

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN Q. HAMM, COMMISSIONER,)
ALABAMA DEPARTMENT OF CORRECTIONS,)
 Petitioner,)
 v.) No. 24-872
JOSEPH CLIFTON SMITH,)
 Respondent.)
- - - - -

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4 ALABAMA DEPARTMENT OF CORRECTIONS,)
5 Petitioner,)
6 v.) No. 24-872
7 JOSEPH CLIFTON SMITH,)
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9 - - - - -

10
11 Washington, D.C.
12 Wednesday, December 10, 2025
13

14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:02 a.m.

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1 APPEARANCES:

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3 Montgomery, Alabama; on behalf of the
4 Petitioner.

5 HARRY GRAVER, Assistant to the Solicitor General,
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7 United States, as amicus curiae, supporting the
8 Petitioner.

9 SETH P. WAXMAN, ESQUIRE, Washington, D.C.; on behalf
10 of the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-872,
5 Hamm versus Smith.

6 Mr. Overing.

7 ORAL ARGUMENT OF ROBERT M. OVERING

8 ON BEHALF OF THE PETITIONER

9 MR. OVERING: Mr. Chief Justice, and
10 may it please the Court:

11 Nothing in the Eighth Amendment bars
12 the sentence Joseph Smith received for
13 murdering Durk Van Dam nearly 30 years ago.
14 Atkins created an exception for offenders known
15 to be intellectually disabled, but Smith is
16 not. He didn't come close to proving an IQ of
17 70 or below with scores of 75, 74, 72, 78, and
18 74.

19 But the lower courts changed the
20 rules. First, misreading Hall, they took the
21 lowest score to represent a possibility that
22 Smith's IQ is 69. Then, to the extent they
23 considered other scores, they took each only in
24 isolation and moved the line to 75. These
25 maneuvers expanded Atkins, and this Court

1 should reverse that expansion, first because it
2 was not authorized by the Eighth Amendment,
3 second because it would eliminate state
4 discretion, and, third, because it ignores that
5 the combined effect of multiple IQ scores
6 reduces error and yields a more accurate
7 estimate.

8 The answer to whether courts may
9 consider the cumulative effect of multiple IQ
10 scores is yes. The answer to how they handle
11 multiple scores is not found in the Eighth
12 Amendment and, thus, left to state discretion.

13 Still, this Court can offer some
14 meaningful ground rules for how to handle
15 multiple scores. First, states are allowed to
16 make the first prong turn on the very best
17 evidence of intellectual functioning, IQ.
18 Second, states are allowed to define the
19 requisite intellectual functioning as an IQ of
20 70 or below. Third, states are allowed to
21 require the claimant to prove his IQ by a
22 preponderance of the evidence.

23 The Court can then supply a durable
24 rule of decision by which a state can adopt a
25 reasonably reliable method for handling

1 multiple IQ scores that, when it suggests the
2 offender's IQ is greater than 70, his sentence
3 does not violate Atkins.

4 Here, every identified method of
5 handling multiple IQ scores favors the
6 conclusion that Smith is not intellectually
7 disabled.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: How would you
10 specifically handle the multiple scores here?

11 MR. OVERING: In this case, the
12 consistent evidence is that Smith's IQ is above
13 70, and we've offered five different ways to
14 see that. But we think, ultimately, it's
15 Smith's burden to come with a method that
16 proves that his IQ could -- is likely below 70.

17 JUSTICE THOMAS: So what did the -- is
18 the -- is the test whether or not it is likely
19 or is?

20 MR. OVERING: Likely below 70 is our
21 understanding of the preponderance burden in
22 Alabama. Other states are free to adopt other
23 burdens of proof.

24 JUSTICE THOMAS: And what was the
25 finding of the court of appeal and the district

1 court?

2 MR. OVERING: The sentence "Smith's IQ
3 is below 70" doesn't appear in the district
4 court's opinion, nor in the court of appeals'
5 opinion. They found the first prong satisfied
6 by a preponderance of evidence but only after
7 they changed the standard to be not just
8 intellectual functioning but -- not just IQ but
9 a broader conception of intellectual
10 functioning.

11 CHIEF JUSTICE ROBERTS: What if the
12 scores were 69, 68, 69, 69, 75? I mean, would
13 you concede in that case that it was -- the
14 actual IQ is below 70, or would you still
15 argue, well, 75 is above, so we've got to look
16 at all sorts of other things?

17 MR. OVERING: Well, the -- the burden
18 would still be on the offender to prove a
19 likelihood that his IQ is 70 or below, and so
20 he'd have to come with a method.

21 Here, Smith didn't, so --

22 CHIEF JUSTICE ROBERTS: He'd have to
23 come with a what?

24 MR. OVERING: With a method for
25 assessing those scores. Here, Smith didn't, so

1 his claim fails. We have an argument that the
2 highest score should be given more probative
3 weight because there are many ways that an IQ
4 test can underestimate IQ, if the offender is
5 distracted, fatigued, ill, or because of the
6 incentive to avoid the death penalty, and --

7 CHIEF JUSTICE ROBERTS: Well, it
8 does -- you can see why that might be regarded
9 as a little results-oriented. When you have
10 scores above 70, you want to average them and
11 discount the -- the one below, but when they're
12 all below, you don't do that. You instead say
13 you've got to look at all these other factors?

14 MR. OVERING: It's not
15 results-oriented, Your Honor, because there is
16 a scientific warrant behind it. And we have to
17 think about what IQ tests are doing. They're
18 trying to measure the capacity for intellectual
19 performance. And so someone's best score is
20 the best representation of their capacity --

21 JUSTICE JACKSON: But, Mr. Overing, it
22 seems to me that you are actually changing the
23 standard. You've accused the district court
24 and the court of appeals of doing so. But, in
25 our case law, consistently, we've said that the

1 first prong relates to a showing of significant
2 sub-average general intellectual functioning.
3 The words "IQ score under 70" does not appear.
4 Those -- that's not the standard.

5 I appreciate that that's one of the
6 ways in which science has determined that you
7 can make such a showing, but we also have
8 allowed for evidence related to adaptive
9 functioning to be taken into account when
10 looking at intellectual functioning. So I
11 think what you've done is shift this to be all
12 about the IQ test in a way that is not
13 supported by our case law.

14 MR. OVERING: Atkins cited the fourth
15 edition of the DSM, and I think the phrase that
16 you just used appears in -- in that edition and
17 then further defines what general intellectual
18 functioning means.

19 And it used to mean an IQ of 70 or
20 below. Before that, it was 65. Now they're
21 saying it's 75. But IQ has always been the
22 primary criterion by which intellectual --

23 JUSTICE JACKSON: The primary but not
24 the sole, and we've never said it's been the
25 sole. And what the district court did here was

1 look not only at the IQ scores holistically but
2 also other evidence of adaptive functioning.
3 And that's precisely what our case law says
4 that the courts are supposed to do.

5 So -- so -- so let me -- let me ask
6 you, why do you think that the test should be
7 simply and solely IQ score cut off at 70?

8 MR. OVERING: IQ is originally how
9 intellectual disability was defined as a
10 condition, and it's always been the primary
11 criterion. And states are allowed to take the
12 best evidence of intelligence and to make that
13 the test. And --

14 JUSTICE JACKSON: But what -- what
15 do -- what do -- what do we do with the brief
16 of the American Association of Intellectual and
17 Developmental Disabilities, the actual experts
18 in this area, who say -- and I'm looking on
19 page 24 here -- "Other than requiring the
20 careful use of clinical judgment and
21 professional responsibility in performing a
22 complete analysis, there can be no single,
23 mandatory empirical method for clinicians to
24 use in considering multiple scores or in
25 determining whether or not someone is

1 intellectually disabled."

2 They look at a lot of things. So
3 reducing this to a single score seems to me
4 misguided.

5 MR. OVERING: Well, if there can be no
6 one mandatory method, then it's up for states
7 and their legislatures to decide. That brief
8 also said on page 15 that IQ remains the best
9 single representation of intellectual
10 functioning.

11 And the alternative is very
12 unworkable. Courts do not have the means by
13 which they can compare the evidence at prong 2,
14 for example, that he struggles with navigating
15 the subway system or doesn't know how to cook
16 certain dishes against the objective IQ
17 evidence. How many points --

18 JUSTICE SOTOMAYOR: Counsel --

19 JUSTICE BARRETT: Counsel, can I --

20 JUSTICE SOTOMAYOR: -- can --

21 JUSTICE BARRETT: Oh.

22 JUSTICE SOTOMAYOR: I'm sorry.

23 JUSTICE BARRETT: It's okay.

24 JUSTICE SOTOMAYOR: I'm having a
25 really hard time with this case because I don't

1 think you're wrong. States can define this the
2 way they want. The problem here is not what
3 the State of Alabama is doing. The Alabama
4 state is doing what all courts are doing. You
5 haven't pointed me to Perkins or any other
6 court where the rule that you're proposing has
7 been adopted by Alabama.

8 When we get that case, we might answer
9 your question, but, in the abstract, I don't
10 know how we can answer it here.

11 You didn't argue this below. Your own
12 expert did exactly what you say is wrong. Your
13 own expert said he had valid -- he had valid
14 scores between 72 and 78 and he relied on all
15 of the other indicia to determine that he
16 believed this person wasn't intellectually
17 disabled.

18 Respond -- Respondent's experts
19 concluded differently, and the district court
20 credited Respondent's experts.

21 But please point me to somewhere in
22 the record in the district court where you made
23 this argument.

24 In 2015, the Eleventh Circuit, not the
25 order before us, determined that the Alabama

1 courts had erred unreasonably because they had
2 done exactly what Hall told them they couldn't
3 do. They looked at the three scores that were
4 extant at the time, 72 -- I think it was 72 and
5 two 74s or something like that. It was all --
6 it wasn't the 78, the 78 came later -- and they
7 said on the basis of those scores alone he
8 wasn't intellectually disabled. And that's
9 exactly what Hall the year before had said was
10 wrong to do.

11 You didn't appeal that decision. So
12 we have to accept that the district court is
13 now the finder of fact.

14 And if the district court is the
15 finder of fact, it can do exactly what you're
16 saying: Follow Alabama law. And show me one
17 case in Alabama that has followed your rule.
18 Tell me where in the trial record you argued
19 that somehow aggregating scores, that somehow
20 median scores, that somehow there was one
21 perfect IQ score that states could require.
22 Just show it to me. Point me to the record.

23 MR. OVERING: And, respectfully, Your
24 Honor, at the start of your question, you asked
25 what is Alabama law, and I say Perkins says

1 it's an IQ of 70 or below. And you implied
2 that that's --

3 JUSTICE SOTOMAYOR: But how do you
4 prove that? And Alabama courts do exactly what
5 the district court does here. It looks at the
6 SEMs. That's what the court did here. It then
7 decides whether the person is within the range
8 of intellectual disability, which the court did
9 here. The SEMs, certainly, at least three out
10 of the five are within disability. And then it
11 looks to other things to determine whether the
12 person's intellectually disabled.

13 It's exactly what we told people to do
14 in Hall. It's exactly what we told people to
15 do in Moore.

16 What you're asking us to do is to undo
17 those cases because both in Hall and in Moore,
18 there were various scores, just like in this
19 case. In Hall, there was nine scores
20 between -- what were the figures? Nine scores
21 between -- I can't remember now.

22 MR. OVERING: Seventy-one and above.

23 JUSTICE SOTOMAYOR: Not much
24 different. Even worse than here, between 71
25 and 80. Here, there are five scores between 72

1 and one score of 78. And in Hall, only one of
2 the lowest scores fell within SEM.

3 MR. OVERING: So I'd like --

4 JUSTICE SOTOMAYOR: And, here, there
5 were three.

6 MR. OVERING: I'd like to clarify
7 first Alabama law because, in Your Honor's own
8 description of what the state courts did in
9 this case, they relied on the scores of 72, 74,
10 and 75. And now they have Hall --

11 JUSTICE SOTOMAYOR: Without looking at
12 the SEM. And we, in Hall, the year before said
13 you have to look at the SEM.

14 MR. OVERING: We -- we've cited --

15 JUSTICE SOTOMAYOR: And they didn't.

16 MR. OVERING: We've cited multiple
17 Alabama cases, Bush, Byrd, and Callen, all of
18 which had similar scores to Smith's here.

19 JUSTICE SOTOMAYOR: If you read every
20 one of those cases, the score -- the court
21 did -- the courts there did exactly what this
22 court did here. They looked at all of those
23 scores. Then they looked at the adaptive
24 functioning to determine whether the person was
25 actually at the lower end of the score or the

1 higher end of the score.

2 MR. OVERING: State courts have --

3 JUSTICE SOTOMAYOR: Can you dispute
4 that, that that's what those courts did?

5 MR. OVERING: In some cases, the
6 courts do look to other evidence, but they
7 don't grant an Atkins claim based on that other
8 evidence.

9 There's not an Alabama case in which
10 an offender was known to have an IQ above 70
11 and yet won his Atkins claim. And there's
12 certainly not an Alabama case in which the
13 courts plucked the lowest score alone and said
14 that represents a possibility of intellectual
15 deficits and moved on.

16 JUSTICE BARRETT: That's actually --

17 JUSTICE SOTOMAYOR: You're --

18 JUSTICE JACKSON: That's not what
19 happened here.

20 JUSTICE BARRETT: That's my question,
21 counsel. I -- I wanted to know about the
22 Alabama law too.

23 Could you just precisely explain --
24 not -- I don't want to delve into the record in
25 this case, so my question is a little bit than

1 just -- different from Justice Sotomayor's.

2 I just want to know what is the
3 Alabama rule because it seems to me that
4 Justice Sotomayor is right that there are some
5 Alabama cases that do move on to adaptive
6 functioning. And so what about the other
7 indicia and what role do they play in Alabama
8 law?

9 MR. OVERING: I think, since Hall,
10 courts have been confused in Alabama and
11 nationwide about what some of the dicta in Hall
12 means. I mean, with all due respect to this
13 Court, there are some confusing lines in Hall
14 to interpret and apply in these cases with
15 multiple scores if Hall applies at all to cases
16 with multiple scores.

17 And so the Alabama courts are -- are
18 grappling with that too, and they say: Well,
19 we looked at everything. We looked at the
20 whole record. But there is not a case in which
21 that other evidence has ever trumped IQ in
22 Alabama. And what Alabama wants to do is best
23 exemplified by pre-Hall case law, such as
24 Ex Parte Smith, in which a 72 seriously
25 undermined the Atkins claim.

1 JUSTICE KAGAN: But, Mr. --

2 JUSTICE BARRETT: But I'm confused
3 because it doesn't seem like Alabama prohibits
4 the court from going on. So, if a -- if a
5 federal court is trying to figure out what the
6 Alabama law is, wouldn't a federal court be
7 justified, say, if we remanded it to the
8 Eleventh Circuit in considering factors beyond
9 the IQ scores?

10 MR. OVERING: Well, I -- I think the
11 best evidence of what Alabama law is is how the
12 courts applied it in this case. I think, at
13 the end of the day, this Court has to determine
14 what is the federal constitutional minimum,
15 what's the floor for Atkins claims.

16 JUSTICE GORSUCH: Counsel, isn't --
17 isn't -- I mean, with respect to Alabama and
18 its law, whatever it may or may not be, can a
19 federal habeas court grant relief without
20 finding a violation of federal law or the
21 federal Constitution in this case, the Eighth
22 Amendment?

23 MR. OVERING: No. And -- and that
24 matters quite a lot.

25 JUSTICE SOTOMAYOR: So what matters

1 is, is he intellectually disabled. That's the
2 federal law, right?

3 MR. OVERING: The federal law is
4 Atkins and Hall.

5 JUSTICE SOTOMAYOR: Exactly. That you
6 can't execute an intellectually disabled
7 person.

8 JUSTICE BARRETT: What is your
9 understanding of the rule of state law in
10 making that determination whether Atkins and
11 Hall leave discretion to Alabama in defining
12 what intellectually disabled is? That's my
13 question. Obviously, it's an Eighth Amendment
14 question, but what is the relationship between
15 the Eighth Amendment and state law on this
16 question?

17 MR. OVERING: So, for Atkins, page 317
18 said that, to the extent there's disagreement,
19 the states have disagreements about who
20 qualifies, who is, in fact, intellectually
21 disabled. And so there's some suggestion in
22 Smith's brief that the state's discretion
23 extends only to procedural or evidentiary
24 matters. But I read that paragraph in Atkins
25 to mean that states actually have leeway as

1 well in defining intellectual disability.

2 And the definitions change. One
3 reason states need discretion is that the line
4 used to be 67. AMR at one point put the line
5 at 85. Now it's 70 or maybe it's 75 or
6 somewhat above 75.

7 And so states are not required to
8 divine from these different psychiatric manuals
9 what the best possible science could be when
10 they're making a legal determination of
11 intellectual disability.

12 JUSTICE GORSUCH: Let -- let me posit
13 this to you: That Atkins was trying to give
14 states a little leeway because Atkins was -- it
15 was a -- it was a -- it was a strong new
16 holding from this Court, applying new ground,
17 and it tried to give states some leeway.

18 But, at the end of the day, a federal
19 habeas court cannot grant relief on the basis
20 of a violation of state law.

21 MR. OVERING: Correct. States can be
22 more lenient, but that would not be a ground
23 for federal habeas relief. Smith has an Atkins
24 claim.

25 JUSTICE GORSUCH: We have to find that

1 there is an actual Eighth Amendment violation
2 in this case.

3 MR. OVERING: Correct. Smith has an
4 Atkins claim, not a Perkins claim. And Alabama
5 is not more lenient than Atkins. Alabama is
6 not more lenient than Hall. Alabama is trying
7 to enforce the constitutional --

8 JUSTICE GORSUCH: It would be rather
9 surprising to hear Alabama come in here and say
10 we're more lenient --

11 MR. OVERING: Correct.

12 JUSTICE GORSUCH: -- than what the
13 court is requiring us to do.

14 MR. OVERING: Absolutely.

15 JUSTICE GORSUCH: It could happen, but
16 it seems unlikely.

17 MR. OVERING: Not in this case.

18 JUSTICE GORSUCH: And under Atkins,
19 what do you -- what do you think about --
20 because you -- I'm sorry. My time's expired.

21 CHIEF JUSTICE ROBERTS: No, please
22 continue.

23 JUSTICE GORSUCH: Asking about, you
24 know, what the Eighth Amendment and what do we
25 do with our precedents in this area. What if

1 we said, under Atkins, states can implement
2 prong 1 however they want, because that's what
3 Atkins says, as long as they don't treat a
4 single score in the low 70s as decisive, Hall;
5 and, two, don't use extraneous facts to IQ
6 scores to outweigh a low score, Moore?

7 MR. OVERING: I think that's correct
8 with one caveat. It's not just a low score in
9 the low 70s, but it has to be a score that has
10 an error range and that could be one standard
11 error of measurement according to the APA's
12 brief in Hall on page 23 that includes 70
13 within its span. So that's how I would read
14 Hall, but, yes, those two rules are -- are how
15 we read the precedents.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 JUSTICE THOMAS: No.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: No.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: You know, I don't

1 see any state that defines intellectual
2 disability this way. I certainly don't see --
3 or to prove it this way. I don't see anything
4 in Alabama's law that suggests it's following
5 that rule. You're making something wholesale
6 up.

7 And you're claiming that there's
8 disagreement in the lower courts. I don't see
9 all that much disagreement. In Smith's table
10 on page 17 of the appendix, he has cases from
11 across all the states. And although you try to
12 reap some confusion about -- among them, they
13 all seem to be following the method the
14 district court here followed. And we announce
15 a new rule. We've announced more confusion
16 into an area where there's pretty standard
17 procedures. They do exactly what the district
18 court did here.

19 I have no case that I have found, and
20 I want you to find one state case that applies
21 the rule as you've articulated it.

22 MR. OVERING: Byrd versus State
23 clearly states that the offender has the burden
24 to prove by a preponderance of the evidence
25 that his IQ is 70 or below.

1 JUSTICE SOTOMAYOR: There is no
2 dispute about that. Assume I take that as a
3 given. We didn't grant cert on that because
4 that really wasn't disputed anywhere.

5 So where's the rest of what you're
6 saying, that states determine prong 1 based
7 solely on IQ scores and some statistical
8 unknown method of creating a medium composite
9 score?

10 MR. OVERING: There -- there are
11 different methods. Some states -- some state
12 courts have taken the average or the median, or
13 they've simply said the scores are consistently
14 above 70. And so it's the offender's burden to
15 come back and overcome that with a statistical
16 method. It's not Alabama's burden.

17 JUSTICE SOTOMAYOR: Tell me what --
18 name one court that has held that, that it's up
19 to the defendant to prove the first prong by a
20 preponderance of the evidence with some
21 statistical measure. It's not what I see. I
22 have not found one state case that has required
23 that.

24 MR. OVERING: It -- it --

25 JUSTICE SOTOMAYOR: And now you're

1 going to put in a new requirement that's
2 actually even more complex than what states
3 have been doing.

4 MR. OVERING: Well, Hall itself said
5 that evaluating multiple scores is a
6 complicated endeavor. Experts are --

7 JUSTICE SOTOMAYOR: I am asking you
8 for a simple answer. Name one state case that
9 has made your prong 1 dependent on a
10 statistical analysis of what's somehow either
11 an aggregated, medium, composite, I don't care
12 what word you use, one state case that has
13 required that.

14 MR. OVERING: Well, I -- I think
15 courts haven't needed to go that far because
16 offenders haven't come with a method. They
17 haven't satisfied their burden in these cases
18 when this Court --

19 JUSTICE SOTOMAYOR: But we've --
20 they've granted -- they have granted relief to
21 others without it.

22 MR. OVERING: Not in Alabama.
23 Sometimes the Eleventh Circuit will do that,
24 applying this lowest score rule. And there is
25 a division of authority. The Eighth, Ninth,

1 and Eleventh Circuits look at the lowest score
2 alone and say that it runs --

3 JUSTICE SOTOMAYOR: They -- they may
4 well be wrong, and I think they probably -- I
5 haven't looked at those cases carefully enough
6 to say whether they made error or whether
7 you're characterizing them in a way that's not
8 quite accurate, like here.

9 The Eleventh Circuit made clear, as
10 did the district court, that it wasn't relying
11 on just the one raw score. There were three
12 scores that were within the SEM of 70 and
13 below.

14 MR. OVERING: Hall said that IQ is
15 a -- a measurement that has statistical
16 properties which we can evaluate. And that's
17 why we take into account the standard error of
18 measurement. The experts in this case are also
19 telling us --

20 JUSTICE SOTOMAYOR: Point to one case
21 that has used -- required plaintiffs to come in
22 with the statistical mathematical certainty of
23 a particular number.

24 MR. OVERING: Not certainty but a
25 preponderance of the evidence. And this --

1 JUSTICE SOTOMAYOR: Thank you,
2 counsel.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE SOTOMAYOR: Your answer must
5 be --

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Mr. Overing, I -- I
8 guess, when I read Hall and Moore, I come away
9 with a couple of things that are relevant here
10 and then a lot of space for a state court to do
11 what it wishes, including with respect to
12 multiple scores.

13 But here are the two things that I
14 take from Hall and Moore that are relevant
15 here: The first is that in looking at any
16 given score, you have to take into account the
17 standard error of measurement, right, so that a
18 72 with a standard error of measurement of 5
19 becomes a 67 to a 77. And that's one thing
20 that they said, right? You can't just treat it
21 as above 70 because you have to recognize that
22 SEM. I don't think you disagree with that.

23 MR. OVERING: Except for the 5.
24 Correct, courts have to take into account
25 standard error, but it's not always 5.

1 JUSTICE KAGAN: Of course.

2 MR. OVERING: Right.

3 JUSTICE KAGAN: I'm just using that as
4 a hypothetical, all right?

5 MR. OVERING: Yes.

6 JUSTICE KAGAN: The second thing that
7 it seems to me come out of those two cases is
8 when you have a score, and most of these cases,
9 you're going to have -- you know, almost all of
10 them, you're going to have multiple scores, but
11 when you have one score because, in both of
12 these cases, they just treated that low score
13 as dipping below the 70 or a 70 or below, that
14 that gives the defendant the opportunity to
15 come forward with adaptive functioning
16 evidence. It's just an opportunity to come
17 forward with that evidence.

18 Now, at that point -- and this is true
19 of a state that does the whole thing
20 holistically. It's also true of a state that
21 breaks it up into prongs. At that point, a
22 court can decide how that evidence compares to
23 all the other evidence in the case.

24 And if it's a multiple score case
25 where it's only one score that's dipping below

1 70, of course, the court can say, you know,
2 there are five other scores that are above 70,
3 and we think that that's highly probative. So,
4 you know, it's very nice that he had the chance
5 to come in with adaptive evidence, but that's
6 not going to play in our analysis because we
7 look at all the scores and the scores alone do
8 it for us.

9 I think a court is definitely allowed
10 to say that after Hall and Moore as long as
11 they've given a person the opportunity to come
12 in with adaptive evidence. But they're also
13 allowed to take into account that there are a
14 lot of scores that suggest that the person is
15 not intellectually disabled.

16 So that's what it seems to me the law
17 is coming out of these two cases. Do you agree
18 with that or do you not agree with that?

19 MR. OVERING: No, I don't agree with
20 that because Hall didn't answer the question of
21 what to do with multiple scores. And so, if
22 it --

23 JUSTICE KAGAN: It didn't. I mean,
24 it -- and -- and because it didn't, that's why
25 I say it really does leave a lot of discretion

1 to a state court to decide how it wants to deal
2 with the fact that there are a lot of scores on
3 the plus 70 side and not a lot on the minus 70
4 side. That's totally within a state court's
5 discretion to say there are a lot of scores
6 here on the plus 70 side; that's dispositive
7 for us as long as they've given a person --
8 this is the only requirement that seems to me
9 that comes out of Hall and Moore. They have to
10 give the person with the minus -- with the 70
11 or minus score the opportunity to come in with
12 adaptive evidence suggesting the opposite.

13 MR. OVERING: Well, that would be an
14 extension of Hall, and we've said that Hall
15 should not be extended.

16 JUSTICE KAGAN: I would have thought
17 that that's just what it says.

18 MR. OVERING: If -- if it's reasonable
19 for a court to do that on a set of facts, then
20 it should also be reasonable for a state
21 legislature to say the true IQ line is 70 and
22 that can be dispositive.

23 So, if a court could do that with
24 scores of 72, 75, 76, why couldn't a
25 legislature do the same thing and say: No, we

1 don't want to leave that door open because we
2 don't trust trial --

3 JUSTICE KAGAN: I think the --

4 MR. OVERING: -- trial judges --

5 JUSTICE KAGAN: Yeah, I think --

6 MR. OVERING: -- to do this well.

7 JUSTICE KAGAN: Yeah, but I think that
8 is the difference, right, that Hall and Moore
9 did say you have to give the person the
10 opportunity. You have to put it in front of
11 the judge for the judge to say, you know, this
12 is a case where I'm not convinced -- you know,
13 there are five scores, but they're all hovering
14 around the 70 mark, you know, as compared to a
15 case where there are five scores and most of
16 them are nowhere near the 70 mark.

17 So you have to give this person the
18 opportunity once you have that low score to say
19 maybe it's that low score that should be --
20 that is more reflective of the person's
21 intellectual function.

22 MR. OVERING: There's more we can do
23 with IQ. And -- and the experts are coming in
24 and agree with us that there are ways that you
25 can combine the scores. And so the offender's

1 at least got to do that and at least has to
2 show a -- a likelihood below 70.

3 If there's a case where it's truly
4 indeterminate, and that's what Hall seemed to
5 think, that a score of 71 is so uncertain
6 standing alone, if there were a case that's
7 truly indeterminate, then perhaps there could
8 be other evidence --

9 JUSTICE KAGAN: I -- I don't think --

10 MR. OVERING: -- of intellectual
11 functioning, not adaptive behavior, certainly.

12 JUSTICE KAGAN: -- I don't think that
13 they thought it was indeterminate standing
14 alone. I mean, both Hall and Moore are
15 multiple score cases, and both were perfectly
16 aware that they were multiple score cases and
17 talked, as you said, about the difficulties of
18 dealing with multiple scores. So they knew
19 that they were talking about multiple score
20 cases.

21 And the requirement that they set up
22 is still, if you have one score that brings you
23 into the 70 minus range, that's enough so that
24 you have to a little bit -- you -- you have to
25 open the door to a person's evidence.

1 Now that's not to say you have to
2 accept that evidence for a moment if there are
3 a whole bunch of scores going the opposite way.

4 MR. OVERING: We know what happens in
5 these cases is that courts don't weigh the IQ
6 evidence. They -- they don't say, well, the IQ
7 evidence is really strong for the state, let me
8 weigh that against his inability to buy car
9 insurance or to maintain a bank account or
10 something like that.

11 They simply move on from IQ. And so,
12 once you open the door to this kind of
13 balancing test, the second prong is really
14 malleable, really amorphous, and we're picking
15 up disparate facts about someone's life,
16 self-reported or by biased reporters. And so
17 that evidence is not disciplining the inquiry.
18 It's not adding more rigor to figuring out what
19 the intelligence is.

20 And if it were, then the IQ
21 specialists would simply make a better IQ test
22 that accounts for things like that.

23 JUSTICE KAGAN: Okay. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: So what are the
3 different permissible Eighth Amendment
4 approaches a state can use when there are
5 multiple scores? For example, in your reply
6 brief, you articulate the -- if the median is
7 above 70. Is that -- if the median's above 70,
8 can the state say that's it?

9 MR. OVERING: Yes.

10 JUSTICE KAVANAUGH: Okay. And you
11 don't think Hall and Moore require more -- more
12 analysis in those cases? You think that's a
13 safe harbor, so to speak?

14 MR. OVERING: Yes, states can adopt
15 reasonably reliable methods. And the APA
16 handbook says that the median is option 1.

17 JUSTICE KAVANAUGH: Okay. And if
18 the -- another approach you articulate is the
19 overlap approach, the overlap among each
20 scorer's error range. Same question there.

21 If the overlap -- well, you're a
22 little bit ambiguous about what the overlap
23 needs to be to give you certainty. What -- you
24 want to explain that? I know you think it's
25 satisfied here, but what's the rule?

1 MR. OVERING: So the idea is that when
2 there's a cluster of scores, that we can take
3 into account each score's error range and then
4 lay them on top of each other and see which
5 numbers the error ranges have in common. So
6 the intuition there is that maybe his true IQ
7 is somewhere in the middle.

8 JUSTICE KAVANAUGH: What if the bottom
9 of the error -- error range is 69 or 70, of the
10 overlap error range?

11 MR. OVERING: I -- I don't think
12 that's a problem for the state because the
13 question is still the likelihood that his IQ is
14 70 or below. So simply having the number 69 in
15 an error range, whether using the overlap or
16 some other method, doesn't reflect a greater
17 than 50 percent chance that his IQ is below 70.

18 JUSTICE KAVANAUGH: But, in any event,
19 in this case, you say the bottom of the overlap
20 is 73, I believe, correct? At least that's
21 what you say in the reply brief. You say 73 to
22 77.

23 MR. OVERING: And I think that should
24 be a 78, but that's on the most generous
25 assumption about the error range being plus or

1 minus 5.

2 JUSTICE KAVANAUGH: Okay. And is the
3 composite score method another method that the
4 state can use, a state can use and, in your
5 view, stop there?

6 MR. OVERING: Yes.

7 JUSTICE KAVANAUGH: Okay.

8 MR. OVERING: When it's available.

9 JUSTICE KAVANAUGH: And are there any
10 other methods?

11 MR. OVERING: The average is a rough
12 approximation of the composite score.

13 JUSTICE KAVANAUGH: Well, there's a
14 lot of skepticism about the average being
15 accurate.

16 MR. OVERING: Well, the author of the
17 A -- one of the authors of the APA's amicus
18 brief in this case, Dr. Schneider, said that
19 the average is a rough approximation of the
20 composite score. Even if the composite score
21 is the theoretically best method, states are
22 allowed to adopt other methods.

23 The fifth method would be to look at
24 the high score when the highest score's entire
25 error range is over 70. And those are the five

1 that we've discussed as reasonably reliable
2 methods.

3 JUSTICE KAVANAUGH: And why there --
4 this picks up on the Chief Justice's question.
5 Why are you picking just the high score in that
6 fifth approach?

7 MR. OVERING: The high score --

8 JUSTICE KAVANAUGH: That seems, as --
9 as he said, results-oriented.

10 MR. OVERING: The -- the high score is
11 more probative because there are many ways that
12 an IQ score can err downward and very few ways
13 that a score can err upward. And so especially
14 to take into account the obvious incentive to
15 malinger in these cases, the lowest score
16 should be viewed with greater suspicion.

17 Oklahoma has adopted a rule like this
18 and it has withstood federal review for many
19 years.

20 JUSTICE KAVANAUGH: Then, to follow up
21 on Justice Kagan's question, what's the logic
22 or the rationale or the sense behind not having
23 a district court or a trial court or a state
24 court have the ability in those circumstances
25 to go on and look at more?

1 Because I think what you were saying
2 is each of those approaches are essentially a
3 safe harbor. You win. The defendant can't
4 meet his or her burden in those circumstances,
5 you win. The state court can't go on and look
6 at other things. That's, I think, what you're
7 saying. What's the logic, the rationale, the
8 sense behind that?

9 MR. OVERING: Well, the adaptive
10 behavior prong is simply not as good as IQ, and
11 so, once you start weighing that subjective and
12 amorphous evidence against the objective
13 evidence of IQ, we don't think it's within
14 courts' capacities to do that well. Even if
15 clinicians could somehow weigh the evidence of
16 the ability to buy groceries against the IQ
17 score of 78, I don't know how courts would do
18 that.

19 Adaptive behavior was added later.
20 Originally, the diagnosis was just based on IQ.
21 There's great disagreement among the experts
22 about what adaptive behavior even means. Is it
23 10 or 11 domains or three different domains?
24 And there's great disagreement about how to
25 even measure it.

1 There are hundreds of different
2 scales, inventories, batteries for adaptive
3 behavior. I think people have a misconception
4 that these are just other standardized tests,
5 but often it's not. And there's a lot of
6 judgment that goes into picking them.

7 So I'll just give one example in this
8 this case. A -- a reading comprehension test,
9 the courts below credited evidence that -- that
10 Mr. Smith is barely literate, I think at
11 Petition Appendix 22, and then he was
12 administered a reading comprehension test that
13 showed he reads at an 11th grade level, which
14 is clearly inconsistent with intellectual
15 disability, but the state courts focus on the
16 evidence from grade school. They pluck out a
17 different fact.

18 And so this is not a really rigorous
19 scientific test the way that IQ is, the fruit
20 of a multi-century enterprise to figure out the
21 best possible estimate of intelligence.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: So I guess I'm
2 trying to understand the basis for our being
3 able to determine that the district court in
4 this case erred, which is what I understand you
5 to be asking us to do.

6 So are -- are you saying that Alabama
7 has selected any one of those five methods by
8 legislation, for example, and the district
9 court refused to apply it in its consideration?

10 MR. OVERING: Alabama hasn't adopted
11 one of those methods.

12 JUSTICE JACKSON: All right. So you
13 explored a number of possibilities with Justice
14 Kavanaugh, none of which Alabama has actually
15 adopted, so we can't say that the district
16 court erred by not applying Alabama law in that
17 sense.

18 Did you ask the district court to
19 apply any of those methods in its consideration
20 of -- of this defendant's intellectual
21 disability?

22 MR. OVERING: Well, it's the
23 Petitioner's burden to come in --

24 JUSTICE JACKSON: No, no, no. Did --
25 your -- your burden right now as Petitioner is

1 to establish that the district court erred, and
2 so what I'm trying to ask you is whether you're
3 saying that the district court erred by not
4 evaluating this defendant in a way that he was
5 never asked to do by the state below.

6 MR. OVERING: Well, it's a legal error
7 because my answers to Justice Kavanaugh were
8 that those are all reasonably reliable methods
9 that the state could adopt. And if that's
10 true, then it doesn't matter whether Alabama
11 has, in fact, adopted them in statute because
12 there's no Eighth Amendment violation.

13 JUSTICE JACKSON: That was my first
14 question. Doesn't it matter for the purpose of
15 our evaluation of the district court's error
16 whether or not the district court was asked to
17 evaluate this defendant using the method that
18 you now say it was erroneous for the district
19 court to not have used?

20 MR. OVERING: The --

21 JUSTICE JACKSON: I mean, this never
22 came up during -- like, no one said to the
23 district court, please evaluate him using this
24 method, and the district court said no. In
25 that situation, we then assess whether the

1 district court was wrong in refusing to adopt
2 that method.

3 MR. OVERING: We didn't get that far
4 because we had five IQ scores that clearly show
5 he loses, and then the district court focused
6 only on the 72. And so the question --

7 JUSTICE JACKSON: But the district
8 court was weighing all of the evidence under
9 the standard that it seems like your expert
10 also agreed was the right legal test at the
11 time. And now you're saying the test should
12 have been different, the district court was
13 only allowed to look at one of these other five
14 reliable methods, although no one said to the
15 district court at the time, please look at that
16 method.

17 MR. OVERING: We said to the district
18 court Alabama law is a true IQ of 70 or below
19 by a preponderance. And then the district
20 court did not apply that burden.

21 JUSTICE JACKSON: Okay. Let me ask
22 you this because I do think that there's
23 something about party presentation here that's
24 a little troublesome. A couple weeks ago, in a
25 case called Clark versus Sweeney, we summarily

1 reversed a grant of habeas because the court of
2 appeals had granted habeas based on an argument
3 that the petitioner had not presented -- had
4 not presented.

5 So I feel like you're actually asking
6 us to violate that same principle. You never
7 asked the court of appeals in this case, for
8 example, to evaluate the district court on the
9 basis of these five methods and say that it was
10 erroneous on that basis or on the cumulative --
11 on the cumulative effects test.

12 I'm -- I'm a little confused all
13 around because I thought the question presented
14 in this case was about the cumulative effects
15 test and that that's what you were actually
16 advocating for. But that didn't come up in the
17 lower courts. So how could we possibly reverse
18 on the basis of these kinds of arguments that
19 were not presented below?

20 MR. OVERING: We absolutely did
21 present evidence from Dr. King at JA 270 and
22 271 that his consistent scores were above 70.
23 We didn't have to get to the level of
24 granularity of specifying a particular method
25 because there is no method in this case that

1 can prove his IQ is likely 70 or below.

2 We're offering those to answer the
3 Court's question how to assess multiple IQ
4 scores --

5 JUSTICE JACKSON: And your -- your
6 answer is not --

7 MR. OVERING: -- but it's sufficient
8 to reverse --

9 JUSTICE JACKSON: -- your answer is
10 not something about cumulative effects is what
11 the court had to do and didn't do? I -- I
12 thought that was the test that you were
13 requiring us to consider as the thing that a
14 district court has to do.

15 MR. OVERING: Our first argument is
16 that it didn't do that because it looked only
17 at the possibility. And if the Court agrees --

18 JUSTICE JACKSON: It didn't -- wait.

19 MR. OVERING: -- it has to do that --

20 JUSTICE JACKSON: I'm sorry. I
21 just -- I thought you were saying the district
22 court erred because it didn't consider the
23 cumulative effect of multiple IQ scores and
24 that the cumulative effect was a thing that the
25 district court didn't do.

1 All I'm asking here is, did you ask
2 the district court to do that or did you say to
3 the court of appeals the district court has
4 erred because it didn't look at the "cumulative
5 effect" of the multiple IQ scores?

6 MR. OVERING: Yes, we said that in the
7 district court. With Dr. King's testimony, we
8 said it, and --

9 JUSTICE JACKSON: Cumulative effect,
10 I'll find it in the record?

11 MR. OVERING: We -- we -- we --

12 JUSTICE JACKSON: Because I didn't see
13 the words "cumulative effect" in the record.

14 MR. OVERING: Well, there are lots of
15 synonyms, but consistent scores above 70,
16 that's the -- the same thing. And then, in the
17 Eleventh Circuit, we presented this evidence
18 and said the district court didn't take
19 seriously the whole of the IQ evidence because
20 it didn't even mention his score of 78, so it
21 couldn't have done the cumulative effect.

22 That's enough to reverse. If the
23 Court wants to go further and discuss the
24 reasonably reliable methods, we think that
25 would be a good idea, especially for

1 guidance --

2 JUSTICE JACKSON: So you're not asking
3 necessarily for that rule about the reasonably
4 reliable methods that certainly did not come up
5 before?

6 MR. OVERING: Well, that is the
7 question presented, and so that would be a
8 complete answer to Smith's claim, is that there
9 is no way that he can prove an IQ below 70
10 because, even on these common and
11 expert-approved methods, he hasn't shown that
12 his IQ is below 70.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Graver.

17 ORAL ARGUMENT OF HARRY GRAVER

18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONER

20 MR. GRAVER: Mr. Chief Justice, and
21 may it please the Court:

22 Under Atkins, states have significant
23 discretion in defining what it means to be
24 intellectually disabled and what a defendant
25 must do to prove it. Alabama has exercised

1 that discretion to require that Respondent show
2 his true IQ is likely 70 or below based on all
3 relevant evidence, including his multiple IQ
4 scores all above 70.

5 The courts below erred because they
6 replaced that burden with some variant of a
7 one-low-score rule. Everyone now agrees that
8 such a rule is wrong. Instead, Respondent
9 focuses on justifying the opinions below as
10 applying a holistic analysis.

11 But that misses the point. The
12 problem here is not that the courts below
13 simply looked at other evidence. It is that
14 they measured that evidence against the wrong
15 standard, and it's that they looked at that
16 evidence on only one side of the scale, never
17 considering the collective weight of
18 Respondent's multiple IQ scores taken together.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: What exactly did
21 Atkins say the Eighth Amendment violation was?

22 MR. GRAVER: I think Atkins laid down
23 a general rule.

24 JUSTICE THOMAS: Which -- which is?

25 MR. GRAVER: Which is that you cannot

1 execute the intellectually disabled, and the
2 meaning of intellectual disability is something
3 that states define with significant discretion.

4 JUSTICE THOMAS: How did Atkins --
5 what did Atkins say about determining what
6 intellectual disability meant? Actually, it
7 used the word "retardation."

8 MR. GRAVER: Sure.

9 JUSTICE THOMAS: What did it say that
10 was?

11 MR. GRAVER: I think that Atkins
12 looked -- and the Chief Justice put this well
13 in Moore -- it's that the scope of Atkins
14 reaches no further than the consensus of the
15 states.

16 So I think that to the extent there's
17 content to that command, it's going to come
18 from state consensus. But I really do think
19 that Atkins largely, much as this Court has
20 done in the insanity context, outsourced the
21 definition of intellectual ability to the
22 states.

23 JUSTICE SOTOMAYOR: Counsel, I'd like
24 to -- you -- you're focusing in on Atkins, but
25 Hall and Moore say something very different

1 than what you're saying. In Hall, Mr. Hall had
2 scores between -- nine scores over 40 years.
3 The lower courts found a score of 71 and 80,
4 only two of the scores, to be valid. But
5 Florida had a strict cutoff rule that said
6 anyone with higher than a 70 could not be
7 intellectually disabled. So you can't have a
8 flat rule that says you get one score over 70,
9 you're not -- you're not disabled, correct?

10 MR. GRAVER: Correct. I think that
11 just -- yeah.

12 JUSTICE SOTOMAYOR: And what Atkins
13 also said, I'm quoting, "For professionals to
14 diagnose and for the law then to determine
15 whether an intelligence disability exists once
16 an SMN applies and the individual's IQ scores
17 is 75 or below, the inquiry would consider
18 factors indicating whether the person had
19 deficits in adaptive functioning. Courts must
20 analyze the STEM, and if the STEM includes 70,
21 the defendant must be able to present
22 additional evidence of intellectual disability,
23 including testimony regarding adaptive
24 functions."

25 So for us to say what Petitioner wants

1 would disavow that language in Hall. It would
2 disavow nearly the identical language in Moore.
3 In Moore, he had two valid scores of 74 and 78.

4 Nowhere did we suggest that courts had
5 to aggregate, cumulate, medium them out,
6 composite them, do anything else with them.
7 What we had -- and, there, the court held that
8 the state courts had violated Hall when it
9 discounted the lower end of Moore's STEM
10 because he was malingering. The tests were
11 valid. It had a SEM. The SEM was below 70.

12 And then the Court held, once the SEM
13 in some of those valid tests were below 70s,
14 the courts "must continue the inquiry and
15 consider other evidence of" -- "of intellectual
16 disability where an individual's IQ score
17 adjusted for the test's standard error falls
18 within the clinically established range for
19 intellectually functioning deficits."

20 So you are asking us to tell courts
21 below to do something substantially different
22 than what we told them to do in Hall and Moore.

23 MR. GRAVER: Respectfully, no, Justice
24 Sotomayor.

25 There's a big difference between

1 saying you can move on and look at other
2 evidence and saying you can then forget about
3 IQ entirely.

4 JUSTICE SOTOMAYOR: Ah.

5 MR. GRAVER: Big problem here.

6 JUSTICE SOTOMAYOR: Okay. That's
7 something different. What you're talking
8 about, then, is not a -- a legal error by the
9 courts below. You're talking about a different
10 -- your difference of opinion.

11 MR. GRAVER: No, it is a legal error
12 twice over, and I think it's a helpful thing to
13 spell out here, is that even if you look at
14 other evidence, you still need to circle back
15 and see how that weighs against the evidence on
16 the other side of the scale.

17 And in this context, that is going to
18 be the multiple consistent IQ scores together.

19 JUSTICE SOTOMAYOR: Well, wait a --

20 MR. GRAVER: The two legal errors --

21 JUSTICE SOTOMAYOR: -- minute. But
22 that's what the district -- that's what the two
23 experts -- the three experts here did.

24 There was Dr. King, I think one was
25 Dr. Chudy, who was the original expert, and

1 then there was the evidentiary hearing,
2 Dr. Fabian, if I'm not mistaken. Each one of
3 them did exactly that.

4 Your Dr. King looked at the scores and
5 said I'm looking at the functioning, and I
6 don't think he's on the lower end of 7 -- of 70
7 because when I speak to him, he speaks well.
8 He can respond. I think he functions at a
9 higher rate.

10 The other doctors, which the district
11 court credited, and did many, many more tests
12 than Dr. King did, looked at all of the tests,
13 all of the results and said I'm convinced that
14 his range is 70 and below.

15 MR. GRAVER: So before turning to the
16 experts, let me just emphasize what I think are
17 two discrete legal errors with the way in which
18 the courts thought about this under Alabama
19 law.

20 Even if you tend to look at the
21 secondary evidence, you still need to circle
22 back --

23 JUSTICE SOTOMAYOR: Are you saying
24 it's wrong to do it? Do you say Alabama says
25 it's wrong to do that?

1 MR. GRAVER: Wrong to do what?

2 JUSTICE SOTOMAYOR: Look at secondary
3 evidence.

4 MR. GRAVER: I don't think there is
5 any per se rule in Alabama that says you cannot
6 look at this. But the difference is --

7 JUSTICE GORSUCH: Can you tell us --

8 JUSTICE SOTOMAYOR: So there's no --

9 JUSTICE GORSUCH: -- what the two --

10 JUSTICE BARRETT: Can you please tell
11 us what the two legal errors are?

12 JUSTICE GORSUCH: Yeah. Thank you.

13 JUSTICE BARRETT: Thank you,
14 Mr. Graver.

15 MR. GRAVER: So the basic idea is,
16 where you have all of this evidence together,
17 are you measuring it against the right
18 standard?

19 So one legal error that happened below
20 is that the courts swapped essentially a
21 preponderance burden with a possibility burden.

22 But the other part is, even putting
23 that to the side, the difficulty is that you
24 still need to figure out what the ultimate
25 question Alabama law is asking here, which is,

1 is this other evidence strong enough to drag
2 down the collective weight of IQ --

3 JUSTICE KAGAN: So that seems --

4 MR. GRAVER: -- below the line.

5 JUSTICE KAGAN: -- totally right to
6 me. So I'm -- I'm wondering, you -- you heard
7 the question that I asked Mr. Overing, and I'm
8 wondering if we disagree at all.

9 If I say the thing that Hall and Moore
10 require is that when you have a score that's 70
11 or below, you do have to give the defendant an
12 opportunity to come in and to talk about
13 adaptive functioning.

14 But having given the defendant the
15 opportunity to talk about adaptive functioning,
16 yes, of course, you can go back to the scores
17 and to the fact that there are a lot of scores
18 on one side, the upper side of 70, that make
19 you think that that evidence of adaptive
20 functioning just cannot possibly carry the day.

21 Is that what you're saying or are you
22 saying something more than that?

23 MR. GRAVER: I think I agree with
24 95 percent, or at least with one or two
25 asterisks.

1 And let me say how I think that cashed
2 out here and then what the constitutional rule
3 is for how you just think about IQ.

4 The issue is that what you were
5 describing before just did not happen here.
6 The only time that the courts grappled --

7 JUSTICE KAGAN: Okay. So I -- I take
8 that point.

9 MR. GRAVER: Okay.

10 JUSTICE KAGAN: Let's -- let's presume
11 that I don't care about it for the moment.

12 MR. GRAVER: Fair enough.

13 JUSTICE KAGAN: You know, that all --
14 all I'm trying to do is to figure out the rule
15 and then we can go back and say whether the
16 court did it or not do it.

17 MR. GRAVER: So I think that the part
18 where I disagreed with what you said before is
19 just in the sense that a single low score in
20 all circumstances, no matter what, will always
21 preclude a state from being able to focus on
22 IQ. So imagine, for instance, just a case --

23 JUSTICE KAGAN: No, I -- I don't think
24 it would -- it would -- the only thing that I
25 think a -- a single low score does is to say,

1 yes, at that point, the defendant does have to
2 have the opportunity to come in with adaptive
3 evidence. And I take Hall and Moore to have --
4 that is their holding.

5 MR. GRAVER: Right. So I think I take
6 it slightly less categorically than you do,
7 which is just to say, so you imagine the case
8 of, you know, ten 85s and one 72.

9 The collective error range of those
10 scores, even if you look at the 95 percent
11 confidence interval, is not going to grace
12 70 or below.

13 So imagine a situation like that
14 where -- you -- I think you can structure it
15 where the possibility remains so low --

16 JUSTICE KAGAN: Okay. So it looks
17 like the hypothetical that you gave in your
18 brief, like if there are a lot of 90s, and I
19 kind of take that point, right, because, like,
20 at some point there's no clinician in the world
21 who's going to say that just because you have,
22 like, one outlier score, that -- that there's a
23 possibility, right, if you have, like, six 90s
24 and a 72.

25 But if you have something that's more

1 along the lines of here --

2 MR. GRAVER: Mm-hmm.

3 JUSTICE KAGAN: -- right? Then I take
4 it that we are in agreement, tell me if I'm
5 not, that at that point the Hall and Moore
6 ruling is you have to allow the person to come
7 in with adaptive functioning evidence but, of
8 course -- may I, Mr. Chief Justice?

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE KAGAN: But, of course, you
11 can say this is outweighed by the fact that
12 there's a multitude of scores on one side.

13 MR. GRAVER: Yeah, I think that there
14 is broad -- and if I can just stress the two
15 key points of agreement is that moving on
16 doesn't mean you're done. It involves circling
17 back to the standard that state law imposes.

18 And I think in turn with that, it's
19 helpful to clarify what I think is now a point
20 of agreement, that the one low score rule
21 reading of Hall and Moore where prong 1 is
22 satisfied substantively so long as you have
23 one low score is wrong.

24 JUSTICE KAGAN: Right.

25 MR. GRAVER: Yeah.

1 JUSTICE KAGAN: Okay.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 JUSTICE ALITO: Let me see if I
7 understand the colloquy you just had with
8 Justice Kagan and -- and the degree to which
9 you agree with what she said.

10 Did either Hall or Moore hold anything
11 with respect to how a case must be treated when
12 there are multiple scores? Hall and Moore talk
13 about one score. And they say that dealing
14 with multiple scores is a complicated matter.

15 But do they say anything about how a
16 court is to deal with the situation where there
17 are more than one scores?

18 MR. GRAVER: No, not expressly.

19 JUSTICE ALITO: So if there is a case
20 with one score, and the one -- the -- the
21 standard error of measurement has a range that
22 is below 70, and that's it, that's all that's
23 in the case, one score, standard error of
24 measurement is below 70, yes, they -- Hall says
25 that allows the -- the -- the prisoner to

1 proceed with evidence about adaptive functions,
2 but it doesn't say how the Court is to deal
3 with the situation where there are multiple
4 scores.

5 MR. GRAVER: That's correct. And this
6 is what I was trying to get at before, is that
7 I do think in a lot of the solutions that I
8 think might come with concerns that come with
9 looking at injecting adaptive functioning into
10 this space is I do think states have some
11 discretion about when you want to sort of focus
12 on IQ alone as a threshold matter.

13 And I do think to the extent that a
14 defendant or -- just can't come in and show
15 that your multiple scores have any realistic
16 possibility of dipping below any concerning
17 range, that is a time where a state can say we
18 don't want to inject any of this other stuff
19 into it, just focus on IQ.

20 JUSTICE ALITO: Okay. So what we are
21 looking for here under our precedents is the
22 evolving standard of decency that exists on
23 this issue about how to -- how to decide
24 whether a -- someone who is sentenced to death
25 has significantly subaverage intellectual

1 functioning.

2 In prior cases where we have tried to
3 determine what the national consensus is, we
4 have looked at state laws, things that are
5 enacted by the state legislature on the theory
6 that they reflect the moral judgment of the
7 people of that state as expressed through their
8 elected representatives.

9 But what do we do with a situation --
10 and let's say that if state -- a state made the
11 law through case law without being -- without
12 thinking that it had to do something one way
13 or the other because of our decisions about
14 constitutional standards. Put that aside.

15 What do we do with a situation like we
16 have here where state courts and lower federal
17 courts are trying to figure out what we said
18 in -- what Hall and Moore mean?

19 And so their decisions reflect their
20 interpretations, perhaps erroneous
21 interpretations, of those two precedents of
22 this Court.

23 Do we look at those to see whether
24 there is a national consensus?

25 MR. GRAVER: No, I don't think so. I

1 think there is a difference between -- the idea
2 for a national consensus is when a certain
3 moral judgment has the imprimatur of the
4 people. I don't think that happens when a
5 court imposes that standard on an incorrect
6 understanding of federal law.

7 So to the extent that this Court is
8 still doing head counting for purposes of
9 Eighth Amendment, I don't think that courts
10 misunderstanding Hall or Moore would factor in
11 favor for whatever new rule is being proposed.

12 JUSTICE ALITO: Now I don't know
13 whether you have surveyed the state -- state
14 statutes, so perhaps you're not in a position
15 to answer this question, but if one were to
16 survey the statutes of all the states that have
17 the death penalty and see whether they have
18 adopted one approach or another approach to the
19 situation we're dealing with here, what would
20 we find?

21 MR. GRAVER: So I don't -- I can't
22 speak to the legislatures just because I don't
23 know what's motivating them. Alabama was able
24 to catalogue, I think, a few examples in their
25 brief of instances where state courts were

1 applying what is essentially the one low score
2 rule. That erroneous understanding of Hall and
3 Moore, which, again, we all agree is an
4 erroneous understanding of Hall and Moore, I
5 don't think that that counts as a moral
6 endorsement for the one low score rule.

7 JUSTICE ALITO: And Justice Kavanaugh
8 asked your friend about the advantages and
9 disadvantages of the safe harbor as opposed to
10 the alternative. And maybe you would -- I'd be
11 interested in what you have to say about that.

12 If there's a -- a safe harbor in the
13 sense that a -- a person sentenced to death
14 who's claiming intellectual disability has to
15 meet some concrete standard before the case can
16 go on, will there not be greater consistency
17 and predictability, and is that not one of the
18 -- the lodestars of the Court's death penalty
19 jurisprudence, as opposed to a situation where
20 everything is up for grabs in -- in every case,
21 and both sides can bring in experts to testify
22 about the person's intellectual disability or
23 lack of intellectual disability and every trier
24 of fact is going to decide that on an
25 individualized basis?

1 MR. GRAVER: So I 100 percent agree
2 with that, Justice Alito. And if I can just
3 emphasize one point because I don't think
4 there's any practical daylight between what I'm
5 saying and what Alabama was just talking about.
6 I think just -- the point I was making before
7 is there might not be a per se legal bar in
8 looking at the other evidence, but the IQ
9 evidence may nonetheless be practically
10 dispositive in a given case.

11 So what I'm understanding essentially
12 what my friend was saying is, well, if we look
13 at the IQ scores, it was the Defendant or
14 Respondent's burden to essentially show at step
15 1 that the error range of those scores together
16 reaches 70 or below, because even if that range
17 in never reaches 70 or below in the first
18 place, there's no realistic possibility that
19 any of the secondary evidence on the other
20 cited of the scale is going to drag you over.

21 So I think that that's just the --
22 that's more of a practical matter with the
23 facts of this case where IQ happens to be
24 dispositive, just because there's not going to
25 be anything on the other side of the scale that

1 tips it over.

2 JUSTICE ALITO: Thank you.

3 JUSTICE SOTOMAYOR: I'm not sure how
4 that happens. There were nine scores in Hall
5 between 71 and 80. And we still sent it back
6 for the court to consider additional evidence,
7 including adaptive functioning, correct?

8 What Justice Alito was saying is
9 states could do something like he suggests, but
10 is that constitutionally required?

11 MR. GRAVER: I think the difference,
12 though --

13 JUSTICE SOTOMAYOR: Answer my
14 question. Would states have to do it that way?

15 MR. GRAVER: I --

16 JUSTICE SOTOMAYOR: Or could they do
17 it now in whatever way they thought, one of the
18 five ways suggested by the other side or the
19 way they're actually doing it now?

20 MR. GRAVER: The answer is uncertain
21 for the reasons I was explaining with Justice
22 Kagan. And I can't -- you know, I'm not good
23 enough at math to do this on the fly, but the
24 basic idea is that if those collective scores
25 do not produce a range that even greater than

1 70 --

2 JUSTICE SOTOMAYOR: Has any state
3 adopted that --

4 MR. GRAVER: -- I don't think there's
5 any constitutional requirement --

6 JUSTICE SOTOMAYOR: -- has any state
7 approached the issue that way with multiple
8 scores?

9 MR. GRAVER: I don't think so. I
10 think --

11 JUSTICE SOTOMAYOR: Did Dr. King
12 approach it that way below?

13 MR. GRAVER: In part. I think he
14 focused on IQ and said that it did not fall
15 below 70, and then also said that the other
16 evidence on the -- on the other side of the
17 ledger wasn't strong enough to show any other
18 form of disability either.

19 JUSTICE SOTOMAYOR: What I thought he
20 did was exactly what all the experts did, is
21 three of the five fell within intellectual
22 disability, and then he relied on adaptive
23 functioning to say he thought he was not
24 intellectually disabled.

25 MR. GRAVER: Let me make one quick

1 point --

2 JUSTICE SOTOMAYOR: Mm-hmm.

3 MR. GRAVER: -- just in addition to
4 this, is that what you won't find in any of the
5 expert reports is a conclusion with respect to
6 what Alabama law asked. None of them found
7 that Respondent's true IQ was likely 70 or
8 below.

9 So finding that Respondent did not
10 satisfy his state law burden --

11 JUSTICE SOTOMAYOR: I'm sorry, who
12 didn't find that?

13 MR. GRAVER: No expert in this case --
14 you won't find any --

15 JUSTICE SOTOMAYOR: Wait a minute.
16 That's what they did say.

17 MR. GRAVER: No, no -- it's --

18 JUSTICE SOTOMAYOR: That two of them,
19 at least two of Respondent's experts found he
20 was intellectually disabled. That was the
21 finding the district court made.

22 MR. GRAVER: It depends what
23 definition you're using. The experts were
24 using clinical definitions that are distinct
25 from Alabama law.

1 JUSTICE SOTOMAYOR: I don't --

2 MR. GRAVER: I want to make --

3 JUSTICE SOTOMAYOR: -- I don't
4 disagree with you, but the district court was
5 following Alabama law. It's -- these things
6 are not statutory. Most of these -- the very
7 few, maybe Oklahoma is now, where one score
8 above 76 disqualifies you. I don't know how
9 that's not different than the 70, one score
10 above 70 situation might be, but we'll look at
11 Oklahoma when it comes to us.

12 MR. GRAVER: Sure. The only thing
13 I'll add is that I don't think the district
14 court was follow -- following Alabama law
15 because, as my friend emphasized, I think a
16 very telling point is that you will not find a
17 single sentence in anything the district court
18 wrote that said Respondent's IQ is likely 70 or
19 below.

20 We think that they were laboring over
21 --

22 JUSTICE SOTOMAYOR: Oh, is that what
23 you think is -- they did wrong?

24 MR. GRAVER: I think that there's --
25 what I was trying to get at, at the start, is

1 there's two problems. They misunderstood the
2 standard for a possibility idea from the one
3 low score rule.

4 JUSTICE SOTOMAYOR: That was only the
5 Eleventh Circuit who said that. The district
6 court certainly didn't say that.

7 MR. GRAVER: But then the basic part
8 too is returning to what Alabama law is, which
9 is a numerical inquiry, does the evidence show
10 that you've been able to drag down the IQ
11 scores below 70. There's no engagement with
12 that. The basic IQ --

13 JUSTICE SOTOMAYOR: But that -- that
14 was never argued by Alabama.

15 MR. GRAVER: Oh, no, it -- it was one
16 of their leading arguments, which was that you
17 did not consider the totality of the evidence.
18 And when you're trying to figure out whether
19 the secondary evidence drags --

20 JUSTICE SOTOMAYOR: Counsel, that --

21 MR. GRAVER: -- the IQ down --

22 JUSTICE SOTOMAYOR: -- that's -- all
23 right. I'll stop.

24 CHIEF JUSTICE ROBERTS: Justice --

25 JUSTICE SOTOMAYOR: But that's

1 attributing to one broad statement a specific
2 argument that I don't see. Where did they say
3 that the adaptive functioning should be ignored
4 because the cumulative effect of the score
5 showed he wasn't --

6 MR. GRAVER: It's two sides of the
7 same coin. What it's saying is there's no need
8 to move on to other stuff because here
9 Respondent hasn't even carried his initial
10 burden of showing it will do any good.

11 JUSTICE SOTOMAYOR: All right. Thank
12 you.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Justice Kagan?

15 Justice Gorsuch?

16 JUSTICE GORSUCH: I have a few
17 questions there where I don't think you got to
18 finish your answer. Here's your shot.

19 MR. GRAVER: I would be pretending if
20 I remember what any of those questions were.

21 (Laughter.)

22 MR. GRAVER: So, you know, I think
23 instead of, you know, turning myself in a
24 circle, if there's anything, you know, that you
25 wish I'd spoke to --

1 JUSTICE GORSUCH: Well, no, no. Well,
2 no there isn't. I want to get what your
3 argument is, as I'm here to understand it.

4 MR. GRAVER: Right.

5 JUSTICE GORSUCH: Not -- not -- not --
6 not anything else. And I think one of the
7 questions was what do you think the error was
8 the district court made and that the Eleventh
9 Circuit made? I think that was one question
10 that I'd like to hear the answer to.

11 MR. GRAVER: Right. So I think
12 there's two related errors. And the first is
13 what we were saying before, is that they just
14 misunderstood what the substantive standard is.
15 I'm going to look at this evidence, I'm going
16 to ask whether there's a possibility. Alabama
17 looks for a likelihood. So that's mistake
18 number one.

19 But the second part is, even if you
20 say it's applying the right standard, there's
21 still a basic analytical error, because once --
22 if you look at the opinions below, once the
23 courts consider multiple IQ and conclude that
24 it's theoretically possible Respondent's IQ
25 dips to 70 or below, IQ falls out of the case

1 entirely. And that's a basic analytical error
2 because, of course, not all possibilities are
3 the same.

4 A defendant with one score of 75 is
5 going to have a really different burden than a
6 defendant with 100 scores of 75. So the
7 analysis here, what it should have looked like
8 is taking account of that dynamic, which is not
9 just saying, well, there's a possibility IQ
10 falls away; I'm going to look at this secondary
11 evidence. You then need it to circle back and
12 see if that secondary evidence was strong
13 enough to drag down the IQ scores below the
14 line set by Alabama law.

15 JUSTICE GORSUCH: And the first error,
16 though, might be itself dispositive, it sounds
17 like.

18 MR. GRAVER: Yeah, they're independent
19 errors.

20 JUSTICE GORSUCH: Either one of which
21 is sufficient?

22 MR. GRAVER: Correct.

23 JUSTICE GORSUCH: Okay. And you agree
24 that at the end of the day, before a federal
25 court can grant habeas relief, it has to find

1 a violation of the Eighth Amendment here?

2 MR. GRAVER: Yes. Can I add one piece
3 to it, is that --

4 JUSTICE GORSUCH: If you must.
5 (Laughter.)

6 MR. GRAVER: The -- the wrinkle here
7 which I think is a bit difficult is the
8 innovation of Atkins --

9 JUSTICE GORSUCH: Yeah.

10 MR. GRAVER: -- which is to --

11 JUSTICE GORSUCH: Innovation. That
12 was the word I was looking for.

13 (Laughter.)

14 MR. GRAVER: -- which is to identify a
15 federal rule, a general rule against executing
16 intellectually disabled, but largely
17 outsourcing its definition to state law.

18 JUSTICE GORSUCH: At -- at -- at
19 bottom, though, I agree with that. That's an
20 innovation for sure. But it was trying to give
21 some breathing room to states.

22 MR. GRAVER: Mm-hmm.

23 JUSTICE GORSUCH: And there has to be
24 a floor, an Eighth Amendment floor, beneath all
25 that breathing room, right?

1 MR. GRAVER: Yes.

2 JUSTICE GORSUCH: Presumably. And
3 before a federal habeas court can grant relief,
4 I would have thought you have to find a
5 violation of federal law.

6 MR. GRAVER: Yeah, I think that -- you
7 know, make of it what you will, but I think the
8 -- the formal way in which it would work is
9 there's a violation of Atkins, federal,
10 because, one way or another, either met or did
11 not meet, or not -- whether or not you
12 satisfied Atkins turns on whether you satisfied
13 state law.

14 JUSTICE GORSUCH: Even if state law is
15 well above the Eighth Amendment floor?

16 MR. GRAVER: Oh, I understand. In
17 that, I think the answer would be probably yes,
18 although I think it's difficult.

19 JUSTICE GORSUCH: Really? Is it that
20 difficult?

21 MR. GRAVER: Well, I think that states
22 have broad discretion to set -- I do think at
23 some point -- what I will say -- you know, let
24 me take that back just a little bit.

25 JUSTICE GORSUCH: I would think you

1 would want to.

2 MR. GRAVER: Yeah. That states are
3 free to be more protective --

4 JUSTICE GORSUCH: Right.

5 MR. GRAVER: -- than what the Eighth
6 Amendment requires.

7 JUSTICE GORSUCH: How many times have
8 we held that, right?

9 MR. GRAVER: A hundred percent. So,
10 for instance, what, you know, I meant to say is
11 imagine a state adopted the one low score rule
12 as a matter of state law. Whether or not you
13 violated that wouldn't necessarily implicate
14 the Eighth Amendment because it's more
15 protective than what the Eighth Amendment would
16 require.

17 JUSTICE GORSUCH: Exactly. And so --

18 MR. GRAVER: Yeah.

19 JUSTICE GORSUCH: -- before a habeas
20 court could grant relief, it would still have
21 to go beyond that and find a violation of the
22 Eighth Amendment.

23 MR. GRAVER: Yes.

24 JUSTICE GORSUCH: Okay. I would --
25 I'm glad we got to that.

1 Okay. And then what do you think
2 about my -- the -- the holding that I suggested
3 to your friend from Alabama, you know, looking
4 at what Hall and Moore and trying to figure
5 out, because I agree there is some confusion
6 and that's why we took the case, the QP we did,
7 was to try to sort some of that out, that under
8 Atkins, states can implement the first prong
9 however they want as long as they don't treat a
10 single low score -- a single score in the low
11 70s as decisive, Hall, or use facts extraneous
12 to IQ scores to outweigh a low score, Moore.

13 Is that a correct and -- and fair
14 summary of the law that would provide guidance,
15 do you think?

16 MR. GRAVER: A hundred percent.

17 JUSTICE KAVANAUGH: On the -- on the
18 constitutional floor that you were just
19 exploring, I want to ask the questions to you
20 that I was exploring with Alabama's counsel.

21 If the median is above 70, I
22 understood them to say that you -- the
23 defendant cannot make out a successful Eighth
24 Amendment claim even if they might have
25 something under state law.

1 Do you agree with that?

2 MR. GRAVER: I don't think that the
3 Eighth Amendment necessarily speaks to that one
4 way or another. I mean, again, I think --

5 JUSTICE KAVANAUGH: So you don't agree
6 with that then?

7 MR. GRAVER: Well, I think that the
8 standard for what the Eighth Amendment is at
9 least under Atkins is going to only -- the --
10 the Eighth Amendment strictures are only going
11 to reach as far as a nationwide consensus
12 mandates. So, when it comes to those specific
13 issues, to the extent there's no nationwide
14 consensus on the question, no, I don't think
15 you run afoul of that.

16 JUSTICE KAVANAUGH: So what happens
17 when the median is above 70 or when the -- I
18 assume you're going to have the same answer on
19 the overlap as well. So the overlap approach,
20 let's say, as here, 73 to 77, they're saying,
21 when that's the case, you cannot make out a
22 successful Eighth Amendment claim, period.

23 MR. GRAVER: I think that -- right.

24 JUSTICE KAVANAUGH: Do you agree
25 with -- do you agree with him on that?

1 MR. GRAVER: So I agree that it's
2 practically dispositive under Alabama law.

3 JUSTICE KAVANAUGH: Yeah, you said
4 that. I -- I wrote that down, practically
5 dispositive. What does practically as opposed
6 to legally dispositive mean?

7 MR. GRAVER: Because I think that it's
8 not to say that -- that there's some per se
9 legal error to moving on to other evidence in
10 light of the source --

11 JUSTICE KAVANAUGH: Could the other
12 evidence then, when you move on, if you're
13 saying they can move on or over the state's
14 objection, you're saying the other evidence in
15 some circumstances could outweigh the scores
16 even when the median's above 70 --

17 MR. GRAVER: This is -- yeah.

18 JUSTICE KAVANAUGH: Let me finish --
19 or when the range is something like 73 to 77,
20 in those circumstances, unlike the state,
21 you're saying the other evidence could outweigh
22 in some cases?

23 MR. GRAVER: I'm not saying it could
24 outweigh. I think there's a difference between
25 a constitutional rule as to whether or not you

1 need to consider it, but I think, in a
2 circumstance where you have consistent scores
3 that are in the high 70s, this is what I mean
4 by practically dispositive.

5 JUSTICE KAVANAUGH: Well, if you're
6 saying that you could consider it, but it's not
7 dispositive like the state says, then I'm
8 trying -- is this just for --

9 MR. GRAVER: I think this --

10 JUSTICE KAVANAUGH: -- going through
11 the motions or what -- what --

12 MR. GRAVER: -- I think this is a
13 product of -- again, this is going to be a
14 product of state experimentation. If you have
15 a totality-of-the-circumstances inquiry in some
16 measure, it doesn't mean all the evidence is
17 equally important.

18 So, even if you decide to look at
19 other evidence for one reason or another, the
20 IQ scores might be so strong that there's no
21 realistic possibility that that other evidence
22 is going to drag the IQ scores down.

23 JUSTICE KAVANAUGH: If the -- and I'll
24 ask it again. If the median's above 70, the
25 Court -- the state says end there, you're

1 saying no, you can go on to consider the other
2 evidence, the defendant can have you go on to
3 consider the other evidence.

4 In some cases, can the other evidence
5 outweigh the scores even when the median is
6 above 70?

7 MR. GRAVER: So, yeah, I can imagine a
8 circumstance hypothetically where -- so suppose
9 you have --

10 JUSTICE KAVANAUGH: So that's a yes.
11 That's -- okay, that's different from the
12 state.

13 MR. GRAVER: Again, I think that, you
14 know, so imagine a circumstance where you have
15 two scores of 71 and then you come in and
16 essentially have this -- you have an expert
17 say, well, the content of those IQ exams tested
18 A, B, and C aspects of intellectual
19 functioning. I have all of these, you know,
20 neuropsychological batteries that test other
21 aspects of intellectual functioning and they're
22 really, really low.

23 I could imagine that being, you know,
24 in a state that has decided to adopt the
25 totality-of-the-circumstances inquiry, that

1 would be a kind of circumstance where, yes, the
2 other evidence could put you below the line.

3 JUSTICE KAVANAUGH: So I think it
4 would be constitutional error then for a court
5 to say the median is above 70 -- is 73, that's
6 the end of it, you can't prevail on an Eighth
7 Amendment claim. That would be constitutional
8 error?

9 MR. GRAVER: I would be -- so I think
10 that I would be reluctant to phrase this in
11 terms of median and composite, whatever it
12 might be. And this is what I was trying to get
13 at a little bit with Justice Kagan, is that
14 there's some point in Hall I think blesses this
15 practice. There's some point where the
16 possibility of your scores dipping below --
17 dipping to 70 or below is remote enough that
18 you can rely on IQ exclusively.

19 I don't think this Court's precedents
20 paints with a bright line. It certainly
21 doesn't mandate at this point a specific median
22 number, but I think that's the nature of the
23 inquiry, is that with some --

24 JUSTICE KAVANAUGH: But that's where
25 you differ from the state. The state really

1 was pretty definitive on that and you're not,
2 which is fine. I'm just trying to explore this
3 because we're going to have to dig through a
4 lot in this case to explore the difference.

5 MR. GRAVER: Right. I'll -- I'll
6 let -- but, again, this is, you know, returning
7 to the part of is it a real-world matter, I
8 don't think it's going to make any difference
9 here with the idea of --

10 JUSTICE KAVANAUGH: Here meaning in
11 this case?

12 MR. GRAVER: Correct.

13 JUSTICE KAVANAUGH: Okay. That's all
14 I need. Thank you.

15 JUSTICE BARRETT: Mr. Graver --

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Mr. Graver, I just
19 want to clarify. It seemed to me that what you
20 were telling Justice Kavanaugh might have been
21 different than what you said to Justice
22 Gorsuch, and I want to make sure that I didn't
23 misunderstand that.

24 When Justice Gorsuch read you his
25 proposed rule statement, it didn't include

1 anything about necessarily having to consider
2 the evidence of adaptive functioning. But I
3 understood you to tell Justice Kavanaugh that
4 you would have to go on to consider such
5 evidence and that in some circumstances, it
6 could outweigh the IQ scores even if they were
7 in, say, the, you know, 73 to 78 range.

8 Is there a difference, or am I
9 misunderstanding this?

10 MR. GRAVER: I think a little bit.
11 The part that I would want to focus on is the
12 adaptive functioning piece, is that there's
13 some aspect, I think, as we were getting at,
14 there's some rule of Hall, taking Hall at face
15 value that I -- at some point, IQ scores alone
16 can't be the only thing you're looking at.

17 I do think states have some discretion
18 after that to structure what the other evidence
19 is. And I would imagine that a rule that, for
20 instance, focuses just on conventional evidence
21 of intellectual functioning would be
22 constitutional.

23 The way in which that -- if a -- if a
24 state imposed that substantive standard, the
25 question that would follow is, well, are Hall's

1 references to adaptive functioning, that dicta
2 itself, is that something this Court wants to
3 give the force of law that you need to consider
4 this bucket of evidence in particular. I don't
5 see any constitutional mandate to do that.

6 But I think the only point is is that
7 so long as your scores touch a certain level,
8 perhaps IQ can't be the only thing you're
9 considering at prong 1.

10 JUSTICE BARRETT: Okay.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: I have to say I
14 think that the arguments and assertions in this
15 case are all over the map and very hard to
16 follow, so I'm trying -- trying to understand
17 how and to what extent the district court erred
18 in this case given the law as it existed at the
19 time the district court ruled as opposed to the
20 law that Alabama wishes it had enacted or the
21 cases that it wishes it had already put into
22 place with respect to standards that it's
23 coming up with now.

24 So I understood you to say that there
25 were two errors, something about likelihood or

1 possibility -- versus possibility, and the
2 second is one -- the one I'm most focused on,
3 which is that under Alabama law, you understand
4 that the law is and was at the time of the
5 district court that if you're looking at
6 secondary evidence, was the secondary evidence
7 strong enough to drag down what you had gleaned
8 previously from the IQ scores.

9 Is that -- is that what you understood
10 Alabama law to be and, therefore, it was an
11 error for the district court not to apply it?

12 MR. GRAVER: Yeah, and I don't think
13 it's an IQ-specific insight. I think it's just
14 a common-sense point about the nature of how
15 preponderance would work.

16 JUSTICE JACKSON: I just want to know
17 if it existed as a standard so that we can say
18 the district court erred.

19 MR. GRAVER: Yeah. I think that when
20 you need to show that some -- a fact is more
21 likely than not in light of the totality of the
22 evidence, you can't then exclude the most
23 probative evidence as part of that weighing.
24 So the issue here that the district court did
25 is it allow -- it said that the IQ scores

1 allowed it to move on to other evidence, but
2 then it forgot about the first half of the
3 scale. It never looked at the collective
4 weight of the IQ scores all above 50 to see --

5 JUSTICE JACKSON: But it did -- it did
6 entertain expert testimony. And this is the
7 second part of my question to you, is I'm
8 trying to understand, there is a nub of this
9 that's a question of fact, right? Is this
10 person intellectually disabled? And I don't
11 take it that you disagree that experts are
12 going to be involved somehow in making this
13 assessment, right?

14 MR. GRAVER: Right.

15 JUSTICE JACKSON: They're not only
16 testing, but they're also looking at other
17 evidence to the extent courts allow them to.

18 So what I understood happened in this
19 case is we had a series of experts come in,
20 evaluate not only the test scores but also the
21 other evidence, and testify as to whether or
22 not they thought this person had an
23 intellectual disability.

24 Now I appreciate that the state's
25 expert said no, but the other experts said yes,

1 and the court looked at that and made a
2 decision.

3 I don't understand why that's error
4 from the court's perspective when we -- we --
5 we ordinarily allow for hearings with evidence
6 and testimony that goes to issues of fact and
7 the court decides.

8 MR. GRAVER: Right. So I don't -- I
9 wouldn't think about this as a battle of the
10 experts cases because --

11 JUSTICE JACKSON: But why not? We had
12 experts --

13 MR. GRAVER: Right.

14 JUSTICE JACKSON: -- who testified to
15 this issue.

16 MR. GRAVER: That's the part where I
17 disagree with you. No expert testified to
18 whether or not Respondent satisfied his burden
19 at prong 1 as understood by Alabama law. All
20 of the evidence about intellectual functioning
21 was measured against clinical definitions that
22 are different in kind from what Alabama asked.

23 So, again, the experts offered in
24 their insights --

25 JUSTICE JACKSON: Okay. Can you point

1 to a case in which Alabama says, Experts, you
2 can only testify for the purpose of our law to
3 the standard as we are now articulating it?
4 Because, to the extent that Alabama sat there
5 and heard the experts testifying and didn't
6 object on the basis that you're saying or
7 didn't argue to the district court there's a
8 problem with this testimony because he's
9 testifying to things that Alabama law doesn't
10 consider, I think you may have waived this.

11 MR. GRAVER: No, I -- I think just the
12 basic point is that it's not an all-or-nothing
13 inquiry either way.

14 JUSTICE JACKSON: I'm just trying to
15 understand what was argued below. If you're
16 now saying the problem with the -- with the
17 testimony before the district court of the
18 experts is that it wasn't focused in the way
19 that Alabama law requires, where's the
20 objection from Alabama below saying that?

21 MR. GRAVER: The fact that it doesn't
22 answer the entire legal analysis does -- or
23 legal question before the district court does
24 not mean the expert testimony is not relevant.
25 But the district court then needs to take that

1 evidence, put it into the equation as
2 structured by Alabama law. So what I mean by
3 that is that it is true that the expert said,
4 well, this secondary evidence has a bit of a
5 downward pull, but that is the --

6 JUSTICE JACKSON: The expert did say?
7 You --

8 MR. GRAVER: But that is the start,
9 not the end of the analysis. And that's the
10 key problem with the district court, is that it
11 never looked back to see the weight of the
12 thing that it is pulling because, essentially,
13 what it said is this downward pull is
14 dispositive. It never returned to the
15 collective weight --

16 JUSTICE JACKSON: All right.

17 MR. GRAVER: -- of the IQ scores as
18 part of that analysis.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Waxman.

23 ORAL ARGUMENT OF SETH P. WAXMAN

24 ON BEHALF OF THE RESPONDENT

25 MR. WAXMAN: Mr. Chief Justice, and

1 may it please the Court:

2 Just to clarify one thing, the
3 statutory standard in Alabama for prong 1 is
4 substantially sub-average intellectual
5 functioning. Now courts sometimes use the
6 term, improperly so, "true IQ of 70 or below."
7 But every court in Alabama and this Court and
8 every other court in every other state that I
9 am aware of understands that raw observed test
10 scores is not the definition of true IQ.

11 Now, in deciding whether a defendant
12 has carried his burden to prove that he suffers
13 from substantially sub-average intellectual
14 functioning, Alabama law, like near -- like
15 that of nearly all other states, all other
16 states with the qualified sometimes exception
17 of Oklahoma, requires courts to evaluate all
18 probative evidence as to intellectual
19 functioning offered by either side. That
20 includes evidence of intellectual functioning
21 other than IQ test scores at least where a
22 court, considering expert testimony, concludes
23 that those scores alone don't decide the issue.

24 The courts below did exactly that by
25 evaluating evidence of Smith's significant

1 impairment on other neuropsychological tests of
2 intelligence. This is pages 88 and 90 to 92 of
3 the Petition Appendix. His grade school
4 records, which showed that on every measure he
5 was two to four years below grade average,
6 culminating in a diagnosis of mental
7 retardation in the seventh grade.

8 The -- sorry. The warden and the
9 Solicitor General ask you to reverse the lower
10 court's faithful application of Alabama law.
11 And I am holding all 12 decided, reported cases
12 on this issue post-Hall in Alabama, and there
13 is not a single case, including the two that my
14 friend mentioned, in which the court said we're
15 only going to look at the test scores, we are
16 not going to consider other evidence.

17 In Perkins itself, which is the lead
18 Supreme Court case, there -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 JUSTICE THOMAS: Before you go on to
21 the -- another granular argument --

22 MR. WAXMAN: I'm not leaving.

23 JUSTICE THOMAS: -- what is precisely
24 in -- to your understanding, is Alabama law?

25 MR. WAXMAN: Alabama law --

1 JUSTICE THOMAS: Just -- just -- just
2 the pure law, not this case. What does it
3 require?

4 MR. WAXMAN: Alabama law requires that
5 in evaluating whether an individual is
6 intellectually disabled, three prongs must be
7 met, substantially sub-average intellectual
8 functioning, substantially sub-average adaptive
9 functioning, and onset before the age of 18.
10 And the -- the Alabama Supreme Court in Smith
11 versus State specifically said and subsequently
12 repeated that Al -- the Alabama legislature has
13 adopted the most liberal definition of
14 intellectual disability for purposes --

15 JUSTICE THOMAS: Okay.

16 MR. WAXMAN: -- of the Eighth
17 amendment.

18 JUSTICE THOMAS: So the -- excuse me.
19 But do you agree that compliance with Alabama
20 law would be compliance with the Eighth
21 Amendment?

22 MR. WAXMAN: In this instance, yes. I
23 could imagine a situation in which, you know,
24 Alabama said we're just never going to execute
25 anybody who gets a score --

1 JUSTICE THOMAS: Well, let me just put
2 it a different way. Do you think that the
3 man -- that the statement or, in theory, the
4 pure Alabama law, not in application here, is
5 enough to comply with the Eighth Amendment?

6 MR. WAXMAN: In this instance -- given
7 the way that Alabama has defined intellectual
8 disability, yes.

9 JUSTICE THOMAS: Okay.

10 MR. WAXMAN: In other words, to go to
11 Justice Gorsuch's question of both of my
12 friends earlier, of course, a federal court --
13 and, here, a court is not sitting -- this is
14 not a post-conviction, you know, AEDPA-type
15 review. The -- there -- the trial court never
16 held this hearing and heard this evidence.

17 It is certainly true that a federal
18 court cannot reverse a state sentence unless it
19 violates the Constitution. That is exactly
20 what both lower courts held. And that has got
21 to be the case because, as Atkins explains,
22 federal constitutional law in this area
23 incorporates state law.

24 JUSTICE ALITO: Do you think the
25 Eighth Amendment means something different in

1 Alabama, could mean something different in
2 Alabama than it means in, let's say, Florida or
3 Texas?

4 MR. WAXMAN: No. I mean, I think --

5 JUSTICE ALITO: Okay. So then --

6 MR. WAXMAN: -- I -- I -- I will --
7 may I just add one sentence?

8 JUSTICE ALITO: Yes, sure.

9 MR. WAXMAN: As we've pointed out in
10 our brief in the appendix, and I'm happy to
11 answer any questions about any particulars,
12 there is no state -- every state that has
13 considered multiple test scores post-Hall, and
14 it may also be true pre-Hall, I don't know,
15 with the possible -- with the limited exception
16 of Oklahoma, and Oklahoma only when there's one
17 score above 76, has said, if there -- if there
18 are multiple scores whose SEM ranges
19 individually reach 70 or below, you consider
20 other evidence that is relevant to intellectual
21 functioning.

22 JUSTICE ALITO: If -- if the --

23 MR. WAXMAN: That is a consensus.

24 JUSTICE ALITO: -- if the Eighth
25 Amendment has to mean the same thing in every

1 state, then there is the conundrum of Hall's --
2 I'm sorry -- of Atkins' reference to the
3 discretion that is afforded to the states. And
4 one possible interpretation of that seems to be
5 the one that you are advocating, which is that
6 federal law somehow incorporates state law so
7 that in -- in determining whether there's an
8 Eighth Amendment violation, the court is to
9 determine whether there was a violation of
10 state law.

11 But isn't it another -- isn't another
12 possible interpretation of that the following?
13 That the Eighth Amendment, as understood in
14 Atkins, gives the states discretion, but there
15 is an Eighth Amendment floor, and the Eighth
16 Amendment floor is what cannot be -- you can't
17 go below the floor. And the floor is whatever
18 a -- a -- a definition of intellectual
19 disability, procedures for determining
20 intellectual disability that are impermissible.

21 And so long as a state does not go
22 below that floor, a state court does not go
23 below that floor, there's no Eighth Amendment
24 violation.

25 MR. WAXMAN: I'm not sure -- it seems

1 to me so long as the state court does not apply
2 their -- the "means to enforce this
3 constitutional rule," which is the language of
4 Atkins, in a way that is inconsistent with
5 the -- the Atkins principle that persons whom a
6 court, interpreting court law that itself is
7 applying the Eighth Amendment standard,
8 considers to be satisfying of all three prongs.
9 In other words, what the -- what --

10 JUSTICE GORSUCH: So I -- I take -- I
11 take that as an agreement that -- that it would
12 be possible for a state to come up with
13 procedures that would violate the Eighth
14 Amendment, right? I mean, you wouldn't want to
15 rule that possibility out?

16 MR. WAXMAN: Oh, of course. That was
17 exactly what happened in Hall. And in Moore,
18 for that matter, and in Brumfield. And in
19 every single one of those cases, the court
20 remanded to the state courts which then heard
21 all of the relevant evidence, not just IQ test
22 scores, all of the relevant evidence, and
23 concluded that the defendant had, in fact,
24 satisfied his burden to show all three prongs.

25 JUSTICE BARRETT: Mr. Waxman, if a

1 state law goes above what we might say the
2 Eighth Amendment floor is, and a federal habeas
3 court deviates from what state law requires,
4 does it violate the Eighth Amendment?

5 MR. WAXMAN: No. I mean, the -- the
6 -- the example would be, let's say a state
7 said: Look, we've read all the other cases,
8 but in our state, we're not going to execute
9 anybody who has a true IQ below 80. And we're
10 going to hear all the evidence, but a true IQ
11 below 80, you win under state law.

12 A federal court couldn't say --

13 JUSTICE GORSUCH: Couldn't grant
14 habeas in that circumstance.

15 MR. WAXMAN: Right.

16 JUSTICE GORSUCH: Yeah.

17 MR. WAXMAN: Right. Unless there was
18 a compelling argument that the true IQ was
19 below 70. Yeah.

20 JUSTICE GORSUCH: Right. Right. But
21 it might be a violation of state law, but it
22 isn't a violation of federal Constitution.

23 MR. WAXMAN: That's right. But what
24 we have here is a situation in which every
25 state, with the limited, very limited exception

1 of Oklahoma, says you can -- IQ test scores are
2 not the same as -- are not equivalent to
3 substantially sub-average intellectual
4 functioning because that is a condition, not a
5 test score. They are highly probative,
6 considering the standard error of measurement,
7 of what actual IQ is, but --

8 JUSTICE BARRETT: So we don't have to
9 really consider Alabama law. Because what
10 you're articulating -- what you're articulating
11 is the Eighth Amendment standard as you see it
12 based on what you're pointing to in the
13 consensus of the states.

14 But just to kind of clarify the
15 position on this thing we have been going back
16 and forth with about what is the role of state
17 law, really, Alabama law here does not matter
18 to your argument?

19 MR. WAXMAN: Alabama law matters a
20 great deal to my argument because, as this
21 Court has -- has taught, we leave it to the
22 states to -- to apply appropriate means for
23 enforcing the Eighth Amendment guarantee. And
24 that is what the Alabama appellate courts have
25 said repeatedly that they are doing in

1 considering both evidence of IQ test scores,
2 if there are any, and where those scores are
3 determined by -- upon expert testimony to be
4 inconclusive, other evidence of intellectual
5 functioning, including in -- in this case four
6 other psychometric tests that test intellectual
7 functioning, and a history where, in the
8 seventh grade, he was diagnosed, medically
9 diagnosed as mentally retarded.

10 And considering all those factors, the
11 court found -- both the district court and the
12 court of appeals made clear on remand that with
13 respect to evidence of intellectual
14 functioning, including but not limited to test
15 scores, he satisfied prong 1. The court of
16 appeals then went on to say in its opinion on
17 remand for this Court that "the additional
18 evidence" -- I am quoting from page 8A of the
19 joint appendix, which is quoting from Hall --
20 the addition -- "additional evidence of Smith's
21 adaptive deficiencies plausibly supports the
22 district court's reading that although Smith
23 scored above" 80 -- "70 in IQ tests, his actual
24 functioning is comparable to that of
25 individuals with a lower score."

1 JUSTICE BARRETT: Thank you,
2 Mr. Waxman.

3 MR. WAXMAN: Thank you.

4 JUSTICE KAVANAUGH: Putting -- putting
5 aside how it applies in this case, the SG's
6 methodological approach, as I understood it, I
7 want to make sure whether you agree or disagree
8 with it, what I understood the Solicitor
9 General to say is that the scores -- start with
10 the scores, but then you have to go on,
11 usually, maybe always, to consider all the
12 other evidence, but then when you make the
13 final evaluation, you can't forget about the
14 scores as part of the overall analysis.

15 MR. WAXMAN: That is -- I agree
16 100 percent with that. And the district court
17 did nothing of the sort.

18 JUSTICE KAVANAUGH: Right. On that
19 latter part, I know you disagree.

20 MR. WAXMAN: Yeah, yeah.

21 JUSTICE KAVANAUGH: But on the
22 methodology, you -- anything you disagree with
23 the Solicitor General on?

24 (Laughter.)

25 JUSTICE KAVANAUGH: I'm not -- as I

1 just --

2 MR. WAXMAN: My memory is even
3 worse --

4 JUSTICE KAGAN: Okay. I will push --
5 I will push it a little further. I mean, it's
6 possible that the place you do disagree is I
7 think that the Solicitor General had an
8 exception for scores that were -- this is
9 his -- in the brief, you know, many 90 scores.
10 And he said, you know, the scores can be such
11 that you wouldn't have to. I think he had that
12 exception --

13 MR. WAXMAN: I --

14 JUSTICE SOTOMAYOR: -- that caveat.

15 MR. WAXMAN: I agree with that. I
16 mean, you can take an example, for example, of
17 somebody -- I'm not sure if I have exactly got
18 his hypo right, but let's say four 90s and one
19 71.

20 JUSTICE KAGAN: Right.

21 MR. WAXMAN: The court would certainly
22 hear expert testimony on that. There may very
23 well be expert testimony, maybe even agreement,
24 that the 71 is, in fact, the result of
25 malingering or that it is a statistical

1 outlier, and taking into account other evidence
2 relevant to intellectual functioning should be
3 disregarded.

4 But I think a constitutional -- a
5 state court that said: Come on, the guy has
6 four 90s and one 71, and I've heard expert
7 testimony on both sides, and I find on the
8 basis of that that the defendant has not
9 satisfied his burden of proving by a
10 preponderance.

11 What we have here are four --

12 JUSTICE ALITO: On that hypothetical,
13 could --

14 MR. WAXMAN: If I may just finish my
15 sentence?

16 JUSTICE ALITO: Yes, sure.

17 MR. WAXMAN: What we have here are two
18 experts who said four of the five scores are
19 within the range of intellectual disability.
20 The -- the district court itself specifically
21 found that. And so we're not in that
22 hypothetical range, but I agree with the
23 Solicitor General.

24 JUSTICE ALITO: On that hypothetical,
25 three or four sentences later -- on that

1 hypothetical --

2 (Laughter.)

3 JUSTICE ALITO: Would it be --

4 MR. WAXMAN: I couldn't contain
5 myself. I'm sorry. I apologize.

6 JUSTICE ALITO: I know. Never.

7 Would it be permissible for a district
8 court to say: Well, you got four 90s and one
9 71, that's enough?

10 MR. WAXMAN: That's enough, what?

11 JUSTICE ALITO: That's enough to
12 show -- to -- to show substantial,
13 significantly substantial, substandard --
14 significantly substandard intellectual
15 functioning. It could do that, in that
16 situation?

17 MR. WAXMAN: I mean, it -- the -- the
18 review is for clear error. And unless there
19 were some compelling testimony to discount the
20 four 90s, it would be clear error.

21 JUSTICE ALITO: There is no situation
22 in which IQ scores could be -- in and of
23 themselves, be sufficient. So the court could
24 say look, I've looked at these IQ scores, and
25 that's enough.

1 The statistical possibility that the
2 true IQ is below 70 is so small that the
3 defendant can't possibly prevail?

4 MR. WAXMAN: I mean, I'm not --

5 JUSTICE ALITO: The court always has
6 to hear additional evidence about adaptive
7 functioning?

8 MR. WAXMAN: I don't think that's the
9 case. And, in fact --

10 JUSTICE KAGAN: I think you said just
11 the opposite, is that not right? You said the
12 court in that case would not have to look at
13 adaptive functioning evidence.

14 MR. WAXMAN: Right. I mean, if
15 there -- there's going to be expert testimony
16 pro and con with respect to the administration
17 of these tests. And if the court hears the
18 expert testimony and says that, on balance, I
19 credit the expert who says that the 71 was a
20 result of malingering, or that the 71 is an
21 outlier, or that the 71 tested, as my friend
22 the Solicitor General's assistant says, tested
23 certain aspects of intellectual functioning but
24 not others that are really important and it
25 should be discounted, a district court that

1 credited that testimony would not err under the
2 Eighth Amendment.

3 JUSTICE ALITO: But what you say --

4 MR. WAXMAN: So long as it was
5 consistent with state law.

6 JUSTICE ALITO: What you say in your
7 brief is that there is near unanimous consensus
8 on the states that multiple IQ scores must be
9 assessed holistically in light of all relevant
10 evidence.

11 MR. WAXMAN: That's correct. And --

12 JUSTICE ALITO: So if there are
13 multiple IQ scores, there are five 100s and one
14 71, you still -- the court can't just say the
15 defendant has not -- cannot prove that he's
16 intellectually disabled. You would -- the
17 court would have to hear additional evidence.

18 MR. WAXMAN: The court would certainly
19 have to hear expert testimony about the
20 reliability of the -- what are we up to now,
21 five -- five 100s? But a court would certainly
22 be within -- assuming state law permitted it, a
23 court would certainly be within its -- its
24 rights to say there is no other evidence of
25 intellectual functioning that could reasonably

1 convince me that this man, who fall -- doesn't
2 fall remotely within the borderline, even
3 taking the most generous standard error of
4 measurement, and I'm ending my inquiry there.
5 It would have to --

6 JUSTICE KAGAN: So --

7 MR. WAXMAN: You would have to be able
8 to show evidence on one side or the other that
9 the test scores are, in fact, properly -- were
10 properly administered and reliably interpreted.
11 And there are Alabama cases in which the state
12 has offered extraneous evidence, that is,
13 evidence other than test scores, that go to
14 intellectual functioning to say even though he
15 scored within the range of 69, he's not
16 intellectually disabled.

17 JUSTICE JACKSON: And so I think your
18 -- your arguments or your responses to Justice
19 Alito are all really heavily focused on the
20 fact that what the court is actually doing is
21 hearing evidence, that the court is actually
22 assessing making this determination about
23 intellectual functioning in light of expert
24 testimony about these things.

25 And so it seems kind of odd to have

1 rules that would be rigid with respect to how
2 these particular experts are testifying or what
3 the impact of the various scores are in this
4 environment, I think.

5 I mean, am I right about -- like
6 the -- part of the confusion that I'm having is
7 that the -- you know, Alabama and the SG seem
8 to want to remove the evidentiary aspect of
9 this and make it into just a question of -- of
10 law as though the court, without evidence, is
11 just making this decision, when, in fact, the
12 court is hearing from experts who have looked
13 at the test scores and all of the evidence and
14 are testifying as to their beliefs regarding
15 this particular legal criteria.

16 MR. WAXMAN: Let --

17 JUSTICE JACKSON: And then the court
18 is deciding.

19 MR. WAXMAN: Let me make two points in
20 response to that, Justice Jackson.

21 First of all, it's too late and
22 irrelevant for me to pick sides in Moore versus
23 Texas, but what the district court did in this
24 case is precisely what the Chief Justice in
25 dissent said was properly done in Texas. A

1 court hears the evidence, all probative,
2 relevant, and admissible evidence on both
3 sides, and makes a determination against the
4 standard, the Eighth Amendment standard, with
5 whatever procedural or substantive applications
6 that state law provides.

7 And in this -- in this particular
8 case, what -- what I understand the state to be
9 saying is, look, as a matter of Alabama law,
10 you know, whether you're talking about, I don't
11 know, the -- the overlap or the average or the
12 median or whatever, you know, if you don't have
13 an actual score at 70, you don't get to -- it
14 is error, clear error, for the court to hear
15 other evidence that is probative of
16 intellectual functioning, including other
17 psychometric tests that test intelligence, as
18 well as adaptive functioning, and the fact that
19 the guy was diagnosed as mentally retarded in
20 the seventh grade.

21 Of course, a court should be able to
22 determine that. There is -- there's just no
23 warrant for this Court to announce a
24 constitutional rule binding on all states that
25 precludes consideration of evidence that

1 Alabama and the other states and the medical
2 community properly considers probative of
3 intellectual functioning.

4 JUSTICE KAVANAUGH: I don't -- I think
5 that would be setting a floor for all states,
6 not binding the states. The states could
7 always go above the floor. But, in any event,
8 I understood Alabama and the Solicitor General
9 to have different views on that and that
10 Alabama has that view that you just said, that
11 if the scores -- the median or the overlap is
12 above 70, then that's it; you can't make out a
13 successful Eighth Amendment claim.

14 I understood the Solicitor General to
15 say, no, you still go on and consider the other
16 evidence, but don't forget about the scores. I
17 gather methodologically you agree with the
18 Solicitor General. You think Alabama is wrong
19 on that.

20 MR. WAXMAN: Well, I think --

21 JUSTICE KAVANAUGH: I think --

22 MR. WAXMAN: I --

23 JUSTICE KAVANAUGH: It's not really a
24 question, but you can say yes or no to that.

25 (Laughter.)

1 MR. WAXMAN: Yes, because, number one,
2 there was -- there is no Alabama case that --
3 and -- and there was no evidence in this case
4 with respect to whatsoever applying some
5 aggregate score as the test for true IQ,
6 absolutely not. Now --

7 JUSTICE KAGAN: But then -- but then
8 --

9 MR. WAXMAN: -- median, you know --

10 CHIEF JUSTICE ROBERTS: Counsel, let
11 the Justice --

12 MR. WAXMAN: Oh, I'm sorry, Justice --

13 JUSTICE KAGAN: You -- you can have
14 one sentence.

15 (Laughter.)

16 MR. WAXMAN: I will -- I will reserve
17 my one sentence to answer your question. And I
18 apologize.

19 JUSTICE KAGAN: Mr. Graver doesn't get
20 a chance to stand up and tell me whether I'm
21 wrong about my summary of his, but then I think
22 he would say, okay, you agree on that, but --
23 but he says that the court here made two
24 fundamental errors. One is it treated the
25 preponderance standard as a possibility

1 standard, and the second is it never -- it
2 thought that it was not permissible for it to
3 get back around to the scores. And he says
4 that -- those were the two errors.

5 Were they? Is that right?

6 MR. WAXMAN: No. I think --

7 JUSTICE KAGAN: Mr. Graver --

8 MR. WAXMAN: -- I think that the
9 district court's opinion refutes both of those
10 contentions. The district court plainly and
11 expressly found, by a preponderance of the
12 evidence, that he satisfied prongs 1, 2, and 3
13 independently.

14 I don't even remember what the second
15 part is, but that would be --

16 JUSTICE KAGAN: No, so the second part
17 is important, because Mr. Graver says that the
18 court thought that it couldn't get back around
19 --

20 MR. WAXMAN: Oh.

21 JUSTICE KAGAN: -- and say, look,
22 there are five scores here, most of them don't
23 reach the 70 threshold, that sort of thing.

24 MR. WAXMAN: I mean, the district
25 court opinion will speak for itself. The court

1 -- you know, the court said that he -- the
2 court's opinion discusses each test score. It
3 discusses each of the four experts' testimony.
4 It discusses what the experts showed about the
5 other psychometric intelligence tests, about
6 his history, and what each expert said about
7 that, and then concluded, applying Alabama's
8 standard of substantially significant --
9 substantially sub-average intellectual
10 functioning, that he -- by a preponderance, he
11 had met that standard.

12 JUSTICE GORSUCH: You talk about that
13 standard as Alabama's. That's straight out of
14 Atkins, isn't it?

15 MR. WAXMAN: It's straight out of the
16 Alabama statute.

17 JUSTICE GORSUCH: Also straight out of
18 Atkins, isn't it, and Hall --

19 MR. WAXMAN: Well --

20 JUSTICE GORSUCH: -- and Moore?

21 MR. WAXMAN: -- Atkins --

22 JUSTICE GORSUCH: And you say it's the
23 same standard everybody, except for Oklahoma
24 uses it. So --

25 MR. WAXMAN: Well, Oklahoma uses --

1 JUSTICE GORSUCH: -- presumably, they
2 all -- all use it for a reason because it came
3 out of our decisions, right?

4 MR. WAXMAN: Well, no. The reason it
5 came out of Atkins was Atkins found that there
6 was unanimity among the expert practitioners
7 and associations.

8 JUSTICE GORSUCH: Fine. Whether the
9 -- the -- the chicken or the egg came first,
10 it's in Atkins.

11 MR. WAXMAN: We're in violent
12 agreement.

13 JUSTICE GORSUCH: All right. Thank
14 you.

15 JUSTICE SOTOMAYOR: Counsel,
16 Mr. Waxman, I don't do this often, but Justice
17 Gorsuch set out a -- a statement that he asked
18 the other side whether it was a holding that
19 they disagreed with.

20 You read something.

21 JUSTICE GORSUCH: I did.

22 JUSTICE SOTOMAYOR: Yes, you did.

23 JUSTICE GORSUCH: Do you want me to
24 read it again?

25 JUSTICE SOTOMAYOR: Please.

1 (Laughter.)

2 JUSTICE SOTOMAYOR: Because I'd like
3 Mr. Waxman --

4 MR. WAXMAN: I don't remember it, so I
5 appreciate --

6 JUSTICE SOTOMAYOR: No, and I took it
7 down and I can't find my notes now.

8 So could you please, if you'd do
9 that --

10 JUSTICE GORSUCH: I would -- I would
11 be delighted.

12 JUSTICE SOTOMAYOR: Thank you.

13 (Laughter.)

14 JUSTICE GORSUCH: The question is just
15 how to understand, which I've struggled with,
16 both Moore and Hall. And I read Hall as saying
17 that you cannot treat a single score in the low
18 70s as decisive. And I read Moore as saying
19 you can't use facts extraneous to IQ to
20 outweigh a low score. Fair?

21 MR. WAXMAN: Fair with the caveat that
22 extraneous to IQ -- well, no.

23 JUSTICE GORSUCH: I mean, that's what
24 the Court did --

25 MR. WAXMAN: If fair -- if what you

1 mean is extraneous to the question of what his
2 true intellectual functioning is --

3 JUSTICE GORSUCH: No, no, no.

4 MR. WAXMAN: -- yes.

5 JUSTICE GORSUCH: Yeah, it started
6 looking at things to try to outweigh a low
7 score. It started grabbing at other facts.

8 MR. WAXMAN: Well, it is -- it not
9 only -- it -- it -- I think it would be a due
10 process violation for a court to say the
11 evidence on the test scores is inconclusive,
12 but I'm not going to let you -- I'm not going
13 to let either the state or the defense put on
14 evidence.

15 I mean, this -- this Court has -- I
16 mean, Washington versus Texas and Crane versus
17 Kentucky and any number of other cases has --
18 basically stands for the proposition that you
19 can't artificially limit presentation of
20 evidence that is relevant, probative, and
21 admissible.

22 JUSTICE SOTOMAYOR: In Moore, counsel,
23 the two scores were 74 and 78, and the Court --
24 and we held the state court violated Hall when
25 it discounted the lower end of the SEM because

1 he was "malingering." There we held that when
2 there's an IQ below 70, with the SEM, that --
3 adjusted for the test standard error, then you
4 must permit evidence of whether clinically he
5 falls within the range of intellectual
6 functioning details, correct?

7 MR. WAXMAN: That is a correct
8 holding. And my understanding of the
9 disagreement between the majority and the --
10 and the dissent was, leaving aside the Briseno
11 factors, whether a district judge committed
12 clear error in determining the case the way --
13 determining the issue the way it did.

14 JUSTICE SOTOMAYOR: And so Justice
15 Gorsuch's second reading is wrong. We do
16 require clinical evidence, but the finder of
17 fact could rightly not be persuaded by it or it
18 could be persuaded by it. That's your point,
19 isn't it?

20 MR. WAXMAN: That's correct, unless
21 the Court concludes that I've got -- you know,
22 let's make it now ten IQ test scores, all of
23 which, both experts agree were properly
24 administered and reliable.

25 And in light of that finding, one

1 test score of 70, there is no -- there is no
2 evidence other than the testimony of the
3 experts that I would -- that could change my
4 mind that he has not met prong 1 --

5 JUSTICE SOTOMAYOR: But that's not --

6 MR. WAXMAN: -- but I think that --

7 JUSTICE SOTOMAYOR: -- the case here.

8 MR. WAXMAN: We're not in the same
9 time zone as that.

10 JUSTICE SOTOMAYOR: No, because we
11 have three tests, all of them --

12 MR. WAXMAN: Four.

13 JUSTICE SOTOMAYOR: Four, all of them
14 within the SEM. He could be 70 or below?

15 MR. WAXMAN: He could, and he, in
16 fact, demonstrated by a preponderance that he
17 is.

18 JUSTICE SOTOMAYOR: And, in fact,
19 Dr. King, whom they rely upon, the Petitioner's
20 testified that the scores were within
21 intellectual disability, but then he went to
22 other factors to say why he was -- he thought
23 he was functioning within.

24 MR. WAXMAN: Well, I don't -- I
25 don't -- I think Dr. King's testimony will

1 stand for itself. The district court found his
2 testimony to be less credible than the other
3 experts.

4 What he said is we have five scores
5 and they're all above 70. Four of them,
6 looking at the individual standard error of
7 measurement are within the range.

8 But he was asked a question by the
9 prosecutor: Are you aware of a theory by
10 Dr. Flynn that when there are multiple test
11 scores that are close together, the standard
12 error of measurement will be reduced? And he
13 said: Yes, I'm aware of that.

14 There was no testimony about what in
15 this case that standard error of measurement
16 would be, and it is inconsistent, flatly
17 inconsistent with what this Court said in Hall
18 and what -- and at least five cases Alabama
19 courts have done, which is always apply plus or
20 minus 5.

21 CHIEF JUDGE ROBERTS: Thank you,
22 counsel.

23 JUSTICE SOTOMAYOR: And, in fact, they
24 have rejected Flynn, correct?

25 MR. WAXMAN: I'm sorry?

1 JUSTICE SOTOMAYOR: The district court
2 reflected -- rejected the Flynn effect in this
3 case?

4 MR. WAXMAN: Yes. We're not relying
5 on the Flynn effect.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: It would help me to
11 get clarification of your position on a couple
12 of issues. I thought you -- I took from your
13 brief and from your answers at an earlier point
14 in the argument that whenever there are
15 multiple IQ scores they must be assessed
16 holistically in light of all relevant evidence.

17 And by relevant evidence, relevant
18 evidence would include evidence about adaptive
19 functions. That's how I understood your brief.
20 That's what I understood you to say at an
21 earlier point in the argument.

22 But then you just recently said if
23 there is a case where there are, let's say,
24 five 100s and one 71, the inquiry could be cut
25 off at the point -- it would not have to get

1 into any adaptive function. The inquiry could
2 be cut off at that point. Is that correct?

3 MR. WAXMAN: I think, considering the
4 expert testimony, if a court --

5 JUSTICE ALITO: Expert testimony about
6 the IQs or about other things?

7 MR. WAXMAN: About the IQ test
8 administration --

9 JUSTICE ALITO: Yes.

10 MR. WAXMAN: -- and meaning of the
11 test, a court could say look, nothing --
12 nothing you can offer is going to convince me
13 that, in fact, his true IQ is 70 or below.
14 That would be measured -- that determination
15 would be measured for clear error.

16 In other words, what the court would
17 be saying is yes, of course, each side is
18 entitled to offer --

19 JUSTICE ALITO: Okay. So there could
20 not be a categorical rule, there can never be a
21 categorical rule that IQs plus testimony about
22 the IQs is sufficient, and a court would err
23 if it went beyond that and opened up the
24 possibility of holding that there was not
25 intellectual disability?

1 You said it would -- the court could
2 do it.

3 MR. WAXMAN: What I --

4 JUSTICE ALITO: And it would be
5 reviewed for clear error.

6 MR. WAXMAN: What I am saying is if
7 there are multiple -- one or more IQ test
8 scores that are within the range of
9 intellectual disability, that is, 70 or below,
10 it is -- it is error for a court to refuse to
11 consider expert testimony and evidence relating
12 to other psychometric tests and school and
13 prior diagnoses to determine whether the
14 defendant meets prong -- his burden to show
15 prong 1.

16 JUSTICE ALITO: So in just about every
17 case, then, IQs and testimony about IQs can
18 never be sufficient?

19 MR. WAXMAN: I -- I don't know how
20 to -- I have given you every possible answer
21 that I have.

22 I think a court looking at nine -- you
23 know, whatever it is, five 100s and one 71,
24 considering the testimony about how those tests
25 were administered and what the reliable results

1 of those tests are, could conclude, look, I
2 just -- that's it for me. There's nothing you
3 could show me that would change my mind.

4 JUSTICE ALITO: I'm still perplexed
5 also about your view regarding the relevance of
6 Alabama law here. Does it matter what Alabama
7 law says on these points or are we looking for
8 a minimum Eighth Amendment standard?

9 MR. WAXMAN: What Alabama law says
10 about how this is or isn't proven is the Eighth
11 Amendment commandment of this Court in Atkins.
12 That is, it allows states to have -- to apply
13 various standards in order to make a
14 determination about the Eighth Amendment
15 violation or not.

16 As we know, the state can apply
17 different levels of burdens consistent with the
18 due process clause. There are some states that
19 say, you know, if somebody comes -- if somebody
20 is charged with a crime and comes in with a
21 score of 65 even before the trial, he is
22 presumptively ineligible.

23 I mean, there are lots of ways in
24 which states have established rules to enforce,
25 quote, "the constitutional mandate we

1 announce."

2 JUSTICE ALITO: One final question.

3 How are we to determine what the
4 national consensus is based on state court
5 decisions that have struggled, that are
6 struggling to understand what this Court has
7 said in Hall and Moore?

8 MR. WAXMAN: The state has cited
9 one and only one case in which the court has
10 expressed perplexity, and that is not even a
11 state court. It is a federal district court
12 applying the federal death penalty in the
13 Eastern District of -- of New York.

14 The -- you can look at every single --

15 JUSTICE ALITO: Let me just ask it
16 another way, and then I will give up.

17 MR. WAXMAN: Well --

18 JUSTICE ALITO: How are we to
19 determine --

20 MR. WAXMAN: Or I'll give up.

21 JUSTICE ALITO: The states -- the
22 states are trying -- the state courts are
23 trying to apply our decisions. And would you
24 deny the fact that that's what they're doing?
25 They're just going off and deciding

1 what they think is the morally appropriate way
2 of dealing with this question or are they
3 trying to understand what this Court has said?

4 And if they're trying to understand
5 what this Court has said, how can that show a
6 national consensus in the sense in which we
7 have used that term in prior death penalty
8 cases?

9 MR. WAXMAN: The state courts have
10 uniformly looked to Hall versus Florida and
11 this Court's announcement of its rule in Hall,
12 its two-part holding in Hall versus Florida,
13 and said to determine substantially sub-average
14 intellectual functioning, we look at all
15 probative evidence, including, of course, the
16 test results from properly administered IQ
17 tests.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: Can I just quickly
2 point out that in response to -- to Justice
3 Alito, he asked about whether or not there
4 could ever be a categorical rule that scores
5 alone are enough -- are or are not. And I
6 guess I'm just worried about the clinicians and
7 the people who try to evaluate this condition.

8 And they seem to be saying -- I am
9 talking about the amicus briefs here of the
10 American Association on Intellectual
11 Disabilities -- that there are, quote, "too
12 many variables to consider in determining the
13 validity of each test score and the convergence
14 of that score with other scores and qualitative
15 information to rationally support the use of
16 only one procedure."

17 They seem to be saying that you got to
18 look at a lot of different things in order to
19 come to the truth of whether or not this person
20 is actually intellectually disabled.

21 It's not enough just as a clinical
22 matter, as a sort of -- outside of the context
23 of the case -- if we're really trying to get to
24 the bottom of this, you have to look at a lot
25 of things. And I thought that was the thrust

1 of the court's conclusion, that you don't cut
2 people off just because they have a particular
3 test score, that you allow experts to evaluate
4 everything and the court to weigh everything in
5 making this assessment.

6 MR. WAXMAN: That -- that is, in fact,
7 what all clinicians believe, but, of course,
8 there are clinicians who would testify -- you
9 know, who would and, in fact, have testified in
10 Alabama cases that -- there -- there was one
11 case, I'm forgetting the name of it, where the
12 test score was 69. It was only one test. It
13 was 69. And the defense's expert witness
14 testified that she did not believe that, taking
15 into account all of the evidence, he was, in
16 fact, intellect --

17 JUSTICE JACKSON: Sure. That's the
18 point of an expert.

19 MR. WAXMAN: Right.

20 JUSTICE JACKSON: They -- they look at
21 the test scores, they look at all the
22 information, and they make this determination.
23 So sometimes it's not helpful to have
24 categorical rules that impinge on that
25 assessment.

1 MR. WAXMAN: I -- I think when in -- I
2 mean, I think we have to be mindful, as this
3 Court, members of this Court have frequently
4 reminded us, that clinicians determine clinical
5 evidence -- evaluate clinical evidence and
6 courts apply the law.

7 In this case, we have a law announced
8 in Atkins that someone with this condition may
9 not constitutionally be subject to capital
10 punishment. When in -- there -- there is no
11 court that I'm aware of that has simply said
12 there is no circum- -- you know, there are --
13 there -- there is a cate- -- well, other than
14 Oklahoma, there is a categorical rule. When
15 and if, you know, a court in Alabama or
16 elsewhere is presented with an argument that
17 there should be a categorical rule or that
18 state law incorporates and the Eighth Amendment
19 permits a categorical rule, that will be for
20 the lower federal courts and perhaps this Court
21 to evaluate.

22 JUSTICE JACKSON: Thank you.

23 MR. WAXMAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Rebuttal, Mr. Overing?

2 REBUTTAL ARGUMENT OF ROBERT M. OVERING
3 ON BEHALF OF THE PETITIONER

4 MR. OVERING: I had a lot of questions
5 about Alabama law. There's no statute in
6 Alabama. It's Ex Parte Perkins. And it sets
7 the line at 70. The Eleventh Circuit
8 understood that at page 35 when it said Smith's
9 claim turns on whether his IQ is 70 or below.

10 Smith's counsel has essentially
11 abandoned that misreading of Alabama law from
12 their briefs because he agreed with Justice
13 Gorsuch that the question is, is there an
14 Eighth Amendment violation?

15 The United States, at the bottom of
16 page 19 of their brief, said that states can
17 require a defendant to prove his IQ scores
18 betray deficient intellectual functioning. We
19 agree with that. The Eighth Amendment doesn't
20 preclude an IQ burden, and 20 states as amicus
21 agree with us here.

22 Smith's counsel in the Eleventh
23 Circuit said that four and five scores are in
24 the range. Both experts -- this is JA 83 and
25 JA 221 -- use the Flynn effect and then

1 subtracted points for the error range. Both of
2 those are not Alabama law, and they didn't
3 consider the cumulative effect, so the Court
4 should reverse.

5 The Court should remember that this is
6 not just about state sovereignty but also
7 preserving the essential function of the jury
8 to make a reasoned, moral judgment about the
9 criminal and his crime. The jury here had the
10 very best evidence of his intelligence, his 72,
11 the best evidence in his favor. And what's
12 happened decades since then has only confirmed
13 what the jury knew then, that he is not
14 intellectually disabled. The federal courts
15 now have made the demeaning judgment that those
16 12 everyday Americans rendered a sentence that
17 was so barbarous as to be beyond the limits of
18 civilized society?

19 No. The Court should reverse and give
20 the lower courts no more chances, instruct that
21 the writ of habeas corpus be denied.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 The case is submitted.

25

1 (Whereupon, at 12:04 p.m., the case
2 was submitted.)
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