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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 JOHN Q. HAMM, COMMISSIONER,)
4 ALABAMA DEPARTMENT OF CORRECTIONS,)
5 Petitioner,)
6 v.) No. 24-872
7 JOSEPH CLIFTON SMITH,)
8 Respondent.)
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:
2 ROBERT M. OVERING, Principal Deputy Solicitor General,
3 Montgomery, Alabama; on behalf of the
4 Petitioner.
5 HARRY GRAVER, Assistant to the Solicitor General,
6 Department of Justice, Washington, D.C.; for the
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
2 it 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
12 they're all below, you don't do that. You
13 instead say you've got to look at all these
14 other factors.

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

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

1 our case law, consistently, we've said that the
2 first prong relates to a showing of significant
3 sub-average general intellectual functioning.
4 The words "IQ score under 70" does not appear.
5 Those -- that's not the standard.

6 I appreciate that that's one of the
7 ways in which science has determined that you
8 can make such a showing, but we also have
9 allowed for evidence related to adaptive
10 functioning to be taken into account when
11 looking at intellectual functioning.

12 So I think what you've done is shift
13 this to be all about the IQ test in a way that
14 is not supported by our case law.

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

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

24 JUSTICE JACKSON: The primary but not
25 the sole, and we've never said it's been the

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

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

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

15 JUSTICE JACKSON: But what -- what
16 do -- what do -- what do we do with the brief
17 of the American Association of Intellectual and
18 Developmental Disabilities, the actual experts
19 in this area, who say -- and I'm looking on
20 page 24 here -- "Other than requiring the
21 careful use of clinical judgment and
22 professional responsibility in performing a
23 complete analysis, there can be no single
24 mandatory empirical method for clinicians to
25 use in considering multiple scores or in

1 determining whether or not someone is
2 intellectually disabled."

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

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

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

19 JUSTICE SOTOMAYOR: Counsel --

20 JUSTICE BARRETT: Counsel, can I --

21 JUSTICE SOTOMAYOR: -- can --

22 JUSTICE BARRETT: Oh.

23 JUSTICE SOTOMAYOR: I'm sorry.

24 JUSTICE BARRETT: It's okay.

25 JUSTICE SOTOMAYOR: I'm having a

1 really hard time with this case because I don't
2 think you're wrong. States can define this the
3 way they want. The problem here is not what
4 the State of Alabama is doing. The Alabama
5 state is doing what all courts are doing. You
6 haven't pointed me to Perkins or any other
7 court where the rule that you're proposing has
8 been adopted by Alabama. When we get that
9 case, we might answer your question, but, in
10 the abstract, I don't know how we can answer it
11 here.

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

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

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

25 In 2015, the Eleventh Circuit, not the

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

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

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

24 MR. OVERING: Respectfully, Your
25 Honor, at the start of your question, you asked

1 what is Alabama law, and I say Perkins says
2 it's an IQ of 70 or below. And you implied
3 that that's --

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

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

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

23 MR. OVERING: Seventy-one and above.

24 JUSTICE SOTOMAYOR: Not much
25 different. Even worse than here, between 71

1 and 80. Here, there are five scores between 72
2 and one score of 78. And in Hall, only one of
3 the lowest scores fell within SEM.

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

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

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

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

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

16 JUSTICE SOTOMAYOR: And they didn't.

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

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

1 actually at the lower end of the score or the
2 higher end of the score.

3 MR. OVERING: State courts have --

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

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

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

17 JUSTICE BARRETT: That's actually --

18 JUSTICE SOTOMAYOR: You're --

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

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

24 Could you just precisely explain --
25 not -- I don't want to delve into the record in

1 this case, so my question is a little bit than
2 just -- different from Justice Sotomayor's.

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

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

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

1 undermined the Atkins claim.

2 JUSTICE KAGAN: But, Mr. --

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

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

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

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

1 JUSTICE SOTOMAYOR: So what matters
2 is, is he intellectually disabled. That's the
3 federal law, right?

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

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

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

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

1 to mean that states actually have leeway as
2 well in defining intellectual disability.

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

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

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

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

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

1 JUSTICE GORSUCH: We have to find that
2 there is an actual Eighth Amendment violation
3 in this case.

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

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

12 MR. OVERING: Correct.

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

15 MR. OVERING: Absolutely.

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

18 MR. OVERING: Not in this case.

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

23 CHIEF JUSTICE ROBERTS: No, please
24 continue.

25 JUSTICE GORSUCH: Asking about, you

1 know, what the Eighth Amendment and what do we
2 do with our precedents in this area. What if
3 we said, under Atkins, states can implement
4 prong 1 however they want, because that's what
5 Atkins says, as long as they don't treat a
6 single score in the low 70s as decisive, Hall,
7 and, two, don't use extraneous facts to IQ
8 scores to outweigh a low score, Moore?

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

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: No.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

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

24 MR. OVERING: Byrd versus State
25 clearly states that the offender has the burden

1 to prove by a preponderance of the evidence
2 that his IQ is 70 or below.

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

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

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

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

1 MR. OVERING: It -- it --

2 JUSTICE SOTOMAYOR: And now you're
3 going to put in a new requirement that's
4 actually even more complex than what states
5 have been doing.

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

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

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

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

24 MR. OVERING: Not in Alabama.
25 Sometimes the Eleventh Circuit will do that --

1 applying this lowest-score rule. And there is
2 a division of authority. The Eighth, Ninth,
3 and Eleventh Circuits look at the lowest score
4 alone and say that it --

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

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

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

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

1 MR. OVERING: Not certainty but a
2 preponderance of the evidence. And this --

3 JUSTICE SOTOMAYOR: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 JUSTICE SOTOMAYOR: Your answer must
7 be --

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

25 MR. OVERING: Except for the five.

1 Correct, courts have to take into account
2 standard error, but it's not always five.

3 JUSTICE KAGAN: Of course.

4 MR. OVERING: Right.

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

7 MR. OVERING: Yes.

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

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

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

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

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

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

25 JUSTICE KAGAN: It didn't. I mean,

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

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

18 JUSTICE KAGAN: I would have thought
19 that that's just what it says.

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

25 So, if a court could do that with

1 scores of 72, 75, 76, why couldn't a
2 legislature do the same thing and say: No, we
3 don't want to leave that door open because we
4 don't trust trial --

5 JUSTICE KAGAN: I think the --

6 MR. OVERING: -- trial judges --

7 JUSTICE KAGAN: Yeah, I think --

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

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

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

24 MR. OVERING: There's more we can do
25 with IQ. And -- and the experts are coming in

1 and agree with us that there are ways that you
2 can combine the scores. And so the offender's
3 at least got to do that and at least has to
4 show a -- a likelihood below 70.

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

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

12 MR. OVERING: -- of intellectual
13 functioning, not adaptive behavior, certainly.

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

23 And the requirement that they set up
24 is still, if you have one score that brings you
25 into the 70 minus range, that's enough so that

1 you have to a little bit -- you -- you have to
2 open the door to a person's evidence.

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

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

13 They simply move on from IQ. And so,
14 once you open the door to this kind of
15 balancing test, the second prong is really
16 malleable, really amorphous, and we're picking
17 up disparate facts about someone's life,
18 self-reported or by biased reporters. And so
19 that evidence is not disciplining the inquiry.
20 It's not adding more rigor to figuring out what
21 the intelligence is. And if it were, then the
22 IQ specialists would simply make a better IQ
23 test that accounts for things like that.

24 JUSTICE KAGAN: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

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

10 MR. OVERING: Yes.

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

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

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

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

1 satisfied here, but what's the rule?

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

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

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

19 JUSTICE KAVANAUGH: But, in any event,
20 in this case, you say the bottom of the overlap
21 is 73, I believe, correct? At least that's
22 what you say in the reply brief. You say 73 to
23 77.

24 MR. OVERING: And I think that should
25 be a 78, but that's on the most generous

1 assumption about the error range being plus or
2 minus five.

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

7 MR. OVERING: Yes.

8 JUSTICE KAVANAUGH: Okay.

9 MR. OVERING: When it's available.

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

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

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

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

24 The fifth method would be to look at
25 the high score when the highest score's entire

1 error range is over 70. And those are the five
2 that we've discussed as reasonably reliable
3 methods.

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

8 MR. OVERING: The high score --

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

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

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

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

1 to go on and look at more?

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

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

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

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

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

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

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett?

1 Justice Jackson?

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

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

11 MR. OVERING: No, Alabama hasn't
12 adopted one of those methods.

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

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

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

25 JUSTICE JACKSON: No, no, no. Did --

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

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

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

21 MR. OVERING: The --

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

1 that situation, we then assess whether the
2 district court was wrong in refusing to adopt
3 that method.

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

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

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

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

1 case called Clark versus Sweeney, we summarily
2 reversed a grant of habeas because the court of
3 appeals had granted habeas based on an argument
4 that the petitioner had not presented -- had
5 not presented.

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

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

21 MR. OVERING: We absolutely did
22 present evidence from Dr. King at JA 270 and
23 271 that his consistent scores were above 70.
24 We didn't have to get to the level of
25 granularity of specifying a particular method

1 because there is no method in this case that
2 can prove his IQ is likely 70 or below.

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

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

8 MR. OVERING: But it's sufficient to
9 reverse.

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

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

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

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

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

1 district court didn't do.

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

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

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

12 MR. OVERING: We -- we -- we --

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

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

23 That's enough to reverse. If the
24 Court wants to go further and discuss the
25 reasonably reliable methods, we think that

1 would be a good idea, especially for guidance
2 for --

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

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

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Graver.

18 ORAL ARGUMENT OF HARRY GRAVER

19 FOR THE UNITED STATES, AS AMICUS CURIAE,

20 SUPPORTING THE PETITIONER

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

23 Under Atkins, states have significant
24 discretion in defining what it means to be
25 intellectually disabled and what a defendant

1 must do to prove it. Alabama has exercised
2 that discretion to require that Respondent show
3 his true IQ is likely 70 or below based on all
4 relevant evidence, including his multiple IQ
5 scores all above 70.

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

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

20 I welcome the Court's questions.

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

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

25 JUSTICE THOMAS: Which -- which is?

1 MR. GRAVER: Which is that you cannot
2 execute the intellectually disabled, and the
3 meaning of intellectual disability is something
4 that states define with significant discretion.

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

9 MR. GRAVER: Sure.

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

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

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

24 JUSTICE SOTOMAYOR: Counsel, I'd like
25 to -- you -- you're focusing in on Atkins, but

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

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

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

1 So for us to say what Petitioner wants
2 would disavow that language in Hall. It would
3 disavow nearly the identical language in Moore.
4 In Moore, he had two valid scores of 74 and 78.

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

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

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

24 MR. GRAVER: Respectfully, no, Justice
25 Sotomayor. 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: The big problem here --

6 JUSTICE SOTOMAYOR: Okay. That's
7 something different. What you're talking about
8 then is not an -- a legal error by the courts
9 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. And in this
17 context, that is going to be the multiple
18 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's any
5 per se rule in Alabama that says you cannot
6 look at this. But the difference is --

7 JUSTICE SOTOMAYOR: So there's no per
8 se --

9 JUSTICE GORSUCH: Can you tell us what
10 the two --

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

13 MR. GRAVER: Sure.

14 JUSTICE GORSUCH: Thank you.

15 JUSTICE BARRETT: Thank you,
16 Mr. Graver.

17 MR. GRAVER: So the basic idea is,
18 where you have all of this evidence together,
19 are you measuring it against the right
20 standard? So one legal error that happened
21 below is that the courts swapped essentially a
22 preponderance burden with a possibility burden.

23 But the other part is, even putting
24 that to the side, the difficulty is that you
25 still need to figure out what the ultimate

1 question Alabama law is asking here, which is,
2 is this other evidence strong enough to drag
3 down the collective weight of IQ --

4 JUSTICE KAGAN: So that seems --

5 MR. GRAVER: -- below the line.

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

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

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

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

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

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

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

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

10 MR. GRAVER: Okay.

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

13 MR. GRAVER: Fair enough.

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

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

24 JUSTICE KAGAN: No, I -- I don't think
25 it would -- it would -- the only thing that I

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

6 MR. GRAVER: Right. So I think I take
7 it slightly less categorically than you do,
8 which is just to say, so you imagine a case of,
9 you know, 10 85s and one 72. The collective
10 error range of those scores, even if you look
11 at the 95 percent confidence interval, is not
12 going to grace 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 that's like
17 the hypothetical that you gave in your brief,
18 like if there are a lot of 90s, and I kind of
19 take that point, right, because, like, at some
20 point, there's no clinician in the world who's
21 going to say that just because you have, like,
22 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 with
14 multiple scores is a complicated matter.

15 But do they say anything about how a
16 court is to deal with a 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 in
23 the case, one score, standard error of
24 measurement is below 70, yes, they -- Hall says
25 that allows the -- the -- the -- the prisoner

1 to proceed with evidence about adaptive
2 functions, but it doesn't say how the Court is
3 to deal with a situation where there are
4 multiple 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's sentenced to death
25 has significantly sub-average 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? And so their
19 decisions reflect their interpretations,
20 perhaps erroneous interpretations, of those two
21 precedents of this Court.

22 Do we -- do we look at those to see
23 whether there's a national consensus?

24 MR. GRAVER: No, I don't think so. I
25 think there's a difference between -- the idea

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

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

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

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

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

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

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

25 MR. GRAVER: So I a hundred percent

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

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

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

1 JUSTICE ALITO: Thank you.

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

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

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

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

14 MR. GRAVER: I --

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

19 MR. GRAVER: The answer is uncertain
20 for the reasons I was explaining with Justice
21 Kagan. And I can't -- you know, I'm not good
22 enough at math to do this on the fly, but the
23 basic idea is that if those collective scores
24 do not produce a range that even grades at
25 70 --

1 JUSTICE SOTOMAYOR: Has any state
2 adopted that measure?

3 MR. GRAVER: -- I don't think there's
4 any constitutional bar --

5 JUSTICE SOTOMAYOR: Has any state
6 approached the issue that way with multiple
7 scores?

8 MR. GRAVER: I don't think so. I
9 think our big --

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

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

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

24 MR. GRAVER: Let me make one quick
25 point --

1 JUSTICE SOTOMAYOR: Mm-hmm.

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

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

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

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

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

16 MR. GRAVER: No, no, it's -- it's a --

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

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

25 JUSTICE SOTOMAYOR: I don't --

1 MR. GRAVER: No one made --

2 JUSTICE SOTOMAYOR: -- I don't --

3 MR. GRAVER: Okay.

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

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

20 We think that they were laboring
21 over --

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
3 one-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 I --

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 --
23 that's -- all 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 scores
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: A few questions
17 there where I don't think you got to finish
18 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 that the district court made and that the
9 Eleventh Circuit made? I think that was one
10 question 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 a hundred 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 needed 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 a

1 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
7 here 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 the 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: There has to be a
24 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
8 the -- the -- the formal way in which it would
9 work is there's a violation of Atkins, federal,
10 because, one way or another, either met or did
11 not meet or not even -- 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 that the answer would be probably
18 yes, 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 that
23 at some point -- what I will say -- you know,
24 let me take that back just a little bit in
25 that --

1 JUSTICE GORSUCH: I would think that
2 you might want to.

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

5 JUSTICE GORSUCH: Right.

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

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

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

18 JUSTICE GORSUCH: Exactly. And so --

19 MR. GRAVER: Yeah.

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

24 MR. GRAVER: Yes.

25 JUSTICE GORSUCH: Okay. I would --

1 I'm glad we got to that.

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

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

17 MR. GRAVER: A hundred percent.

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

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

1 something under state law.

2 Do you agree with that?

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

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

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

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

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

25 JUSTICE KAVANAUGH: Do you agree

1 with -- do you agree with him on that?

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

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

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

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

18 MR. GRAVER: This is -- yeah.

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

24 MR. GRAVER: I'm not saying it could
25 outweigh. I think there's a difference between

1 a constitutional rule as to whether or not you
2 need to consider it, but I think, in a
3 circumstance where you have consistent scores
4 that are in the high 70s, this is what I mean
5 by practically dispositive.

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

10 MR. GRAVER: I think this --

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

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

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

24 JUSTICE KAVANAUGH: If the -- and I'll
25 ask it again. If the median's above 70, the

1 Court -- the state says end there, you're
2 saying no, you can go on to consider the other
3 evidence, the defendant can have you go on to
4 consider the other evidence.

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

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

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

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

24 I could imagine that being, you know,
25 in a state that has decided to adopt the

1 totality-of-the-circumstances inquiry, that
2 would be a kind of circumstance where, yes, the
3 other evidence could put you below the line.

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

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

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

25 JUSTICE KAVANAUGH: But that's where

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

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

11 JUSTICE KAVANAUGH: Here meaning in
12 this case?

13 MR. GRAVER: Correct.

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

16 JUSTICE BARRETT: Mr. Graver --

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

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

25 When Justice Gorsuch read you his

1 proposed rule statement, it didn't include
2 anything about necessarily having to consider
3 the evidence of adaptive functioning. But I
4 understood you to tell Justice Kavanaugh that
5 you would have to go on to consider such
6 evidence and that in some circumstances, it
7 could outweigh the IQ scores even if they were
8 in, say, the, you know, 73 to 78 range.

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

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

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

24 The way in which that -- if a -- if a
25 state imposed that substantive standard, the

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

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

11 JUSTICE BARRETT: Okay.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

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

25 So I understood you to say that there

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

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

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

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

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

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

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

15 MR. GRAVER: Right.

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

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

25 Now I appreciate that the state's

1 expert said no, but the other experts said yes,
2 and the court looked at that and made a
3 decision.

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

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

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

14 MR. GRAVER: Right.

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

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

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

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

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

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

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

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

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

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

17 JUSTICE JACKSON: All right.

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

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Waxman.

24

25

1 ORAL ARGUMENT OF SETH P. WAXMAN

2 ON BEHALF OF THE RESPONDENT

3 MR. WAXMAN: Mr. Chief Justice, and
4 may it please the Court:

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

14 Now, in deciding whether a defendant
15 has carried his burden to prove that he suffers
16 from substantially sub-average intellectual
17 functioning, Alabama law, like near -- like
18 that of nearly all other states, all other
19 states with the qualified sometimes exception
20 of Oklahoma, requires courts to evaluate all
21 probative evidence as to intellectual
22 functioning offered by either side. That
23 includes evidence of intellectual functioning
24 other than IQ test scores at least where a
25 court, considering expert testimony, concludes

1 that those scores alone don't decide the issue.

2 The courts below did exactly that by
3 evaluating evidence of Smith's significant
4 impairment on other neuropsychological tests of
5 intelligence -- this is pages 88 and 90 to 92
6 of the Petition Appendix -- his grade school
7 records, which showed that on every measure he
8 was two to four years below grade average,
9 culminating in a diagnosis of mental
10 retardation in the seventh grade.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you.

23 JUSTICE THOMAS: Before you go on to
24 the -- another granular argument --

25 MR. WAXMAN: I'm not leaving.

1 JUSTICE THOMAS: -- what is precisely
2 in -- to your understanding, is Alabama law?

3 MR. WAXMAN: Alabama law --

4 JUSTICE THOMAS: Just -- just -- just
5 the pure law, not this case. What does it
6 require?

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

18 JUSTICE THOMAS: Okay.

19 MR. WAXMAN: -- of the Eighth
20 amendment.

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

25 MR. WAXMAN: In this instance, yes. I

1 could imagine a situation in which, you know,
2 Alabama said we're just never going to execute
3 anybody who gets a score --

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

9 MR. WAXMAN: In this instance -- given
10 the way that Alabama has defined "intellectual
11 disability," yes.

12 JUSTICE THOMAS: Okay.

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

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

1 incorporates state law.

2 JUSTICE ALITO: Do you think the
3 Eighth Amendment means something different in
4 Alabama, could mean something different in
5 Alabama than it means in, let's say, Florida or
6 Texas?

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

8 JUSTICE ALITO: Okay. So then --

9 MR. WAXMAN: -- I -- I -- I will --
10 may I just add one sentence?

11 JUSTICE ALITO: Yes, sure.

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

25 JUSTICE ALITO: If -- if the --

1 MR. WAXMAN: That is a consensus.

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

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

24 And so long as a state does not go
25 below that floor, a state court does not go

1 below that floor, there's no Eighth Amendment
2 violation.

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

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

19 MR. WAXMAN: Oh, of course. I mean,
20 that was exactly what happened in Hall and in
21 Moore for that matter and in Brumfield. And in
22 every single one of those cases, the Court
23 remanded to the state courts, which then heard
24 all of the relevant evidence, not just IQ test
25 scores, all of the relevant evidence, and

1 concluded that the defendant had, in fact,
2 satisfied his burden to show all three prongs.

3 JUSTICE BARRETT: Mr. Waxman, if a
4 state law goes above what we might say the
5 Eighth Amendment floor is and a federal habeas
6 court deviates from what state law requires,
7 does it violate the Eighth Amendment?

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

15 A federal court couldn't say --

16 JUSTICE GORSUCH: Couldn't grant
17 habeas in that circumstance.

18 MR. WAXMAN: Right.

19 JUSTICE GORSUCH: Yeah.

20 MR. WAXMAN: Right. Unless there was
21 a compelling argument that the true IQ was
22 below 70. Yeah.

23 JUSTICE GORSUCH: Right. Right. But
24 it might be a violation of state law, but it
25 isn't a violation of the federal Constitution.

1 MR. WAXMAN: That's right. But what
2 we have here is a situation in which every
3 state, with the limited, very limited exception
4 of Oklahoma, says you can -- IQ test scores are
5 not the same as -- are not equivalent to
6 substantially sub-average intellectual
7 functioning because that is a condition, not a
8 test score. They are highly probative,
9 considering the standard error of measurement,
10 of what actual IQ is, but --

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

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

22 MR. WAXMAN: Alabama law matters a
23 great deal to my argument because, as this
24 Court has -- has taught, we leave it to the
25 states to -- to apply appropriate means for

1 enforcing the Eighth Amendment guarantee. And
2 that is what the Alabama appellate courts have
3 said repeatedly that they are doing in
4 considering both evidence of IQ test scores
5 if there are any and where those scores are
6 determined by -- upon expert testimony to be
7 inconclusive, other evidence of intellectual
8 functioning, including in this case four other
9 psychometric tests that test intellectual
10 functioning and a history where, in the seventh
11 grade, he was diagnosed, medically diagnosed,
12 as mentally retarded.

13 And considering all those factors, the
14 court found -- both the district court and the
15 court of appeals made clear on remand that with
16 respect to evidence of intellectual
17 functioning, including but not limited to test
18 scores, he satisfied prong 1. The court of
19 appeals then went on to say in its opinion on
20 remand for this Court that "the additional
21 evidence" -- I'm quoting from page 8A of the
22 Joint Appendix, which is quoting from Hall --
23 the addition -- "additional evidence of Smith's
24 adaptive deficiencies plausibly supports the
25 district court's reading that although Smith

1 scored above" 80 -- "70 in IQ tests, his actual
2 functioning is comparable to that of
3 individuals with a lower score."

4 JUSTICE BARRETT: Thank you,
5 Mr. Waxman.

6 MR. WAXMAN: Thank you.

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

18 MR. WAXMAN: That is -- I agree
19 100 percent with that. And the district court
20 did nothing of the sort.

21 JUSTICE KAVANAUGH: Right. On that
22 latter part, I know you disagree.

23 MR. WAXMAN: Yeah, yeah.

24 JUSTICE KAVANAUGH: But, on the
25 methodology, you -- anything you disagree with

1 the Solicitor General on?

2 (Laughter.)

3 JUSTICE KAVANAUGH: As I just --

4 MR. WAXMAN: My memory is even worse
5 than the --

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

15 MR. WAXMAN: I --

16 JUSTICE SOTOMAYOR: -- that caveat.

17 MR. WAXMAN: I agree with that. I
18 mean, you can take an example, for example, of
19 somebody -- I'm not sure if I've exactly got
20 his hypo right, but let's say four 90s and one
21 71.

22 JUSTICE KAGAN: Right.

23 MR. WAXMAN: The court would certainly
24 hear expert testimony on that. There may very
25 well be expert testimony, maybe even agreement,

1 that the 71 is, in fact, the result of
2 malingering or that it is a statistical outlier
3 and taking into account other evidence relevant
4 to intellectual functioning should be
5 disregarded.

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

13 What we have here are four of five
14 scores --

15 JUSTICE ALITO: On -- on that
16 hypothetical, could --

17 MR. WAXMAN: If I may just finish my
18 sentence?

19 JUSTICE ALITO: Well, yes, sure.

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

1 Solicitor General.

2 JUSTICE ALITO: On that hypothetical,
3 three or four sentences later -- on that
4 hypothetical, would it be --

5 (Laughter.)

6 MR. WAXMAN: I couldn't contain
7 myself. I'm sorry. I apologize.

8 JUSTICE ALITO: I know. Never.

9 Would it be permissible for a district
10 court to say: Well, you got four 90s and one
11 71, that's enough?

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

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

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

23 JUSTICE ALITO: There's no situation
24 in which IQ scores could be -- in and of
25 themselves be sufficient. So the court could

1 say, look, I've looked at these IQ scores and
2 that's enough. The statistical possibility
3 that the true IQ is below 70 is so small that
4 the -- the defendant can't possibly prevail?

5 MR. WAXMAN: I mean, I'm not aware --

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

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

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

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

1 be discounted, a district court that credited
2 that testimony would not err under the Eighth
3 Amendment --

4 JUSTICE ALITO: What you say --

5 MR. WAXMAN: -- so long as it was
6 consistent with state law.

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

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

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

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

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

7 JUSTICE JACKSON: And so what
8 you're --

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

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

1 testimony about these things.

2 And so it seems kind of odd to have
3 rules that would be rigid with respect to how
4 these particular experts are testifying or what
5 the impact of the various scores are in this
6 environment, I think.

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

18 MR. WAXMAN: Let --

19 JUSTICE JACKSON: And then the court
20 is deciding.

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

23 First of all, it's too late and
24 irrelevant for me to pick sides in Moore versus
25 Texas, but what the district court did in this

1 case is precisely what the Chief Justice in
2 dissent said was properly done in Texas. A
3 court hears the evidence, all probative,
4 relevant, and admissible evidence on both
5 sides, and makes a determination against the
6 standard, the Eighth Amendment standard, with
7 whatever procedural or substantive applications
8 that state law provides.

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

23 Of course, a court should be able to
24 determine that. There is -- there's just no
25 warrant for this Court to announce a

1 constitutional rule binding on all states that
2 precludes consideration of evidence that
3 Alabama and the other states and the medical
4 community properly considers probative of
5 intellectual functioning.

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

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

22 MR. WAXMAN: Well, I think --

23 JUSTICE KAVANAUGH: I think --

24 MR. WAXMAN: I -- I --

25 JUSTICE KAVANAUGH: That's not really

1 a question, but you can say yes or no to that.

2 (Laughter.)

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

9 JUSTICE KAGAN: But then -- but
10 then --

11 MR. WAXMAN: -- median, you know,
12 there --

13 CHIEF JUSTICE ROBERTS: Counsel, let
14 Justice Kagan --

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

16 JUSTICE KAGAN: You -- you can have
17 one sentence.

18 (Laughter.)

19 MR. WAXMAN: I will -- I will reserve
20 my one sentence to answer your question. And I
21 apologize.

22 JUSTICE KAGAN: Mr. Graver doesn't get
23 a chance to stand up and tell me whether I'm
24 wrong about my summary of his, but then I think
25 he would say, okay, you agree on that, but --

1 but he says that the court here made two
2 fundamental errors. One is it treated the
3 preponderance standard as a possibility
4 standard, and the second is it never -- it
5 thought that it was not permissible for it to
6 get back around to the scores. And he says
7 that those were the two errors.

8 Were they? Is that right?

9 MR. WAXMAN: No. I think --

10 JUSTICE KAGAN: Mr. Graver --

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

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

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

23 MR. WAXMAN: Oh.

24 JUSTICE KAGAN: -- and say, look,
25 there are five scores here, most of them don't

1 reach the 70 threshold, that sort of thing.

2 MR. WAXMAN: I mean, the district
3 court opinion will speak for itself. The
4 court -- you know, the court said that he
5 showed -- I mean, the court's opinion discusses
6 each test score. It discusses each of the four
7 experts' testimony. It discusses what the
8 experts showed about the other psychometric
9 intelligence tests, about his history, and what
10 each expert said about that, and then
11 concluded, applying Alabama's standard of
12 substantially significant -- substantially
13 sub-average intellectual functioning, that
14 he -- by a preponderance, he had met that
15 standard.

16 JUSTICE GORSUCH: When you talk about
17 that standard as Alabama's, that's straight out
18 of Atkins, isn't it?

19 MR. WAXMAN: It's straight out of the
20 Alabama statute.

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

23 MR. WAXMAN: Well --

24 JUSTICE GORSUCH: -- and Moore?

25 MR. WAXMAN: -- At -- Atkins --

1 JUSTICE GORSUCH: And you say it's the
2 same standard. Everybody except for Oklahoma
3 uses it. So --

4 MR. WAXMAN: Well, Oklahoma uses --

5 JUSTICE GORSUCH: -- presumably, they
6 all -- all use it for a reason because it came
7 out of our decisions, right?

8 MR. WAXMAN: Well, no. The reason it
9 came out of Atkins was Atkins found that there
10 was unanimity among the expert practitioners
11 and associations.

12 JUSTICE GORSUCH: Fine. Whether
13 the -- the -- the chicken or the egg came
14 first, it's in Atkins.

15 MR. WAXMAN: We're -- we're in violent
16 agreement.

17 JUSTICE GORSUCH: All right. Thank
18 you.

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

24 You read something.

25 JUSTICE GORSUCH: I did.

1 JUSTICE SOTOMAYOR: Yes, you did.

2 JUSTICE GORSUCH: Do you want me to
3 read it again?

4 JUSTICE SOTOMAYOR: Please.

5 (Laughter.)

6 JUSTICE GORSUCH: Oh, sure.

7 JUSTICE SOTOMAYOR: Because I'd like
8 Mr. Waxman --

9 MR. WAXMAN: I don't remember it, so I
10 appreciate it.

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

13 So could you please, if -- if you'd do
14 that --

15 JUSTICE GORSUCH: I would -- I would
16 be delighted.

17 JUSTICE SOTOMAYOR: Thank you.

18 (Laughter.)

19 JUSTICE GORSUCH: The question is just
20 how to understand, which I've struggled with,
21 both Moore and Hall. And I read Hall as saying
22 that you cannot treat a single score in the low
23 70s as decisive. And I read Moore as saying
24 you can't use facts extraneous to IQ to
25 outweigh a low score. Fair?

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

3 JUSTICE GORSUCH: I mean, that's what
4 the Court did --

5 MR. WAXMAN: If fair -- if what you
6 mean is extraneous to the question of what his
7 true intellectual functioning is --

8 JUSTICE GORSUCH: No, no, no.

9 MR. WAXMAN: -- yes.

10 JUSTICE GORSUCH: Yeah, it started
11 looking at things to try to outweigh a low
12 score. It started grabbing at other facts.

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

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

1 JUSTICE SOTOMAYOR: In Moore, counsel,
2 the two scores were 74 and 78, and the Court --
3 and we held the state court violated Hall when
4 it discounted the lower end of the SEM because
5 he was "malingering." There, we held that when
6 there's an IQ below 70 with the SEM, that --
7 adjusted for the test's standard error, then
8 you must permit evidence of whether clinically
9 he falls within the range of intellectual
10 functioning details, correct?

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

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

24 MR. WAXMAN: That's correct, unless
25 the Court concludes that I've got -- you know,

1 let's make it now 10 IQ test scores, all of
2 which both experts agree were properly
3 administered and reliable.

4 And in light of that finding, one
5 test score of 70 -- there's no -- there is no
6 evidence other than the testimony of the
7 experts that I would -- that could change my
8 mind that he has not met prong 1 --

9 JUSTICE SOTOMAYOR: But that's not --

10 MR. WAXMAN: -- and I think that --

11 JUSTICE SOTOMAYOR: -- the case here.

12 MR. WAXMAN: We're not in the same
13 time zone as that case.

14 JUSTICE SOTOMAYOR: No, because we
15 have three tests, all of them --

16 MR. WAXMAN: Four.

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

19 MR. WAXMAN: He could, and he, in
20 fact, demonstrated by a preponderance that he
21 is.

22 JUSTICE SOTOMAYOR: And, in fact,
23 Dr. King, whom they rely upon, the Petitioner,
24 testified that the scores were within
25 intellectual disability, but then he went to

1 other factors to say why he was -- he thought
2 he was functioning within.

3 MR. WAXMAN: Well, I don't -- I
4 don't -- I think Dr. King's testimony will
5 stand for itself. The district court found his
6 testimony to be less credible than the other
7 experts.

8 What he said is we have five scores
9 and they're all above 70. Four of them,
10 looking at the individual standard error of
11 measurement, are within the range.

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

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

25 CHIEF JUDGE ROBERTS: Thank you,

1 counsel.

2 JUSTICE SOTOMAYOR: And, in fact,
3 they -- they've rejected Flynn, correct?

4 MR. WAXMAN: I'm sorry?

5 JUSTICE SOTOMAYOR: The district court
6 reflect -- rejected the Flynn effect in this
7 case?

8 MR. WAXMAN: Yes. We're not relying
9 on the Flynn effect.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. WAXMAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas?

15 Justice Alito?

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

23 And by relevant evidence, relevant
24 evidence would include evidence about adaptive
25 functions. That's how I understood your brief.

1 That's what I understood you to say at an
2 earlier point in the argument.

3 But then you just recently said, if
4 there is a case where there are, let's say,
5 five 100s and one 71, the inquiry could be cut
6 off at the point -- it would not have to get
7 into any adaptive function. The inquiry could
8 be cut off at that point. Is that correct?

9 MR. WAXMAN: I think, considering the
10 expert testimony, if a court --

11 JUSTICE ALITO: Expert testimony about
12 the IQs or about other things?

13 MR. WAXMAN: About the IQ test
14 administration --

15 JUSTICE ALITO: Yes.

16 MR. WAXMAN: -- and meaning of the
17 test, a court could say, look, nothing --
18 nothing you can offer is going to convince me
19 that, in fact, his true IQ is 70 or below.
20 That would be measured -- that determination
21 would be measured for clear error.

22 In other words, what the court would
23 be saying is yes, of course, each side is
24 entitled to offer --

25 JUSTICE ALITO: Okay. So there could

1 not be a categorical rule, there can never be a
2 categorical rule that IQs plus testimony about
3 the IQs is sufficient, and a court would err
4 if it went beyond that and opened up the
5 possibility of holding that there was not
6 intellectual disability?

7 You said it would -- the court could
8 do it.

9 MR. WAXMAN: What I --

10 JUSTICE ALITO: And it would be
11 reviewed for clear error.

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

22 JUSTICE ALITO: So, in just about
23 every case then, IQs and testimony about IQs
24 can never be sufficient?

25 MR. WAXMAN: I -- I don't know how

1 to -- I've given you every possible answer that
2 I have.

3 I think a court looking at nine -- you
4 know, whatever it is, five hundreds and one 71,
5 considering the testimony about how those tests
6 were administered and what the reliable results
7 of those tests are, could conclude, look, I
8 just -- that's it for me. There's nothing you
9 could show me that would change my mind.

10 JUSTICE ALITO: I'm still perplexed
11 also about your view regarding the relevance of
12 Alabama law here. Does it matter what Alabama
13 law says on these points, or are we looking for
14 the minimum Eighth Amendment standard?

15 MR. WAXMAN: What Alabama law says
16 about how this is or isn't proven is the Eighth
17 Amendment commandment of this Court in Atkins.
18 That is, it allows states to have -- to apply
19 various standards in order to make a
20 determination about the Eighth Amendment
21 violation or not.

22 As we know, the state can apply
23 different levels of burdens consistent with the
24 Due Process Clause. There are some states that
25 say, you know, if somebody comes -- if somebody

1 is charged with a crime and comes in with a
2 score of 65 even before the trial, he is
3 presumptively ineligible.

4 I mean, there are lots of ways in
5 which states have established rules to enforce
6 "the constitutional mandate we announce."

7 JUSTICE ALITO: One final question.

8 How are we to determine what the
9 national consensus is based on state court
10 decisions that have struggled, that are
11 struggling to understand what this Court has
12 said in Hall and Moore?

13 MR. WAXMAN: The -- the state has
14 cited one and only one case in which the court
15 has expressed perplexity, and that is not even
16 a state court. It is a federal district court
17 applying the federal death penalty in the
18 Eastern District of -- of -- of New York.

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

20 JUSTICE ALITO: All right. Let -- let
21 me just ask it another way, and then I'll give
22 up.

23 MR. WAXMAN: Well --

24 JUSTICE ALITO: How are we to
25 determine --

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

2 JUSTICE ALITO: The states -- the
3 states are trying -- the state courts are
4 trying to apply our decisions. And would you
5 deny the fact that that's what they're doing?

6 They're just going off and deciding
7 what they think is the -- the morally
8 appropriate way of dealing with this question,
9 or are they trying to understand what this
10 Court has said? And if they're trying to
11 understand what this Court has said, how can
12 that show a national consensus in the sense in
13 which we've used that term in prior death
14 penalty cases?

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

24 JUSTICE ALITO: All right. Thank you.
25 Thank you.

1 MR. WAXMAN: Okay.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 Justice Kagan?

5 Justice Gorsuch?

6 Justice Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: Can I just quickly
10 point out that in response to -- to Justice
11 Alito, he asked about whether or not there
12 could ever be a categorical rule that scores
13 alone are enough -- are or are not. And I
14 guess I'm just worried about the clinicians and
15 the people who try to evaluate this condition.

16 And they seem to be saying -- I'm
17 talking about the amicus briefs here of the
18 American Association on Intellectual
19 Disabilities -- that there are "too many
20 variables to consider in determining the
21 validity of each test score and the convergence
22 of that score with other scores and qualitative
23 information to rationally support the use of
24 only one procedure."

25 They seem to be saying that you've got

1 to look at a lot of different things in order
2 to come to the truth of whether or not this
3 person is actually intellectually disabled.
4 It's not enough just as a clinical matter, as a
5 sort of -- outside of the context of the
6 case -- if we're really trying to get to the
7 bottom of this, you have to look at a lot of
8 things. And I thought that was the thrust of
9 the court's conclusion, that you don't cut
10 people off just because they have a particular
11 test score, that you allow experts to evaluate
12 everything and the court to weigh everything in
13 making this assessment.

14 MR. WAXMAN: That -- that is, in fact,
15 what all clinicians believe, but, of course,
16 there are clinicians who would testify -- you
17 know, who would and, in fact, have testified in
18 Alabama cases that -- there -- there was one
19 case, I'm forgetting the name of it, where the
20 test score was 69. It was only one test. It
21 was 69. And the defense's expert witness
22 testified that she did not believe that, taking
23 into account all of the evidence, he was, in
24 fact, intellect --

25 JUSTICE JACKSON: Sure. That's the

1 point of an expert.

2 MR. WAXMAN: Right.

3 JUSTICE JACKSON: They -- they look at
4 the test scores, they look at all the
5 information, and they make this determination.
6 So sometimes it's not helpful to have
7 categorical rules that impinge on that
8 assessment.

9 MR. WAXMAN: I -- I think when in -- I
10 mean, I think we have to be mindful, as this
11 Court, members of this Court have frequently
12 reminded us, that clinicians determine clinical
13 evidence -- evaluate clinical evidence and
14 courts apply the law.

15 In this case, we have a law announced
16 in Atkins that someone with this condition may
17 not constitutionally be subject to capital
18 punishment. When in -- there -- there is no
19 court that I'm aware of that has simply said
20 there is no circum- -- you know, there are --
21 there -- there is a cate- -- well, other than
22 Oklahoma, there is a categorical rule. When
23 and if, you know, a court in Alabama or
24 elsewhere is presented with an argument that
25 there should be a categorical rule or that

1 state law incorporates and the Eighth Amendment
2 permits a categorical rule, that will be for
3 the lower federal courts and perhaps this Court
4 to evaluate.

5 JUSTICE JACKSON: Thank you.

6 MR. WAXMAN: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Rebuttal, Mr. Overing?

10 REBUTTAL ARGUMENT OF ROBERT M. OVERING

11 ON BEHALF OF THE PETITIONER

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

18 Smith's counsel has essentially
19 abandoned that misreading of Alabama law from
20 their briefs because he agreed with Justice
21 Gorsuch that the question is, is there an
22 Eighth Amendment violation?

23 The United States, at the bottom of
24 page 19 of their brief, said that states can
25 require a defendant to prove his IQ scores

1 betray deficient intellectual functioning. We
2 agree with that. The Eighth Amendment doesn't
3 preclude an IQ burden, and 20 states as amicus
4 agree with us here.

5 Smith's counsel in the Eleventh
6 Circuit said that four and five scores are in
7 the range. Both experts -- this is JA 83 and
8 JA 221 -- use the Flynn effect and then
9 subtracted points for the error range. Both of
10 those are not Alabama law, and they didn't
11 consider the cumulative effect, so the Court
12 should reverse.

13 The Court should remember that this is
14 not just about state sovereignty but also
15 preserving the essential function of the jury
16 to make a reasoned, moral judgment about the
17 criminal and his crime. The jury here had the
18 very best evidence of his intelligence, his 72,
19 the best evidence in his favor. And what's
20 happened decades since then has only confirmed
21 what the jury knew then, that he is not
22 intellectually disabled. The federal courts
23 now have made the demeaning judgment that those
24 12 everyday Americans rendered a sentence that
25 was so barbarous as to be beyond the limits of

1 civilized society?

2 No. The Court should reverse and give
3 the lower courts no more chances, instruct that
4 the writ of habeas corpus be denied.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 The case is submitted.

8 (Whereupon, at 12:04 p.m., the case
9 was submitted.)

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