For example, a person with deficits in intellectual functioning whose IQ score is somewhat above 65-75 may nevertheless have such substantial adaptive behavior problems in social judgment or other areas of adaptive functioning that the person's actual functioning is clinically comparable to that of individuals with a lower IQ score." DSM-5-TR 42; *Hall*, 572 U.S. at 712 (underscoring that the "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" (citation omitted)). The opposite is also true: Dr. Reschly explained that in cases where a "person has a low IQ score [but] does well intellectually in all other domains of life, I ignore the IQ score." JA26.

In close cases, "neuropsychological testing as well as cross-battery intellectual assessment" are also "useful for understanding intellectual abilities." DSM-5-TR 38; JA171 (Dr. Fabian testifying that the Neuropsychological Assessment Battery offered to Smith was relevant "both towards intellectual functioning and adaptive functioning"). All of this complexity underscores the need for clinical expertise to evaluate when and how to go beyond IQ scores alone. *See, e.g.*, JA167 (Dr. Fabian sharing his expert "opinion [that] these data points trump an overall score on one administration").

B. The Intellectual Capability And Adaptive Functioning Prongs Are Independent But Relevant To One Another

The Warden repeatedly suggests (*e.g.*, Br.22) that intellectual capabilities can always be divined from IQ scores alone without consideration of other evidence. But this Court has already recognized that intellectual capabilities and adaptive functioning are "conjunctive and interrelated" factors of intellectual functioning, and the medical community shares that same view. *Hall*, 527 U.S. at 723.

As to the "conjunctive" component, clinical guidelines are clear that "[i]ntellectual functioning and adaptive behavior are distinct and separate constructs." AAIDD-12 33. Intellectual functioning incorporates "reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, learning quickly, and learning from experience." AAIDD-12 25.

Adaptive behavior, meanwhile, refers to the "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." AAIDD-12 29. The first two prongs of the intellectual disability test thus represent two independent concepts.

At the same time, the two prongs are "interrelated" because "[i]ntellectual capacity … influence(s) adaptive functioning," and so clinicians and diagnosticians sometimes look to evidence of adaptive functioning in order to evaluate intellectual capacity. DSM-5-TR 42; *see also* AAIDD-12 33 (noting that intellectual functioning and adaptive behavior are "moderately correlated"); AAIDD-12 25 ("[I]ntellectual functioning is influenced by other human functioning dimensions and by systems of supports.").

Such relationship is especially typical of the "conceptual/academic" domain of adaptive functioning, one of three such domains, along with social and practical skills. The conceptual domain "involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-TR-42. The conceptual domain necessarily overlaps with intellectual functioning, and thus it is commonplace for clinicians to refer to academic performance in part to inform an assessment of intellectual capacity. *See, e.g.*, JA798-799, JA810-811, JA826-839 (Dr. Fabian); JA883-891 (Dr. Reschly); JA590, JA596-597 (Dr. King).

Evidence relevant to the other domains of adaptive functioning may also inform intellectual capacity. For example, use of "travel and transportation" is a frequent consideration for the "practical" domain. DSM-5-TR-42; *see, e.g.*, JA182 (Dr. Fabian testifying that "managing

home transportation" was an area of weakness for Smith); JA801 (Dr. Fabian noting that Smith "did not use a bus" and "had never been in a taxi"). While using public transportation is a practical skill, the reasons why a person can or cannot use public transportation may pertain to his intellectual capabilities. For example, if a person could not use public transportation because he lacks cognitive capacity to make sense of a map or comprehend that subway lines were connected, a reasonable clinician would view that as evidence of compromised intellectual functioning. *See* JA171-179 (Dr. Fabian testifying that several of the "neurocognitive, academic achievement, [and] neuropsychological tests" he administered to Smith were relevant "both towards intellectual functioning and adaptive functioning").

C. The Clinical Guidelines Are Not In Flux

The Warden also argues that considering clinical standards when interpreting the Eighth Amendment is "especially inappropriate because such standards constantly evolve," Br.31 (citation omitted), but the historical record indicates otherwise. "Although the term has changed over time from 'mental deficiency' to 'mental retardation' (MR) to ID, the three essential elements of ID—limitations in intellectual functioning and adaptive behavior, and early age of onset—have not changed significantly over the last 60 years." AAIDD-12 xii.

To the extent there have been changes in the guidelines for assessing those elements, they have resulted from "greater precision in the diagnostic process" over time and thus resulted in an increasingly empirical approach to defining intellectual disability. AAIDD-12 xiii. The increased precision has been "based on standards of educational and psychological testing" and has introduced disciplining requirements including "the use of

individually administered standardized assessment instruments [], the operational definition of significant limitations as an intelligence quotient (IQ) score or an adaptive behavior score that is approximately two standard deviations below the population mean [], and the use of the [SEM] to establish a statistical confidence interval within which a person's true score falls." *Id.* The historical amendments to the clinical guidelines, none of which is relevant to the disposition of this case, thus more closely resemble honing in on a single, constant target rather than shifting that target. And because intellectual disability is defined by standard deviations from the population mean based on IQ, it is a relative measure that will always remain a consistent proportion of the population. *See* JA43 (Dr. Reschly noting that statistically "roughly 2.3 percent of all persons have intellectual performance below the score of 70").

Lastly, there is no reason for concern over disagreement regarding the relevant guidelines. This Court has repeatedly recognized the AAIDD and the APA as the two authoritative organizations regarding the definition and classification of intellectual disability. *See supra* pp.5-6. And "[a]cross revisions of the [DSM], the APA has generally adopted, with some minor adaptations, the AAIDD definition and diagnostic criteria for MR/ID." AAIDD-12 17. To the extent individual clinicians and diagnosticians disagree regarding the application of those guidelines in an individual case, that simply presents a dispute for factfinders to weigh as they do "countless times each day throughout the American system of criminal justice," *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976).

IV. THE DISTRICT COURT AND COURT OF APPEALS FAITHFULLY APPLIED ALABAMA LAW, WHICH VALIDLY IMPLEMENTS THE EIGHTH AMENDMENT AS REQUIRED BY *ATKINS* AND ITS PROGENY

In accordance with clinical guidelines and the national consensus, Alabama law requires courts evaluating intellectual disability claims to review "all relevant evidence." *Reeves*, 226 So.3d at 729. Alabama law also dictates that conflicting evidence regarding intellectual disability, including expert testimony, should be assessed based on "weight and credibility," *id.* at 725; *see also id.* at 741, not bright-line rules. That is precisely the approach taken by the district court in this case and affirmed on review by the Eleventh Circuit.

A. The District Court Correctly Assessed The Totality Of The Evidence In Finding Smith Intellectually Disabled, Consistent With Alabama Law

The district court faithfully applied Alabama law. Rather than relying on any single IQ score, or IQ scores alone, the court engaged in a holistic analysis of all the scores in light of the relevant evidence.

1. In assessing Smith's intellectual functioning, the court looked first to the IQ scores, considering "the standard error inherent in IQ test" and expert testimony regarding the tests' reliability and significance. Pet.App.68a. Relying upon AAIDD and DSM guidance, Dr. Fabian testified that four of Smith's five IQ scores were within the range of intellectual disability when applying a 95% confidence interval, JA17; JA111; JA181, and the district court credited his analysis, *see*

Pet.App.71a.[3] The district court rejected Dr. King's efforts to explain away Smith's lower IQ scores with speculation that he "likely" had a "learning disability" instead of intellectual disability because no other evidence supported that theory. Pet.App.69a; *see also* DSM-5-TR 45 (noting that learning disorders "may co-occur with intellectual developmental disorder" and "[b]oth diagnoses" may be made).

The court acknowledged Dr. King's interpretation that Smith's IQ scores placed him "in the borderline range of intellectual functioning," but concluded that "Smith did not consistently score so high that the Court is confident that the lowest score can be thrown out as an outlier or that the standard error for the tests can be disregarded." Pet.App.70a. The court refused to disregard Smith's scores within the range associated with intellectual disability based on "clear" evidence that Smith was "not malingering." Pet.App.74a. The court acknowledged this was a "close case" because "at best 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." Pet.App.74a. The court thus concluded that "additional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled." Pet.App.74a.

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[3] The Warden argues that the WISC-R scores of 74 and 75 must be accepted at face value because there was no testimony or evidence presented about the SEM for those scores. Br.17. That is wrong. Both Dr. Reschly and Dr. Fabian provided information about the SEM for these scores and testified that the WISC-R scores Smith received when he was a child were within range for intellectual disability. JA83 (Dr. Reschly); JA170-171; JA244, 824, 868-869 (Dr. Fabian).

By proceeding in this manner, the court relied not only on this Court's decisions in *Hall* and *Moore*, but also on the DSM's instruction that "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.75a.

Moving beyond IQ scores, the court credited evidence that Smith struggled with employment and finances, had difficulty coping with emotional problems, and had significant deficits in his academic functioning. *See* Pet.App.82a-87a. The court also considered Smith's performance on a number of neuropsychological tests performed by Dr. Fabian, including the Neuropsychological Assessment Battery, the Green Emotional Perception Test, the Expressive One-Word Picture Vocabulary Test, the Receptive One-Word Picture Vocabulary test, and the Social Cognition Test, all of which supported a finding of intellectual disability. Pet.App.90a-91a. The court underscored that several of these tests relate not only to "conceptual areas of adaptive functioning" but also "correlate to intelligence," demonstrating their relevance to assessing intellectual functioning at prong one of the *Atkins* inquiry. *Id.*

The court discredited Dr. King's administration of the ABAS-3, an adaptive behavior test, because Dr. King relied on Smith to "giv[e] a report on himself," even though the AAIDD "cautions against reliance on self-reporting." Pet.App.52a. And the court credited Dr. Fabian's use of a different adaptive-behavior test, the ILS, in part because Dr. King himself had "utilized the ILS test in a prior *Atkins* case" and testified that it "measures adaptive functioning in a number of different

domains." Pet.App.89a-90a (quoting *Tarver*, 940 So.2d at 324); *see* Pet.App.47a.

In the end, the court explained that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed." Pet.App.91a. The court concluded that Smith's experts were more credible than Dr. King, and that Smith had thus proven by a preponderance of the evidence that he had *both* "significantly subaverage intellectual functioning and significant deficits in adaptive behavior." Pet.App.92a.

2. The Warden's attempts to discredit the district court's opinion lack merit. Despite the Warden's suggestions otherwise, *see, e.g.*, Br.32-36, the court "look[ed] at all relevant evidence" and did not view any "one piece of evidence, such as an IQ test score" as "conclusive" of Smith's intellectual functioning, *Reeves*, 226 So.3d at 729.

The Warden implies that the court should have blinkered itself to other evidence regarding Smith's intellectual functioning, including expert testimony and other neuropsychological tests, and should have focused *only* on the numerical results of his IQ tests. *See* Br.10, 24. But Alabama courts have repeatedly explained that the question of intellectual disability is "a factual one" and the factfinder's role is "to determine the weight that should be accorded to expert testimony of that issue." *Byrd* v. *State*, 78 So.3d 445, 450 (Ala. Crim. App. 2009). The Warden suggests the court was required to adopt Dr. King's view that multiple consistent scores reduce measurement error, such that intellectual functioning should be determined based exclusively on those scores without accounting for the SEM. *See, e.g.*, Br.23-24, 35. But there was contrary expert testimony explaining that four out of Smith's five IQ scores were in the range

associated with intellectual disability, *see* JA83; JA170-171; JA244, that the remaining score was "pretty consistent," JA171; that all of the scores "indicate[d] that [Smith is] quite low functioning," JA171; and that other tests "relevant to intellectual functioning" showed "consistent evidence of executive functioning impairments," JA171-177, all of which together demonstrated "significant limitations" in "intellectual functioning," JA180.[4] The district court as factfinder observed that testimony, assessed the credibility of the witnesses, reviewed the expert reports, and properly weighed the evidence to reach its decision on Smith's intellectual functioning, *see* Pet.App.70a, 74a, 90a-92a.[5]

Reeves illustrates this point. There, the Alabama Court of Criminal Appeals weighed not only the petitioner's three borderline IQ scores, which indicated that his IQ could be as low as 63 or as high as 78, but also other relevant evidence, including conflicting expert testimony, school records, and diagnostic history. 226 So.3d

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[4] The Warden's contention (Br.24) that Smith's expert agreed the recognized consistency in Smith's scores means Smith's true IQ score is likely above 70 mischaracterizes the relevant testimony. When asked whether the existence of multiple scores reduced the SEM for IQ tests, Dr. Fabian testified that "you can't use poor data to increase the reliability of good data." JA105. And again, Dr. Fabian testified that four out of Smith's five IQ scores were in the range of significantly subaverage intellectual functioning. JA170-171; JA244.

[5] The Warden's assertion (Br.33) that Smith's brief in opposition "concede[d] that his true IQ is 'somewhat higher than 70'" is demonstrably false. The brief in opposition observed (at 20) only that, under prevailing clinical guidelines, "people with IQs somewhat higher than 70 who exhibit significant deficits in adaptive behavior" can be diagnosed as intellectually disabled.

at 729-739, 741. The district court's approach in this case closely tracks this analysis.

The Warden is also wrong to suggest (Br.20) that the court based its intellectual function finding exclusively "on Smith's lowest score's lowest range." The Warden omits that the court also weighed Smith's other scores when considering whether Smith's "intelligence is higher than his previous scores indicated," Pet.App.68a-70a, concluding "Smith did not *consistently* score so high that the Court is confident that the lowest score can be thrown out as an outlier or that the standard error for the tests can be disregarded." Pet.App.70a (emphasis added). The Warden also ignores that the court considered evidence beyond IQ scores relevant to "intelligence"—including evidence regarding deficits in "verbal abstract reasoning" and the "ability to express and receive language," Pet.App.90a-91a—before finding that "Smith ha[d] shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning," Pet.App.92a.[6]

Finally, the Warden's arguments proceed as if this case involves a federal court disturbing a state court's determination regarding intellectual disability, but that is simply not the case. *See*, *e.g.*, Br.33. Based on the pre-*Atkins* trial record, the state courts erroneously refused to entertain the merits of Smith's *Atkins* claim and prevented Smith from developing and presenting evidence

[6] This is not the only place the Warden misstates the record. As another example, the Warden asserts that Dr. Fabian "agreed that Smith's scores were 'outside the range' without applying the Flynn effect," Br.24, but Dr. Fabian in fact said that all of Smith's IQ scores, save for the score he received on the test Dr. Fabian administered, were "in the range for intellectual disability … without consideration of the Flynn effect," JA244.

of that claim. JA395-398. The Eleventh Circuit held that unreasonable under AEDPA and reversed and remanded for *de novo* proceedings, including an evidentiary hearing. JA414-415. The Warden did not petition for certiorari to review the Eleventh Circuit's decision, which was clearly correct and is not the subject of this case. The Alabama state courts *never* evaluated the record of the case, including Smith's full set of IQ scores, and thus the courts below never sat in judgment of a state court with regard to the question presented.

More generally, the Warden's suggestion that the district court's analysis was inconsistent with Alabama law is baseless. According to the Warden (Br.22), "Alabama courts" would "rely[] on" multiple IQ "scores above 70" alone as "pro[of] [a claimant's] IQ is above 70." But as the Warden elsewhere admits (Br.10), "the Alabama Supreme Court's post-*Atkins* opinions" in fact "make clear that a court should look at *all relevant evidence* in assessing an intellectual-disability claim and that no one piece of evidence, such as IQ test score, is conclusive as to intellectual disability." *Reeves*, 226 So.3d at 729. Indeed, the Warden fails to cite a single Alabama case adopting the kind of categorical rule it advocates here. In *Clemons* v. *State*, 55 So.3d 314 (Ala. Crim. App. 2003) (cited at Br.10), the Court of Criminal Appeals weighed a range of IQ scores (between 51 and 84) in light of "extensive and often conflicting evidence" regarding their reliability. *Id.* at 323-329, 332. The court did not simply tally up the scores either above or below 70 to assess their "cumulative effect." Br.10. And *Bush* v. *State*, 92 So.3d 121 (Ala. Crim. App. 2009) (also cited at Br.10), includes very little reasoning, simply observing that Bush had three scores ranging from 69 to 75, recounting evidence of adaptive functioning, and denying relief. *Id.* at 151.

Alabama law requires courts assessing *Atkins* claims to consider all relevant evidence and weigh competing expert testimony. Even the Solicitor General ultimately agrees, as he must, that it should "fall to the factfinder to assess and weigh" competing evidence of intellectual functioning. U.S.Br.19. That is precisely what occurred below.

B. The Court Of Appeals Correctly Found No Clear Error In The District Court's Analysis

1. Because "whether a capital offender suffers from an intellectual disability is a question of fact," the Eleventh Circuit properly reviewed the district court's opinion for clear error, a "highly deferential standard of review." Pet.App.33a. The panel concluded that the district court did not err in considering the SEM or concluding that, on this record, "additional evidence" of intellectual functioning beyond IQ scores "must be considered," including evidence of adaptive deficits bearing on intellectual functioning. Pet.App.38a, 43a. The panel also credited the district court's findings that Smith had significant adaptive deficits, including its credibility finding regarding Dr. King's contrary testimony. *See* Pet.App.46a-56a.

On remand, the Eleventh Circuit clarified that its analysis was based on a "holistic approach," "unambiguously reject[ing] any suggestion" that a court may conclude a defendant suffers from significantly subaverage intellectual functioning "based solely on the fact that the lower end of the standard-error range for his lowest of multiple IQ scores is 69." Pet.App.2a. The court again stressed that "the question of whether a person has significantly subaverage intellectual functioning often overlaps with whether that person also has significant or substantial deficits in adaptive behavior" and that "if a

holistic review of a person's multiple IQ scores does not foreclose the conclusion that he has significantly subaverage intellectual functioning … the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." Pet.App.3a-5a (quotation marks omitted).

The Eleventh Circuit then painstakingly narrated how the district court "adhered to that legal framework." Pet.App.5a. After "properly account[ing] for the standard-error range for IQ tests," the district court "assessed whether Smith's IQ test results, taken together and in context of expert testimony, foreclosed the conclusion that Smith had significantly subaverage intellectual functioning." Pet.App.5a. And "[w]hen it found that Smith's IQ scores could not rule out the possibility that Smith is intellectually disabled, it followed the law's requirement that individuals must be able to present, and the district court must consider, additional evidence of their intellectual disability, including evidence of the individual's adaptive deficiencies." Pet.App.6a.

2. The Warden argues that the Eleventh Circuit inappropriately focused on only the lowest end of Smith's SEM range, adopting what the Warden attempts to frame as a "*per se* rule" that a single score dipping below 70 is "dispositive." Br.35. But that again mischaracterizes the opinion. The panel walked through *all* the relevant evidence before the district court, including Smith's school records, the five IQ scores, the trial testimony of Dr. Chudy, and the testimony of all three experts at the *Atkins* hearing, Pet.App.36a-38a, concluding that the district court did not clearly err in finding that "Dr. King's testimony was not 'strong enough'" to overcome the weight of contrary evidence, Pet.App.37a. Because of the range in Smith's IQ scores, and the testimony of

credited experts, the panel held that the district court permissibly considered additional evidence of Smith's intellectual functioning, including evidence of adaptive deficits bearing on intellectual functioning, as contemplated by *Hall* and *Moore*. Pet.App.40a.

For all the Warden's talk of the courts below applying a categorical rule in disguise, it is the Warden himself who argues that a single score of 78 "should have ended this case years ago" and disqualified Smith from relief. Br.41-42. Needless to say, that does not comport with this Court's precedent, Alabama law, established clinical guidelines, or nationwide practice. And it belies the Warden's refrain (Br.27) that he endorses a "truly holistic" analysis of intellectual disability.

C. Neither Court Below Shifted Smith's Preponderance Burden

The Warden's assertion (Br.32) that the courts below "nullified the state-law preponderance burden" misreads the opinions and conflates the legal and clinical components of the *Atkins* analysis. Both courts expressly stated that Smith had the burden of proof by a preponderance of the evidence. Pet.App.35a, 65a, 92a. And both courts held Smith to that standard.

1. The Warden clings to a few turns of phrase to claim that the courts below required the State to conclusively prove that Smith's IQ scores alone demonstrated sufficient intellectual capacity, thereby shifting Smith's burden on this element. Br.32-33. Viewing each of these phrases in context reveals the courts did no such thing.

For example, the Warden points to the district court's observation that the testimony of Dr. King was not "'strong enough' to deny the claim." Br.20. But the court did not resolve "the claim" based on the strength

of the Dr. King's testimony. Rather, the court found that Dr. King's testimony was not "strong enough to conclude that Smith is not intellectually disabled without considering evidence of his adaptive deficits." Pet.App.70a. Put differently, the district court concluded that because the conflicting evidence regarding the import of Smith's IQ scores was not sufficient to resolve his intellectual functioning, other evidence bearing on his intelligence should be considered. *See* Pet.App.74a-75a, 90a-91a. That approach does not involve shifting any burdens because the court did not reach any conclusion regarding Smith's showing on the intellectual function prong until considering all relevant evidence. *See* Pet.App.91a-92a.

The Warden similarly sounds the alarm over the Eleventh Circuit's statement that Dr. King's testimony regarding Smith's IQ scores did not "foreclose" or "rule out" the possibility Smith had significantly subaverage intellectual functioning. Br.33. Yet again, the Eleventh Circuit used these turns of phrase to refer to the fact that the district court found it "must consider[] additional evidence of [Smith's] intellectual disability, including evidence of [Smith's] adaptive deficiencies" in order to reach a conclusion regarding whether Smith had satisfied his preponderance burden on prong one. Pet.App.6a. At no point did the Eleventh Circuit suggest that Smith prevailed because the Warden failed to carry a burden he held.

2. The Warden is also wrong to claim (Br.32) that the lower courts "nullified the state-law preponderance burden" by employing a 95% confidence interval to "count[] all scores below 76 for Smith on the ground that *each* suggests a *possibility* of disability." That misapprehends *what* preponderance is required. Alabama law requires defendants to convince the court by a preponderance of all evidence presented that, applying the

established clinical criteria (including SEMs), the best expert analysis would classify the defendant as exhibiting significantly subaverage intellectual functioning. *See Smith* v. *State*, 213 So.3d 239, 252 (Ala. 2007). The 95% confidence interval is simply a feature of test scores: Alabama courts have repeatedly held that the State's assessment of intellectual disability depends upon "recognized clinical definitions, including those found in" the DSM and AAIDD Manuals, which in turn mandate a 95% statistical confidence level. *Id.* at 248.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted.

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APPENDICES

APPENDIX
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TABLE 1

Case Name & Caption	State	Scores Considered	Prevailing Party
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State **v. *Escalante-Orozco*,** **386 P.3d 798 (Ariz. 2017)**	Ariz.	**77** (Bateria-III) **70** (WAIS-III) **66** (WAIS-III) **65** (WAIS-IV)	State (prong 3; prong 1 decided for Petitioner / Defendant; prong 2 un-decided)
Smith **v. *Ryan*,** **813 F.3d 1175 (9th Cir. 2016)**	Ariz.	**93** (WAIS-III) **93** (Reynolds Intellectual Assessment Scale) **89** (Slosson Intelligence Test-Revised) **71** (Otis) **62** (Otis)	Petitioner / Defendant (all prongs)
Rankin **v. *Payne*,** **141 F.4th 913 (8th Cir. 2025)**	Ark.	**72** **66**	State (prong 1)

Case Name & Caption	State	Scores Considered	Prevailing Party
Jackson v. *Payne*, 9 F.4th 646 (8th Cir. 2021)	Ark.	**81** **74** **73** **72**	Petitioner / Defendant (all prongs)
Sasser v. *Payne*, 999 F.3d 609 (8th Cir. 2021)	Ark.	**83** **75**	State (prong 2, possibly prong 1)
In re Lewis, 417 P.3d 756 (Cal. 2018)	Cal.	**73** (1984 WAIS-R) **70** (1963 WISC) **67** (2003 WAIS-III)	Petitioner / Defendant (all prongs)
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Haliburton v. *State*, 331 So.3d 640 (Fla. 2021)	Fla.	**80** (WAIS-R) **80** (WAIS-R) **79** (WAIS-III) **74** (WAIS-IV) **74** (WAIS-IV)	State (all prongs)

Case Name & Caption	State	Scores Considered	Prevailing Party
Quince v. *State*, 241 So.3d 58 (Fla. 2018)	Fla.	**79** (WAIS) **79** (WAIS-III) **77** (WAIS-R)	State (prong 1)
Glover v. *State*, 226 So.3d 795 (Fla. 2017)	Fla.	**80** **72** **69** (Wechsler Abbreviated)	State (all prongs)
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Herring v. *State*, No. SC15-1562, 2017 WL 1192999 (Fla. Mar. 31, 2017)	Fla.	**83** **81** **74** **72**	Petitioner / Defendant (all prongs)

Case Name & Caption	State	Scores Considered	Prevailing Party
***Hall* v. *State*,** **201 So.3d 628 (Fla. 2016)**	Fla.	**80** (WAIS-R) **79** (Kent IQ test) **76** (Beta) **74** (WAIS) **73** (WAIS-R) **72** (WAIS-IV) **71** (WAIS-III) **69** (WAIS-III) **60** (Revised Beta) **52** (Leiter Adult Intelligence Scale)	Petitioner / Defendant (all prongs)
***Raulerson* v. *Warden*,** **928 F.3d 987 (11th Cir. 2019)**	Ga.	**83** **78** **69**	State (all prongs)
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Case Name & Caption	State	Scores Considered	Prevailing Party
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Webster v. *Watson*, 975 F.3d 667 (7th Cir. 2020)	Ind.	**9 scores under 75**	Petitioner / Defendant (all prongs)
McManus v. *Neal*, 779 F.3d 634 (7th Cir. 2015)	Ind.	**81** **78** **72** **70** **One "within the lower limits of the low average range[.]"**	State (prongs 1 & 2)
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Case Name & Caption	State	Scores Considered	Prevailing Party
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Case Name & Caption	State	Scores Considered	Prevailing Party
State v. *Ford*, 140 N.E.3d 616 (Oh. 2019)	Oh.	**80** (WAIS-IV) **78** (2001 K-ABC) **75** (2006 K-BIT2) **64** (2013 WASI) **64** (2013 WASI) **62** (2003 WISC-III)	N/A
Smith v. *Sharp*, 935 F.3d 1064 (10th Cir. 2019)	Okla.	**73** **68-78** (Raven's Standard Progressive Matrices) **65** (WAIS-R) **55** (WAIS-III) **55** (WAIS-III)	Petitioner / Defendant (all prongs)

Case Name & Caption	State	Scores Considered	Prevailing Party
***Black* v. *Carpenter*, 866 F.3d 734 (6th Cir. 2017)**	Tenn.	**97** (1964) **92** (1966 Lorge Thorndike) **91** (1967 Otis) **83** (1963 Lorge Thorndike) **76** (1989 Shipley-Hartford) **76** (1997 WAIS-R) **73** (1993 WAIS-R) **69** (2001 WAIS-III) **57** (2001 Stanford-Binet-IV)	State (prongs 1 & 3)
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***Ex parte Guevara*, No. WR-63,926-03, 2020 WL 5649445 (Tex. Ct. Crim. App. Sept. 23, 2020)**	Tex.	**72** (WAIS-IV Edition Spanish) **60** (Spanish Language IQ test)	Petitioner / Defendant (all prongs)

Case Name & Caption	State	Scores Considered	Prevailing Party
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TABLE 2

Case Name & Caption	State	Scores Considered	Prevailing Party
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Commonwealth v. *Knight*, 241 A.3d 620 (Pa. 2020)	Pa.	**77** **75**	State (prong 3)

Case Name & Caption	State	Scores Considered	Prevailing Party
Commonwealth v. *Hackett*, 99 A.3d 11 (Pa. 2014)	Pa.	85 82 (Beta-2) 80 57 (WAIS)	State (all prongs)
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TABLE 3

Case Name & Caption	State	Scores Considered	Prevailing Party
United States v. *Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016)	FDPA	**84** (2000 WAIS-III) **84** (1989 WIS-R) **80** (1998 WISC-III) **80** (2012 WAIS-IV) **78** (1991 WISC-III) **78** (1993 WISC-III) **76** (2003 WAIS-III) **70** (1994 WISC-III)	Petitioner / Defendant (all prongs)
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Case Name & Caption	State	Scores Considered	Prevailing Party
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TABLE 4

Case Name & Caption	State	Scores Considered	Prevailing Party
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Case Name & Caption	State	Scores Considered	Prevailing Party
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People v. *Woodruff*, 421 P.3d 588 (Cal. 2018)	Cal.	78 (WAIS-III) 66 (WAIS-III)	State (all prongs)
Nixon v. *State*, 327 So.3d 780 (Fla. 2021)	Fla.	88 80 (2006 WAIS-III) 73 72 68 67	State (prongs 1 & 3)
White v. *Commonwealth*, 600 S.W.3d 176 (Ky. 2020)	Ky.	76 (1971 WISC) 73 (1971 Otis)	N/A

Case Name & Caption	State	Scores Considered	Prevailing Party
State v. *Scott*, 233 So.3d 253 (Miss. 2017)	Miss.	**73** (WAIS-III) **68** (WISC) **68** (WISC) **65** (Kaufman) **63** (WAIS-II) **60** (WAIS-III) **48**	Petitioner / Defendant (all prongs)
Frazier v. *Jenkins*, 770 F.3d 485 (6th Cir. 2014)	Oh.	**75** (WAIS-III) **72** (WAIS-III)	State (prong 2)
Jackson v. *Houk*, No. 4:07-cv-00880, 2021 WL 698590 (N.D. Oh. Feb. 23, 2021)	Oh.	**84** **72** **70**	State (defective pleading)
Postelle v. *Carpenter*, 901 F.3d 1202 (10th Cir. 2018)	Okla.	**79** **76**	State (prong 1)

Case Name & Caption	State	Scores Considered	Prevailing Party
Matamoros v. *Stephens*, 783 F.3d 212 (5th Cir. 2015)	Tex.	**77** (2003) **74** (1980) **71** (1977) **65** (2004) **62** (2005)	State (prong 2)
Sorto v. *Stephens*, No. H-10-CV-613, 2015 WL 5734464 (S.D. Tex. Sept. 30, 2015)	Tex.	**66** (TONI) **63** (WAIS-III)	State (prong 1)