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Legal Sidebar

The Cruel and Unusual Punishments Clause's Ban on Executing the Intellectually Disabled

May 1, 2026

In 2002, the Supreme Court in *Atkins v. Virginia* ruled that the imposition of capital punishment on the intellectually disabled constitutes "cruel and unusual" punishment in violation of the Eighth Amendment, leaving to the states the responsibility to determine who qualifies as intellectually disabled. (The Eighth Amendment binds both the federal as well as state and local governments by virtue of the Fourteenth Amendment.) In and after *Atkins*, the Court has provided some guideposts to the states in performing this constitutional inquiry. The Court has not, however, resolved whether and how states may consider a defendant's scores from multiple Intellectual Quotient (IQ) tests. This term, in *Hamm v. Smith*, the Court may resolve the open question.

This Sidebar discusses the Supreme Court's jurisprudence on the Eighth Amendment and the imposition of capital punishment on the intellectually disabled. It sketches the Supreme Court's specific decisions applying the Eighth Amendment's Cruel and Unusual Punishments Clause to the subject of executing the intellectually disabled. Against this backdrop, this Sidebar provides an overview of the *Hamm* case that remains pending before the Supreme Court. Finally, this Sidebar closes with considerations for Congress.

The Categorical Ban on Imposing Capital Punishment on Individuals with Intellectual Disabilities

Atkins v. Virginia

In 2002, the Supreme Court determined in *Atkins v. Virginia* that subjecting prisoners with intellectual disabilities to capital punishment had become "truly unusual," and that it was "fair to say" that a "national consensus" had developed against this policy. To wit, in 1989, only two states that otherwise permitted capital punishment and the federal government prohibited the execution of persons with intellectual disabilities. By contrast, in 2002, the Court observed, an additional sixteen states that otherwise allowed capital punishment had prohibited execution of persons with intellectual disabilities, and no states had reinstated the power. What mattered, the Court clarified, was "not so much the number" of states that had changed course, but instead the "consistency of the direction of change."

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LSB11426

The Court checked the execution of individuals with disabilities against the purposes of punishment. Neither of the two generally recognized penological justifications for the death penalty—retribution and deterrence—applies with full force to individuals with intellectual disabilities, the Court concluded. It found that retribution corresponds with, and reflects, the culpability of the defendant; however, impaired intellectual capacity reduced the defendant's culpability and moral blameworthiness. The Court also pointed out that deterrence theory of punishment is premised on the ability of individuals to conform their conduct to bounds of the law, and diminished intellectual capacity reduces an individual's ability to engage in self-control. As to murder in particular, the Court asserted that this crime involves premeditation and deliberation, but the Court suggested that the intellectually disabled are not as capable of engaging in "that sort of calculus."

The *Atkins* Court left to the states the "task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." In the course of its opinion, the Court referred to definitions of "intellectual disability" from the medical community that centered on three criteria: (1) "significantly subaverage general intellectual functioning"; (2) "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety"; and (3) "[t]he onset must occur before age 18 years." These criteria became relevant in subsequent cases in which the Court provided some guideposts on how states are to evaluate the criteria and continue to be relevant in *Hamm*, in which the Court is being asked to supplement these guideposts.

Post-*Atkins* Supreme Court Cases

Schriro v. Smith (2005)

After *Atkins*, the U.S. Court of Appeals for the Ninth Circuit considered a pending federal habeas action in which a petitioner in Arizona argued he was intellectually disabled and therefore could not be executed. The Ninth Circuit suspended the proceedings, ordering the "Arizona courts to conduct a jury trial to resolve [the petitioner's] . . . claim." On appeal, the Supreme Court stressed that states—not federal courts—are to "adopt[] their own measures for adjudicating [such] claims." The Court reversed the Ninth Circuit's decision, reasoning that "Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition."

Panetti v. Quarterman (2007)

The Court in *Panetti v. Quarterman* clarified when a prisoner's current mental state can bar their execution under *Ford v. Wainwright*—in which the Court in 1986 had held that the Eighth Amendment prohibits the government from carrying out the death penalty on an individual who has a severe mental illness. Relying on the understanding that the execution of a prisoner who cannot comprehend the reasons for his punishment serves "no retributive purpose," in *Panetti,* the Court concluded that the operative test was whether a prisoner can "reach a rational understanding of the reason for [his] execution." The Court announced a standard that if a prisoner's mental state is so distorted by mental illness that he cannot grasp the execution's "meaning and purpose" or the "link between [his] crime and its punishment," he cannot be executed. The Court also described the procedural requirements in such a case. Once a death row inmate has made a "preliminary showing that his current mental state would bar his execution," due process entitles him to a hearing at which he may present "evidence and argument from the prisoner's counsel, including expert psychiatric evidence" in support of his claim of incompetence and in rebuttal of any state-offered evidence.

Hall v. Florida (2014)

The Court in *Hall v. Florida* reviewed a Florida law establishing a mandatory bright-line cutoff under which an individual was not intellectually disabled if the individual possessed an IQ of above 70. The Florida Supreme Court had upheld the "70-point threshold" as constitutional.

The Supreme Court invalidated the law's "rigid rule," observing that "[i]ntellectual disability is a condition, not a number." The majority found that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature. The Court referenced a corresponding consensus of mental health professionals that concluded that an IQ test score should be read not as a single fixed number, but as a range that accounts for a "standard error of measurement" or "SEM." The Court explained that an SEM "means that an individual's score is best understood as a range of scores on either side of the recorded score," "within which one may say an individual's true IQ score lies." Accordingly, the Court determined that a state's assessment of an IQ score must include consideration of the corresponding SEM. In addition, the Court added that "once the SEM applies and the individual's IQ score is 75 or below the [intellectual disability] inquiry" should not bar "factors indicating whether the person had deficits in adaptive functioning."

***Moore v. Texas* (2014 and 2019)**

In two opinions stemming from the same underlying case, the Court reviewed and rejected intellectual disability standards adopted in Texas. In 1980, a Texas state court convicted a defendant for a murder committed during an attempted robbery and sentenced him to death. Following *Atkins*, in 2014, a Texas state habeas court found the defendant to be intellectually disabled and recommended that he be declared ineligible for the death penalty. The Texas Court of Criminal Appeals (CCA), however, denied relief. On appeal, in *Moore v. Texas* (*Moore I*), the Supreme Court rejected the standards used by this Texas court to evaluate whether a death row inmate was intellectually disabled, which created an "unacceptable risk that persons with intellectual disability will be executed." The defendant's six credited IQ scores yielded an average of 70.66. The Court wrote that *Hall* instructs that an IQ score be adjusted for the SEM and that "[b]ecause the lower end of [the defendant's] score range falls at or below 70, the CCA had to move on to consider [the defendant's] adaptive functioning."

Here, the Texas court erred in these two respects, the Court concluded. First, the Court majority concluded that the Texas court improperly narrowed the SEM when assessing the defendant's IQ scores. Second, it found that the Texas court failed to properly analyze the defendant's adaptive functioning. For example, the Court noted that the Texas decision emphasized the petitioner's perceived adaptive strengths and his behavior in prison and discounted several traumatic experiences from the defendant's past. The Supreme Court vacated and remanded the case. On remand, the Texas CCA again concluded that the defendant was not intellectually disabled for capital punishment purposes.

The case returned to the Supreme Court. In a 2019 per curiam opinion, the Court again held that the standard used by Texas fell short of the requirements set forth in *Hall*. The Court criticized the Texas court for its reliance on the petitioner's adaptive strengths in lieu of his adaptive deficits; its focus on the petitioner's adaptive improvements made in prison; its tendency to consider the petitioner's social behavior to be caused by emotional problems, instead of his general mental abilities; and its continued reliance on a lay opinion. In consideration of *Moore I*, the Court concluded the petitioner was a person with intellectual disability, reversing the lower court's judgment and remanding the case.

***Madison v. Alabama* (2019)**

In 2019, in *Madison v. Alabama* the Court explained that a prisoner challenging his execution on the ground of a mental disability cannot prevail merely because he cannot remember committing his crime. The Court found that the relevant temporal moment is not the prisoner's memory vis-à-vis the commission of the offense, but rather the prisoner's appreciation for the nature of the pending execution. The Court made clear that, under its decision in *Panetti*, a prisoner's claim hinges on whether he has a rational understanding of the reason for his execution. A person's memory loss or dementia, the Court

added, could relate to the latter inquiry: "persons suffering from dementia could satisfy the *Panetti* standard." The Court returned the case to state court to reevaluate the prisoner. In doing so, the court stated that general loss of memory, alone, does not bar execution.

Hamm v. Smith

Background

Joseph Clifton Smith was tried and convicted of first-degree murder, a capital offense in Alabama. Following the guilt phase of his trial, Smith was sentenced to death. Smith raised an *Atkins* claim—that he was intellectually disabled and therefore ineligible for capital punishment—that the Alabama state courts rejected. Smith turned to federal court, seeking habeas relief on the ground that his sentence violated *Atkins*. The federal district court held an evidentiary hearing on his *Atkins* claim. At the hearing, Smith presented five IQ scores relevant to whether he suffered from "significantly subaverage general intellectual functioning"—75, 74, 72, 78, and 74. The court heard expert testimony, presented by Smith and by Alabama, on these scores as they relate to Smith's intellectual functioning. The court then moved on to weigh Smith's adaptive functioning, and heard information from experts on Smith's communication skills, literacy, vocabulary, and ability to adhere to rules, among other things. Finally, the court probed whether these two prongs—concerning intellectual functioning and adaptive functioning—were present during Smith's developmental period.

Based on this information, the district court concluded that Smith was intellectually disabled. As relevant here, the district court observed that Smith had IQ "scores as low as 72, which according to testimony could mean his IQ is actually as low as 69 if you take into account the standard error of measurement." The district court did not credit the testimony of Alabama's expert as "strong enough" to throw out the lowest score "as an outlier" or to disregard the standard error of measurement. In view of all the evidence, the district court found that Smith satisfied each of the prongs to show he was intellectually disabled.

The U.S. Court of Appeals for the Eleventh Circuit affirmed, holding that the district court complied with Supreme Court precedent in deciding that "when an offender's lowest IQ score, adjusted for the test's standard error of measurement, is equal to or less than 70, a court must move on and consider evidence of the offender's adaptive deficits." Alabama asked the Supreme Court to review the decision. The Supreme Court denied the petition for review, vacated the Eleventh Circuit opinion, and instructed the Eleventh Circuit to clarify on remand whether its affirmance was based: (1) solely on "the fact that the lower end of the standard-error range for Smith's lowest IQ score is 69" or on (2) a "holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." The circuit court responded that it had employed the latter basis, explaining it had acknowledged that "additional evidence"—beyond a single IQ score—"may be required to determine whether Smith has significantly subaverage intellectual functioning." According to the Eleventh Circuit, the district court followed suit, investigating expert testimony on the IQ scores and Smith's intellectual functioning more generally.

The Commissioner of the Alabama Department of Corrections, John Hamm, filed a petition for review before the Supreme Court. The Justices granted certiorari to address "Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim."

The Parties' Arguments

Alabama contends that reversal is appropriate because "Smith never proved that his five scores *together* imply an IQ of 70." Alabama further argues that the lower courts "fixated" on Smith's lowest IQ score, treating it as dispositive. Alabama claimed that "'holistic' rhetoric was just window dressing" and that, "If all that matters is whether Smith's IQ 'could' be 69, then the presence of multiple scores is legally

meaningless." Alabama further argued that the lower courts looked at each score individually rather than collectively, as the latter "prevents intellectual functioning from being 'reduced to a single numerical score.'"

The United States has participated in the case as amicus in support of Alabama. In its brief, the United States argues that Smith has not met his burden of proving that he is intellectually disabled and urges the Court to reject a "one-low-score rule, where so long as a prisoner obtains one IQ test at the margins, he proves deficient intellectual functioning for purposes of *Atkins*."

For his part, Smith agreed with the parties that "the existence of multiple IQ scores does not mean that IQ score alone can become dispositive of intellectual functioning if the range of those scores, taking into account the SEM, reaches 70 or below." Smith also agreed that intellectual functioning should be determined in a "holistic" fashion. Smith, however, claimed that the district court did not focus on any score or scores overall, but considered other non-IQ evidence indicative of intellectual functioning.

The Supreme Court held oral argument in this case on December 10, 2025. The Court may issue a ruling in the case by the end of June or early July.

Considerations for Congress

Congress has a long-standing and ongoing interest in legislation involving the death penalty. For example, the current Congress has proposed legislation that would introduce new federal capital offenses (*see*, *e.g.*, H.R. 7702, 119th Cong.) and that would add aggravating factors that courts may consider in deciding whether a death sentence should be imposed (*see*, *e.g.*, H.R. 4697, 119th Cong.). Because *Hamm* turns on an interpretation of the Eighth Amendment, Congress's options to address the scope and meaning of *Atkins* and its progeny may be more limited. If it chose to, it could restrict the use of capital punishment beyond what is required under the Eighth Amendment (as interpreted by courts), for example by providing enhanced limitations on the application of federal capital punishment for particular IQ scores. Congress may also leave resolution of these issues to the courts.

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