No. 24-872

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

REPLY BRIEF FOR PETITIONER

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The Court can resolve Smith's claim with "the fruit of a multi-century scientific enterprise to ascertain the best possible estimate of intelligence." APA.Br.9. Or it can adopt Smith's novel, opaque, and unscientific rule that "where an *Atkins* claimant has multiple scores with SEM ranges above and below 70," "a court must consider all relevant evidence" of his "actual functioning" like whether he has "been in a taxi" or can "make sense of a map." Br.24-25, 36-37.

The choice is clear. Smith's brief bobs and weaves, but he cannot avoid the facts: 75, 74, 72, 78, and 74. Smith's five IQ scores together are decisive evidence that he did not satisfy his burden to prove that his IQ is 70 or below. There's a reason none of Smith's *amici* write that he proved his IQ to be 70 or less. He did not.

So Smith tries to change his burden. First, he says that Alabama doesn't demand proof of an IQ below 70, as if *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002), does not exist. He identifies no Alabama inmate with an IQ above 70 who won an *Atkins* claim.

Second, Smith says that IQ scores are inconclusive if "the range" reaches 70. But if "the range" starts from the lowest score minus five, as he suggests, this is just the lowest-score-wins rule that the Eleventh Circuit swiftly disavowed after the Court first considered Smith's claim. If "the range" accounts for *all* scores, as his *amici* suggest, then Smith loses: He never proved with *any* method that the cumulative effect of his scores yields a range that reaches 70. Incanting "clinical judgment" cannot transmute his failure into a viable claim without relieving Smith of his burden, expanding *Atkins*, and straying further from the original meaning of the Eighth Amendment.

I. Smith's claim fails because he did not prove an IQ of 70 or less using any approach to the cumulative effect of multiple IQ scores.

A. Alabama law requires proof of an IQ of 70 or below by a preponderance of evidence.

Smith concedes that *Ex parte Perkins* defined the first prong for *Atkins* claims as "significantly subaverage intellectual functioning (an IQ of 70 or below)." Br.7 The Eleventh Circuit also recognized that the first prong "turns on" Smith's IQ. Pet.App.35a (citing *Perkins*); *see also Hamm v. Smith*, 604 U.S. 1, 2 (2024) ("Smith's claim … depended in part on whether his IQ is 70 or below."). Smith cannot prove his IQ is below 70, so he offers three ways to misread Alabama law, none of which are constitutionally required (*infra* §II).

First, Smith claims that "IQs somewhat higher than 70" can qualify, Br.43 n.5, but "Alabama has not adopted [that] definition, *Albarran v. State*, 96 So. 3d 131, 198 n.8 (Ala. Crim. App. 2011) (citing *Perkins*). While a single score above 70 with an error range including 70 cannot defeat a claim under *Hall*, Smith still has the "burden to establish that it is more likely than not that his IQ is 70 or below." *Byrd v. State*, 78 So.3d 445, 452 (Ala. Crim. App. 2009); *accord, e.g.*, *Bush v. State*, 92 So.3d 121, 151 (Ala. Crim. App. 2009) (with scores of 74, 75, 69, claim failed under "the most liberal definition"); *Ex parte Jerry Smith*, 213 So.3d 214, 225 (Ala. 2003) (counting 72 against claim).

Second, Smith asserts that only "conclusive" IQ evidence can sink his claim, Br.2, 5, 19, 24, which sounds a lot like the lower courts' burden-shifting framework and not at all like Alabama law. It also begs the question, for Smith and friends never say when the IQ evidence is "conclusive." *Perkins* does: the

claim fails when the offender has not proven that his IQ is 70 or less. And because that is a "fact[] necessary" for relief, it must be more likely true than false, Ala. R. Crim. P. 32.3, not a mere "possibility," *Byrd*, 78 So.3d at 452; *contra* Pet.App.6a (requiring that Smith's IQ scores "rule out the possibility"); *id.* at 31a, 37a-40a, 70a (similar).

Third, Smith asserts that Alabama law boils down "to convinc[ing] the court by a preponderance" that under today's clinical criteria, "the best expert" would say his intellect is significantly subaverage. Br.49-50. This is also not the law. No doubt experts play a key role in administering, scoring, and interpreting IQ tests. But whatever the "best expert" would say about him, Smith still must prove that his IQ is 70 or less. *See, e.g.*, *Albarran*, 96 So.3d at 200.

Smith did not find an Alabama case where an offender with an IQ above 70 satisfied prong one based on expert opinion or any other evidence. There is not an Alabama decision remotely like the one below.[1]

B. Smith did not prove that his five IQ scores together yield a likely IQ of 70 or below.

Smith's 1998 IQ test score of 72 ± 3 is ambiguous, according to *Hall*, and does not give us confidence that

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[1] It's a bit rich for Smith to claim the mantle of Alabama law after complaining (successfully) in his first federal appeal that Alabama set a "bright-line … at 70" and "determined that Smith could not qualify … because [of] his scores." App't.Br.53, *Smith v. Campbell*, No. 14-10721 (11th Cir. Oct. 20, 2014). The court refused to defer precisely because the state courts had held that Smith's 75, 74, and 72 "conclusively established" that he "could never meet *Perkins*[.]" App.411. The idea that Alabama law would be *more* favorable to him on this record—after he scored 78 and 74—is baseless.

his true IQ is above or below 70. But with five IQ scores above 70, the evidence was not ambiguous. The odds that Smith's IQ is 70 or below plummeted. For Smith, the "IQ scores alone" were "conclusive." Br.2.

Whether and how to consider this "cumulative effect" is the question before the Court. Smith and the Eleventh Circuit favor a constitutional rule that would force courts to evaluate scores in isolation. *See, e.g.*, Br.34 ("several IQ tests inside and outside the range" cannot "conclusively resolve the first prong"). But common sense, state law, the science, and his own *amici* favor estimating IQ based on the combined effect of multiple scores. Smith had the burden to prove that his scores collectively indicate an IQ of 70 or below. He did not carry that burden, and the Court need not "move on" to consider other evidence.

1. The cumulative effect of Smith's five IQ scores must be considered.

There is uniform support for the principle that multiple valid, consistent IQ scores above 70 decrease the risk of error and increase the likelihood that the test-taker's true IQ is above 70. Because federal law permits denying an *Atkins* claim when the offender's true IQ is likely above 70, evidence or inferences about the cumulative effect must be considered, and the Eleventh Circuit's refusal to do so must be reversed.

Experts on both sides below expressed support for the cumulative-effect principle. The State's expert Dr. King testified that "multiple sources of IQ over a long period of time … contribute[] to … the construct of validity indicating what a true IQ score is for an individual." J.A.271. Smith's expert Dr. Reschly agreed that error is "much reduced when you have more than one IQ score." J.A.105; J.A.104 (agreeing that Smith's

"remarkably consistent" scores "corroborate each other").[2] And Smith's expert Dr. Fabian supported the cumulative effect too. J.A.167 (testifying that the "convergent validity" of Smith's five "pretty consistent" IQ scores "trump … one administration").

Likewise, the APA and the AAIDD emphatically endorse the cumulative effect. Smith castigated the idea that multiple scores can "diminish" or "reduce" error, Br.33, 42, hoping that his *amici* would agree. They did not. As the APA explained, having multiple IQ test scores "allows for a more refined, accurate assessment," "providing a more complete and holistic picture." APA.Br.16, 17; *accord* DSM-5-TR at 41. The AAIDD agreed (at 23): "Multiple IQ test scores … can provide additional information for an evaluation of intellectual disability." Converging scores "can be very informative." *Id.* at 23-24. Smith mistakenly points to guidance that "each individual IQ score" has an error range, Br.33, which no one disputes and does not answer the question presented.

Even the courts below seemed (at times) to admit the cumulative effect of multiple IQ scores. According to the Eleventh Circuit, "consistent scores" "reflect a person's intellectual ability as opposed to random chance." Pet.App.4a; *accord* Pet.App.5a (this "logic 'leans in favor of finding that Smith does not [meet prong one]'" (quoting Pet.App.70a)).

But the panel strayed from sense and science when it adopted *Hall*'s vague and unsourced dicta that "the test" may be "flawed, or administered in a consistently

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[2] Dr. Reschly did say that "you can't use poor data to increase the reliability of good data." Br.43 n.4. But Smith omits the next question and answer in which the expert explained that Smith's five IQ scores were *not* "poor data." J.A.105; *see* J.A.875.

flawed manner" such that even consistent scores are not determinative. Pet.App.4a (quoting *Hall v. Florida*, 572 U.S. 701, 714 (2014)).

Parroting that line repeatedly, Br.5, 18, 23, Smith calls it "*Hall*'s reasoning (if not its holding)" without engaging the State's argument. *Compare* Br.25 *with* Pet.Br.40. First, *Hall* cannot be read to reject any "cumulative-score rule" (Br.25-26) because it never "specified how" to handle multiple scores, *Hamm*, 604 U.S. at 2. Because *Hall* reached no holding on the cumulative effect, the metaphysical possibility of a "consistent flaw" played no role. Second, Smith did not argue that *his* five IQ tests over forty years were "consistently flawed." Rather, the unrebutted expert testimony is that "all of these examiners over all this period of time giving different tests[] basically [came] up with the same result." J.A.271 (State's expert). Smith offers nothing to infer that the tests were consistently biased or skewed against him (rather for him or not at all). This purely "speculative reasoning" (Br.5) that multiple scores could be consistently flawed should play no role.

Smith's other deflections fail too. No, crediting the cumulative effect does not mean using "*only*" the raw "numerical results" without any "expert testimony." Br.42; *see also* Br.25. Experts can interpret scores and cast doubt on their reliability. But that's irrelevant in this case because Smith's scores are undisputed. *See* Br.12-13, 33; J.A.105. Nor does a cumulative approach mean "simply tallying up IQ scores" above a threshold. Br.2. Expert testimony can help assess the cumulative effect of multiple scores, but again, in this case, Smith has not identified how *any* method could prove his IQ to be 70 or less.

Smith also misses the mark when he attacks "a categorical rule" that "multiple scores above 70" end the inquiry. Br.25-27. While *his* scores are decisive, another inmate with two scores near 70 might bring evidence that the joint effect is truly indeterminate, *i.e.*, it yields "a range within which … [his] true IQ score lies" that reaches 70 or below. *Hall*, 572 U.S. at 713. But unlike Hall, who proved with the SEM that a 71 was just as good as a 70, *id.* at 724, Smith has not proven that his five scores together "span 70," Br.25.

Smith's binary—the notion that he accounts for the SEM while the State would "erase" it—is bogus. Br.33. Considering the cumulative effect does not mean pretending that IQ tests are errorless. The State agrees (at 41) with the APA (at 21) that "multiple IQ tests can reduce error" but not "eliminate it." By denying that basic fact, Br.33, 42, Smith not only misuses the SEM on its own terms; he has no basis to believe that his "multiple scores, accounting for the SEM, span 70." Br.25. This case is not *Hall*.

It's not just "Dr. King's view" (Br.42) or that of "a few non-peer-reviewed articles" (Br.33). It's the "broad scientific and professional agreement" that obtaining multiple IQ scores "addresses error and bias in particular test administrations" and produces "greater accuracy." APA.Br.3, 5, 17; *see* Pet.Br.40-41 (citing a major textbook, an APA publication, other expert sources); U.S.Br.18-19; CJLF.Br.5-6; AAIDD.Br.24. The risk of error is never zero, but that nonzero risk provides no path to conclude that Smith's true IQ is *likely* 70 or below.

2. Smith's "holistic approach" ignores the cumulative effect of multiple IQ scores.

Instead of grappling with the cumulative effect of his scores, Smith repeats the word "holistic." But the "'holistic' rhetoric" is "just window dressing" for a novel and indefensible change in constitutional law. Pet.Br.36; *see also* U.S.Br. 24-25. What Smith means (and needs to prevail) is a rule that "if the range of [IQ] scores … reaches 70," then "courts must consider other evidence." Br.18-19; *see also* Br.25 ("[W]here multiple scores, accounting for the SEM, span 70, a court must consider … actual functioning," rather than IQ.); BIO.i, 1, 20.

While Smith tries to run from a lowest-score rule, Br.29-30, 47-48, his brief illustrates how he thinks "the range" is constructed by simply reducing the lowest score by five. For instance, IQ was inconclusive in *Moore*, Smith says, because the "scores of 74 and 78" made "a range from 69 to 83." Br.5. He reads *Reeves* the same way, asserting that the range for scores of 68, 71, and 73 went "as low as 63" to "as high as 78." Br.43; *see Reeves v. State*, 226 So.3d 711 (Ala. Crim. App. 2016). It's no mischaracterization (*contra* Br.47) to call this a "'*per se* rule' that a single score [range] dipping below 70 is 'dispositive'" of IQ. [3]

Smith's answer to "whether" courts may consider the cumulative effect of multiple IQ scores is "never." The lowest score range "reaches 70," or it does not.

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[3] Smith's brief is opaque, but he may intend to advance a rule that requires "*multiple* scores with SEM ranges … below 70," Br.24 (emphasis added). Of course, that would just transform the lowest-score rule into a two-lowest-scores rule. Both rules are insensitive to the cumulative effect.

Br.18. Needless to say, this is not the "complicated endeavor." *Hamm*, 604 U.S. at 2.

Yet it's also how the Eleventh Circuit analyzed IQ. The panel thought that Smith "needed to prove only" "one valid IQ test score" with a range that includes 70. Pet.App.42a, 44a.[4] So even after vacatur, the court emphasized "that Smith had an IQ test score as low as 72, which, according to expert testimony, meant his true IQ could be as low as 69." Pet.App.5a. But that testimony was about a single score, *see* J.A.364, not the cumulative effect of multiple. The courts thus refused to credit the cumulative effect because they thought it would mean "throw[ing] out as an outlier" "the lowest score." Pet.App.6a. That remark, which Smith endorses, is very confused (no score is "thrown out" by the cumulative approach), and it reveals the special weight given to the lowest end of the lowest score's error range.

Nor does the panel's observation on remand that "four out of Smith's five IQ scores" are below 76 evince a cumulative analysis. Br.42. Just the opposite. Fixing the line at 75 assumes a universal error range of ± 5 points, which is an express *rejection* of any cumulative effect to narrow the risk of error. There's nothing "holistic" about any of this. *See* Pet.Br.35-36, 38-41.

Another way to see that Smith and the Eleventh Circuit reject the cumulative approach is to consider a hypothetical inmate with ten or twenty or *any number* of scores of 75. On any method of aggregating scores,

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[4] Here, the court's vacated (but holistic) opinion relied on *United States v. Wilson*, 170 F. Supp. 3d 347 (E.D.N.Y. 2016), in rejecting the "assertion that a district court can consider anything other than the lower end of [the] standard-error range." Pet.App.42a. Tellingly, Smith now disavows *Wilson*. Br.29-30.

the odds of an IQ of 70 or less would be *de minimis*. Yet on Smith's rule, when one or two scores of 75 ± 5 "span 70," the court must consider non-IQ evidence. Likewise, on the Eleventh Circuit's rule, every 75 would be "consistent with mild intellectual disability" and count in favor of the inmate. Pet.App.7a.

Far from "[t]ying all of the scores together," Br.13, or considering "the relationship of the scores to one another," Br.32, Smith and the Eleventh Circuit would have courts evaluate each score "individually" and then "move on." Pet.App.4a, 6a.[5]

3. Smith did not prove that his IQ is 70 or below using any method for jointly analyzing his scores.

Nowhere does Smith's brief explain how his five IQ scores combine to prove an IQ of 70 or below. That should be the end of the case, for *Atkins* protects those offenders "known to have an IQ below 70," *Kennedy*, *v. Louisiana*, 554 U.S. 407, 425 (2008). At most, Smith's response implies this is a case like *Hall* where IQ is "inconclusive," but he never proved that.

Considered jointly, the five scores vanquish the likelihood that Smith qualifies for *Atkins* relief. One simple rule is the median, which is endorsed by two AAIDD and APA publications cited in both briefs. The

[5] Even then, Smith's claim should fail, for he never assessed "each separate score … using the SEM" with test-specific ranges. Br.26. His experts did *not* "provide[] information" about the range for his WISC-R scores. *Contra* Br.40 n.3. If he means one can *assume* an error range of ± 5, that "contradicts the test's own design," *Hall*, 572 U.S. at 724, and the record. *See* Pet.Br.16-18, 36-38 & nn.26-27.

APA Handbook views the median as "Option 1."[6] And an AAIDD chapter endorses it as the "best practice" when the inputs for a composite score are not available.[7] Smith's median score is 74.

A similar method focuses on the overlap among each score's error range, which clinicians "often" use to estimate IQ. AAIDD Br.24 (citing Watson, *supra* at 124). Even assuming a range of ± 5, the "overlap" for Smith's scores is a range of 73 to 77. This is "compelling evidence that the best estimate lies within the convergent range." APA.Br.20.[8]

More complicated is the composite-score method championed by Dr. Schneider. *See* APA.Br.18; AAIDD Br.25; U.S.Br.19. The composite score treats each score as a subtest of a "Mega-IQ Test."[9] But it requires data that is hard to find and "simply may not exist," AAIDD.Br.25 n.17; *accord* CJLF.Br.7-9. Smith's *amici* support the method, but tellingly, none would crunch the numbers to show how it might help Smith's claim. It would not. *See* CJLF.Br.10.

Although taking the average is "not quite right," it still gives a "rough approximation" of the composite

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[6] R. Floyd et al., *Theories and Measurement of Intelligence*, in 1 *APA Handbook of Intellectual and Developmental Disabilities* 415 (L. Glidden et al. eds., 2021).

[7] D. Watson, *Intelligence Testing*, in *The Death Penalty and Intellectual Disability* 124 (E. Polloway ed., 2015).

[8] AAIDD seems to undermine its support for the overlap by suggesting (at 26) that "the 'true' score is *beyond* the grouping." If it means to imply that Smith's IQ is below 72, it stretches its lone citation (to an example using two 70s) well beyond its moorings. *Cf.* CJLF.Br.13-14.

[9] W. J. Schneider, *Principles of Assessment of Aptitude and Achievement,* in *The Oxford Handbook of Psychological Assessment of Children and Adolescents* 290 (D. Saklofske et al. eds., 2013).

score. Schneider, *supra* at 290; *see also* CJLF.Br.6. Smith's average IQ score is 74.6.

* * *

The State does not advocate "a single, mechanical rule … for aggregating multiple IQ scores." Br.34. The State *does* advocate that Smith must "demonstrate—one way or another—that his collective IQ test scores betray deficient intellectual functioning." *Id.* Though it is not the State's burden to prove *anything* with respect to Smith's IQ, the foregoing demonstrates that it is not even *theoretically* possible that the Eleventh Circuit held Smith to his constitutional burden. The only conclusion is the one drawn by the State's expert that Smith's many "sources of IQ" together suggest a "true IQ score" well above 70. J.A.271. There is certainly no "contrary evidence" (Br.47) that rebuts what Smith's scores plainly prove.

II. The Court should not expand *Atkins* with Smith's rule denying the cumulative effect of multiple IQ scores.

A. Smith concedes that the constitutional text and history are independent reasons to reject his position.

Smith's new rule egregiously departs from the original meaning of the Eighth Amendment, which was about punishments that intentionally "superadd terror, pain, or disgrace" and had "fallen out of use." *City of Grants Pass v. Johnson*, 603 U.S. 520, 542 (2024) (citation modified); *see Bucklew v. Precythe*, 587 U.S. 119, 130-31 (2019); Pet.Br.3, 29-32.

In response to the State's argument that no method for assessing multiple IQ scores could be "cruel" as an original matter, Smith is mum. He offers

"nothing in the Eighth Amendment" that would give the Court "lawful authority to extend" *Atkins* and its progeny. *City of Grants Pass*, 603 U.S. at 550. Smith cites a single dissenting opinion not even endorsing the "state consensus" approach, Br.26, and he ignores that the Constitution's "text, history, meaning, and purpose," *Kennedy*, 554 U.S. at 421, are "independent" "reason[s] to disagree" with his position *regardless* of the evolving standards, *cf. Moore v. Texas*, 581 U.S. 1, 27 (2017) (Roberts, C.J., dissenting) (quoting *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)); *see also id.* at 22; Pet.Br.29-32; Idaho.Br.4-17; U.S.Br.11-12, 26-32.

There is no contention that Smith's "sentence constitutes one of 'those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.'" *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989), abrogated by *Roper v. Simmons*, 543 U.S. 551 (2005). While the common law exempted those with an "IQ of 25 or below" from *all* punishments, *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989), the rule that the mildly intellectually disabled "should be tried and punished" but not capitally is a 20th-century innovation, *Atkins*, 536 U.S. at 306; *see id.* at 340-41 (Scalia, J., dissenting). The Constitution as interpreted by this Court even permitted their execution until some time between *Penry* in 1989 and *Atkins* in 2002. Thus, the original meaning cannot support Smith's test; at most, it supports exemptions for those who lack the capacity "to form criminal intent or to understand the difference between good and evil." *Penry*, 492 U.S. at 333; *see also Atkins*, 536 U.S. at 340-41 (Scalia, J., dissenting). Smith is nowhere near that line.

The closest Smith comes to an Eighth Amendment argument is his assertion that any "fact must be determined with the high regard for truth that befits a decision affecting … life or death." Br.24. But that *dictum* from *Ford v. Wainwright* was about the test for granting a hearing, 477 U.S. 399, 410-12 (1986), it comes with no support in text or history, and it begs the question whether Smith's non-cumulative rule better seeks "truth." It does not. *Supra* §I.B.1.

B. No nationwide consensus mandates a rule denying the cumulative effect of IQ scores.

Smith's claim requires the Court to expand the immunity from capital punishment to include inmates whose IQ scores do not prove a likely IQ below 70. No nationwide consensus supports that expansion. Smith does not dispute that the vast majority of state laws dealing with IQ specify 70. *See* Pet.Br.12 n.7.

Nor does Smith identify state laws that focus on the lowest score or reject the cumulative effect of scores. If no consensus supports any "categorical rule," Br.27, then no consensus supports a categorical rule that "where an *Atkins* claimant has multiple scores with SEM ranges above and below 70," "a court must consider … actual functioning," Br.24-25.

A *few* state *courts* have misapplied *Hall*, even granting relief to inmates who did not seem to prove an IQ of 70 or below, Pet.Br.14 n.10; Ky.Br.6-14, but their errors do not have nationwide support, nor are they the "most reliable objective evidence of contemporary values," which is "legislation." *Penry*, 492 U.S. at 331. Yes, state decisional law *is* state law, Br.27-28, but it reflects public morality only to the extent that courts interpret and apply the will of the people—not the meaning of *Hall*'s *dicta*. *Cf. Jones v. Mississippi*,

593 U.S. 98, 127 (2021) (Thomas, J., concurring in judgment) (States "have spent years chasing the ever-evolving definitions of mental incompetence promulgated by this Court and its preferred experts."). That state courts take claims "case-by-case," Br.27, sheds no light on what the American people consider "cruel."

There is a world of difference between what Smith brings and what Hall proved: that "an individual with an IQ score of 71" would not lose due to his 71 in most States. 572 U.S. at 716. In contrast, Smith does not prove by a consensus that an inmate like him—with scores that together conclusively prove his IQ is above 70—would not lose for that reason in most States. At minimum, Smith needed to prove assent to his rule that failure to meet his IQ burden is excused by facts like his facility with "subway lines," Br.37. He did not.

C. No precedent requires eroding prong one with a rule denying the cumulative effect of IQ scores.

Alabama makes IQ the touchstone of prong one because IQ is the "best single representation of intellectual functioning," AAIDD.Br.15, and "the best possible estimate of intelligence," APA.Br.9. This is one of many "appropriate ways to enforce" *Atkins*, 536 U.S. at 321, and "nothing in the Eighth Amendment gives federal judges the authority or guidance they need" to demand a different approach, *City of Grants Pass*, 603 U.S. at 559 n.8.

1. The Court is free to reject Smith's invitation to diminish the role of IQ. *Hall* did not reach the "complicated endeavor" because Florida barred relief for "an individual with an IQ score of 71" regardless of other scores. 572 U.S. at 714, 716. That "strict IQ test score cutoff" was "the issue." *Id.* at 712. Smith mostly

ignores *Hall*'s limited holding but happens to get it right (at 22) when he states that *Hall* applies to "a given IQ score." Extrapolating wildly, he asserts that *all* IQ evidence amounts to "a single factor" that can never be "dispositive" or "bar" other evidence. *Id.*

That rule cannot be derived from *Hall*. Again, we're here because *Hall* did "not specif[y] how" to treat multiple IQ scores, yet Smith's claim "depend[s]" on multiple IQ scores. *Hamm*, 604 U.S. at 2. Reading *Hall* to make IQ non-dispositive conflicts with both of those holdings. Second, *Hall*'s recognition that *some* IQ evidence is inconclusive implies that *other* IQ evidence can be conclusive. For example, *Hall* declined to address "a bright-line cutoff at 75 or greater," 572 U.S. at 715, which the parties agreed would be perfectly constitutional, *see* Oral.Arg.Tr.9, 13-14, 25. If Smith's rule were *Hall*'s rule, *Hall* would have been an easy case, and so would a "cutoff at 75."

Smith makes no attempt to square his rule with *Brumfield v. Cain*, the Court's only decision in which the presence or absence of multiple scores made a difference. 576 U.S. 305 (2015). There, it was crucial that the inmate's second IQ test was not "sufficiently rigorous"; if it had been, it could have "preclude[d] definitively" any "possibility" of relief. *Id.* at 316. *Brumfield* did not answer the question presented, but it did take Smith's answer—that IQ alone cannot preclude a claim, *see, e.g.*, Br.22-23—off the table.

2. Smith repeats *ad nauseum* that intellectual disability is "not a number," *id.*, but prong one "has always required an IQ score" because IQ is the "single best" measure of intellect, AAIDD.Br.10 n.4, 15. The choice is not between "truth" and falsehood, Br.24, but two ways to approach the same body of evidence. On

the one hand, Smith proposes that the Constitution requires courts to "move on" from IQ if the lowest score is ambiguous. Rather than estimating IQ, courts would focus on facts like whether he has insurance (BIO.13) or skill at a childhood game (AAIDD Br.28). On the other, the State has reasonably allowed the "legal determination of intellectual disability," which "is distinct from a medical diagnosis," *Hall*, 572 U.S. at 721, to turn on *the very best evidence* of intelligence. That yields a consistency that avoids "inequities" in criminal justice, *id.* at 737 (Alito, J., dissenting), and preserves meaningful appellate review.

For Alabama's discretion under *Atkins* to matter, it must be permitted to identify signal in the noise. *Hall* characterizes the relationship between prongs one and two as "conjunctive and interrelated." 572 U.S. at 723. But the AAIDD says they are "distinct and separate." AAIDD-12 at 33. Smith labels the two prongs "independent but relevant to one another." Br.35 (capitalization altered). The APA says they are "inherently interrelated." APA.Br.7. States need clarity, not doublespeak.

Smith puts much weight (at 4, 15, 25, 34, 41) on the DSM's "example" that a person "whose IQ score is somewhat above 65–75 may nevertheless have such substantial adaptive behavior problems … that the person's actual functioning is clinically comparable to that of individuals with a lower IQ score." DSM-5-TR at 42. This is not the law, and its adoption would greatly expand *Atkins*, illustrating one of many reasons that States do not need to adhere to the latest medical guide. *Cf.* Pet.Br.31 & n.21; Cert.Pet.14 n.4; *contra* Br.38 (assuring that the definition will "always remain a consistent proportion of the population").

Whether Smith casts his rule as weighing IQ against prong two (as if *Atkins* were a balancing test), or abandoning IQ in favor of "actual functioning," the result is the same: an amorphous and subjective inquiry that abdicates enforcement of the first prong. Every murderer on death row can allege maladaptive behavior. AFLF Br.27-28. Every inmate would get a hearing and a "battle[] of experts," exactly what the APA promised would "*not* result" from *Atkins*. *See* Br. of APA et al. as *Amici Curiae* at 16, *McCarver v. North Carolina*, No. 00-8727 (U.S. June 8, 2001).

A "close case" on IQ is not made easier by injecting adaptive deficits, Br.15, which are "only moderately correlated" with intelligence. AAIDD-12 at 33. Those with an IQ of "75 to 85 often function on a daily basis similarly to or, sometimes, lower than persons" in the "range of 55 to 75." J.A.866. Adaptive deficits can indicate many "conditions or mental disorders," DSM-5-TR at 42, like ADHD, autism, anxiety, and depression. That's why the prongs are separate. Adaptative deficits should be "confirmed" by IQ tests, DSM-5-TR at 37, not the other way around.

And it's easy to see why in practice. For offenders like Smith, prong two means asking his mother and childhood friends how well he socialized, cooked food, or bought groceries *decades ago*. Pet.App.87a. It means asking a death-row prisoner about his "money management" and "transportation." Pet.App.88a. He could "make barbecue," "soup," and "fried chicken," but courts are supposed to discount his 78 IQ score because he "did not use a bus" or take "a taxi." J.A.801.

Perhaps the alchemy of clinical judgment can turn these tidbits into a diagnosis, but the Constitution does not obligate States to prioritize that evidence

over the cumulative effect of IQ. In truth, these are "other sources of imprecision" that cannot "narrow" the range of functioning disclosed by IQ testing. *Moore*, 581 U.S. at 14. As Dr. Reschly put it, "you can't use poor data to increase the reliability of good data." J.A.105. To assess *intellectual* functioning, "individualized, standardized intelligence testing" is the good data. DSM-5-TR at 37. It's also the data "that most directly relates to the concerns" that motivated *Atkins* in the first place. *Hall*, 572 U.S. at 737 (Alito, J., dissenting); *accord Atkins*, 536 U.S. at 320.

III. Smith's IQ score of 78 precludes relief.

Smith's claim fails independently because he obtained a valid IQ score of 78. Assuming the most favorable error range, Smith's 78 yields an interval of 73 to 82 "within which one may say [his] true IQ score lies" with "95% confidence." *Hall*, 572 U.S. at 713. When the entire error range lies above the state-law criterion for deficient intellect, the Constitution does not bar capital punishment.

A. Smith addresses this argument in one sentence, asserting that it would not "comport" with precedent, science, or nationwide practice to deny Smith's claim based on his highest score. Br.48. But Hall conceded that a high-score rule would be constitutional, and the Court did not identify such a rule as forbidden by national consensus. 572 U.S. at 715. Then in *Brumfield*, which Smith ignores, the Court contemplated that a score above 75 would "preclude definitively the possibility" of disability. 576 U.S. at 316. That makes sense. If taking confidence intervals seriously means that an inmate whose sole score range dips to 70 can proceed, it should also mean that an inmate with a valid score range entirely above 70 cannot.

Smith, whose entire theory rests on the low end of his error range, *supra* §I.B.2, should not be heard to complain that it is unscientific to focus on one end or the other. And focusing on the high end has a scientific warrant: There is no way for a test-taker to fake being smarter than he is. Pet.Br.14-15 & n.11. By contrast, there are many ways for a test to *underestimate* IQ. A prisoner's score may be artificially deflated by his poor effort, stress, distraction, fatigue, health conditions, or the obvious incentive to underperform in a capital case. But Smith ignores the obvious.

If Smith's 78 were "tainted" by error or bias, the district court could have discarded it as "[in]valid and [un]reliable." APA.Br.22. An "outlier." APA.Br.20. But there is no claim that Smith's expert erred, and no one contested the score's validity. To the contrary, Smith's other scores *bolster* the 78 because all the ranges (at 95% confidence) "overlap[]." AAIDD.Br.24.

B. A "simple and static" test would be best. *Jones*, 593 U.S. at 127 (Thomas, J., concurring in judgment); *cf. Roper*, 543 U.S. at 594 (O'Connor, J., dissenting) ("especially desirable in this sphere"). *Atkins* itself was prophylactic, protecting not only those who do not deserve their sentences but anyone "less likely" to be culpable. 536 U.S. at 320; *Hall*, 572 U.S. at 709. Any later rule-making is a proxy on top of a proxy for the ultimate issue of moral desert. No line *can be* perfect.

Nonetheless, a "line must be drawn," *Roper*, 543 U.S. at 574, and the Court has already rejected the contention that it needs to be a "medical diagnosis" using "clinical judgment," *Hall*, 572 U.S. at 721, 723. Legal and medical judgments are "distinct," *id.* at 721, as they must be. Judges are not psychiatrists versed in the "uncertainties about the human mind," and

even psychiatrists "disagree widely and frequently." *Kahler v. Kansas*, 589 U.S. 271, 280 (2020). Rather than mimicking clinical judgment when a valid IQ score shows that the inmate is highly unlikely to be disabled, and rather than using a diagnosis as a rough proxy for blameworthiness, there is a better and more familiar approach: Let the sentencer express a "reasoned moral response to the defendant's background, character, and crime," including his intelligence, after an individualized sentencing determination. *Penry*, 492 U.S. at 328. That's what the doctrine provides for a defendant who cannot meet prong three, for example, or one who murders on his eighteenth birthday. And it's what was provided for Smith in 1998.

If state legislatures wish to provide immunity for offenders with scores above 75, they are free to do so. But the judgment below vacated Smith's sentence based on the Eighth Amendment. If the Eighth Amendment does not immunize an offender with a valid IQ score of 78, then Smith's Eighth Amendment claim fails. That is true regardless of how Alabama courts "implement" the "principles of *Atkins*." *Hall*, 575 U.S. at 709-10. *Contra* Br.30, 48.

CONCLUSION

The Court should reverse.

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