



FIRST MONDAY IN OCTOBER

32ND ANNUAL GALA & MOCK SUPREME COURT ARGUMENT

October Term 2025

Hamm v. Smith



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Office of the Appellate Defender's
32nd Annual
FIRST MONDAY IN OCTOBER
A Mock Supreme Court Argument

THE ADVOCATES

Katya Jestin **Anjan Sahni**
Counsel for Petitioner *Counsel for Respondent*

THE BENCH

Chief Justice
Cari Gallman

Associate Justices
Deborah Colson
Teny Geragos
Victor L. Hou
Edward A. Imperatore
Michelle Levin
David B. Massey
Benjamin Naftalis
Avi Weitzman

COURT CRIER
Myrna Felder

SEATING



Advocates' Podium

Associate Justices' seniority was determined alphabetically.

1: Chief Justice Gallman **2:** Deborah Colson **3:** Teny Geragos **4:** Victor L. Hou
5: Edward A. Imperatore **6:** Michelle Levin **7:** David B. Massey **8:** Benjamin Naftalis **9:** Avi Weitzman

WARMEST THANKS TO OUR GENEROUS SUPPORTERS

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Honorary Chair Myrna Felder

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& Plimpton

FRESHFIELDS

GT GreenbergTraurig

Hecker
Fink

JENNER & BLOCK

SULLIVAN & CROMWELL

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As of October 2, 2025

PROGRAM

OPENING REMARKS

Nicolas Bourtin

Sullivan & Cromwell LLP
Chair, OAD Board of Directors

Caprice R. Jenerson

President & Attorney-in-Charge
Office of the Appellate Defender

AWARDS PRESENTATION

OAD GIDEON AWARD

Freshfields

*Accepted by Christian Vandergeest
Presented by Caprice Jenerson*

OAD BEACON OF HOPE AWARD

Dexter Murray

Presented by Caprice Jenerson

THE ORAL ARGUMENT

Setting: The Supreme Court of the United States Courtroom
Time: Monday, October 6, 2025, 10:00 a.m. sharp

AWARDS PRESENTATION

GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

Katya Jestin

Jenner & Block LLP
Presented by Nicolas Bourtin

Anjan Sahni

Wilmer Cutler Pickering Hale and Dorr LLP
Presented by Joanna Hendon

OAD COUNSEL FOR JUSTICE AWARD

Cari Gallman

Bristol Myers Squibb
Presented by David Gopstein

THE SECRET DELIBERATIONS

Setting: The Supreme Court of the United States,
Chief Justice's Conference Room
Time: Friday, October 10, 2025, 3:00 p.m.

There will be no intermission.



2025 MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

KATYA JESTIN

A recognized leader in investigations and crisis management, Katya Jestin's experienced and strategic guidance fosters a sense of calm and order for companies, universities, and individuals facing sensitive, high-stakes matters. A former federal prosecutor, she serves as Co-Chair of Jenner & Block LLP's Investigations, Compliance, and Defense

Practice where she represents clients in criminal, regulatory, and congressional investigations. In addition, Katya helps companies, universities, executives, and boards conduct sensitive internal investigations on matters ranging from global compliance to culture risk.

Katya represents clients in government facing matters, including before the U.S. Department of Justice, the Securities and Exchange Commission, the New York State Attorney General's Office, and the Senate Permanent Subcommittee on Investigations. Known as a diligent, practical, and honest fact-finder, she brings credibility to her clients' dealings with government investigators and prosecutors. Outside of the investigative context, clients rely on her insight when building efficient and sustainable compliance programs. Notably, Katya served as the DOJ-appointed independent compliance monitor for Glencore Ltd. until March 2025.

As an Assistant U.S. Attorney and supervisor in the Criminal Division of the Eastern District of New York, Katya investigated and prosecuted fraud, money laundering, and other white-collar offenses. She also prosecuted leaders of three of the five Mafia organized crime families and served as co-counsel in the RICO prosecution of Gambino boss Peter Gotti and 16 co-defendants.

Katya served for five years, from 2020 until the end of 2024, as Jenner & Block's Co-Managing Partner. During her tenure, the firm experienced a period of transformational economic growth while also deepening its commitment to pro bono service and inclusion. As a member of the firm's Policy Committee, Katya continues to provide strategic leadership and direction for the firm.



2025 MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

ANJAN SAHNI

Anjan Sahni serves as WilmerHale's Managing Partner. He represents companies, boards, nonprofit institutions, and senior executives in federal and state government investigations, litigation, and crisis-related matters. He returned to WilmerHale in 2015, after having been a federal prosecutor for over a decade at the United States Attorney's Office for the Southern District of New York. Since 2005,

Anjan has been lead counsel in over a dozen federal criminal trials and numerous appeals.

Anjan served as an Assistant U.S. Attorney in the Southern District of New York from 2005 to 2015. He served as Chief of the Securities and Commodities Fraud Task Force, in which role he supervised investigations and prosecutions involving insider trading, accounting fraud, market manipulation, commodities fraud, and violations of the Bank Secrecy Act (BSA) and Foreign Corrupt Practices Act (FCPA). Anjan also served as the Co-Chief of the Terrorism and International Narcotics Unit, where he oversaw investigations and prosecutions involving domestic and international terrorism, arms trafficking, counterintelligence, piracy, money laundering, violations of export controls and economic sanctions laws, and global narcotics trafficking.

Anjan advises companies, boards, and senior executives in high-stakes government and internal investigations, litigation, and crisis response. He represents clients in matters involving the DOJ, SEC, CFTC, Congressional Committees, and State Attorneys General. His recent representations have involved the areas of securities and commodities fraud, antitrust, international sanctions, export controls, data privacy, tax law, laws governing the use of classified information, the BSA, the FCPA, the False Claims Act, and federal and state civil rights laws. Anjan maintains an active pro bono practice on behalf of indigent criminal defendants and the Sikh Coalition, a national civil rights organization.

Anjan has a B.A. from Emory University and a J.D. from Yale Law School. Following law school, he clerked for the Honorable Pierre N. Leval of the United States Court of Appeals for the Second Circuit, after which he joined WilmerHale as a litigation associate.



2025 OAD COUNSEL FOR JUSTICE AWARD

CARI GALLMAN

Cari Gallman, executive vice president, general counsel and chief policy officer, leads Law, Public Policy & Government Affairs at Bristol Myers Squibb, overseeing intellectual property, commercial and regulatory law, litigation, corporate governance, transactions, compliance & ethics and corporate security. She is also responsible for the company's global policy and government affairs teams where

she oversees strategy around critical policy issues affecting the company and the people Bristol Myers Squibb serves.

“In a constantly evolving healthcare landscape, we have a responsibility to safeguard the interests of patients by helping shape a dynamic policy environment—one that is grounded in ethical decision-making and designed to enable innovation, expand access, and deliver lasting impact. When we do both well, we not only protect what matters most today—we help create the conditions for progress tomorrow.”

Cari joined Bristol Myers Squibb in 2015 as an attorney and held increasing roles of responsibility until 2020, when she was named as the chief compliance and ethics officer where she drove efforts to ensure the company's operations are always conducted in compliance with ethical business practices and championed Bristol Myers Squibb's Principles of Integrity. In 2023, she was appointed the head of Corporate Affairs, where she advanced company strategy through strategic communications, government relations and policy, corporate social responsibility, corporate marketing and brand reputation, and patient advocacy.

Prior to BMS, Cari began her legal career in private practice representing pharmaceutical and medical device manufacturers in government enforcement and regulatory matters. In her practice, she regularly advised companies on how to design and implement robust compliance policies to meet business objectives as well as legal needs.

She earned a bachelor's degree in political theory from Princeton University, *magna cum laude*, and a J.D. from Harvard Law School.



2025 OAD BEACON OF HOPE AWARD

DEXTER MURRAY

Dexter Murray, an African American man, endured an unimaginable 31 months on Rikers Island—awaiting trial and still maintaining his innocence. Isolated and deteriorating in health, Mr. Murray lost faith in a legal system that seemed determined to ignore him. Yet through it all, he never lost his voice—or his fight.

When he finally stood before a trial judge, he made the bold decision to represent himself, despite strong warnings from the bench. Trusting no one else to tell his story, Mr. Murray took control of his defense. During jury selection, he made a skillful Batson challenge, calling out the prosecutor's use of peremptory strikes that removed four out of five African American jurors. Although the trial judge accepted the prosecutor's superficial justifications, and Mr. Murray was ultimately convicted—not of any felony charges, but only of misdemeanor offenses—he laid the groundwork for something bigger.

Once released, Mr. Murray faced severe personal challenges, including homelessness and deep instability. Still, he remained determined to reclaim his life.

Assigned to his case on appeal, the Office of the Appellate Defender recognized that Mr. Murray's self-advocacy had preserved a powerful Batson claim. On June 29, 2021, the Appellate Division reversed his convictions and ordered a new trial, sharply criticizing the prosecution's race-based juror strikes as rooted in stereotypes and bias.

Dexter Murray has emerged as a passionate and fearless voice for justice. Now residing in an assisted living facility and still facing daily challenges, he refuses to be silenced. He has spoken on panels hosted by the NAACP Legal Defense Fund, written a poignant op-ed in the *New York Daily News* about the Batson doctrine, contributed an article to *Blavity* on the private prison industry, and joined attorney Adam Murphy on the *Black Agenda Report* podcast. He has also shared his experiences with law students at New York University School of Law, inspiring the next generation of legal advocates.

Today, Dexter Murray continues to advocate—not just for himself, but for all those lost in the cracks of a broken system. For his fierce dedication, unwavering strength, and relentless pursuit of justice, OAD is proud to present Dexter Murray with the Beacon of Hope Award.



2025 OAD GIDEON AWARD

FRESHFIELDS

Freshfields LLP is a global law firm with a legacy stretching back nearly 300 years. Freshfields is known for its deep expertise in complex cross-border matters, including M&A, litigation, antitrust, and regulatory work. With over 2,800 lawyers across 33 offices worldwide, the firm combines legal excellence with a forward-thinking approach to client service, innovation, and social responsibility.

At the heart of Freshfields' ethos is a commitment to using the law as a force for good. The firm's pro bono practice is a cornerstone of its responsible business strategy. In 2024, Freshfields delivered over 85,000 hours of **free legal work** last year across over **540 matters for more than 270 clients**.

The firm focuses its pro bono efforts on areas where it can have the greatest impact, including matters on behalf of low-income and incarcerated individuals; immigration; LGBTQ+ rights, and human trafficking. Our lawyers have helped secure compensation for survivors of modern slavery, supported asylum applications, advised global NGOs on legal frameworks for protecting vulnerable populations, and represented clients who advocate for gun safety. Freshfields also partners with corporate clients to develop pro bono initiatives, amplifying impact through collaboration. We also embed lawyers full-time with community organizations through fellowships and secondments. Our efforts have been recognized with awards from the *Financial Times*, Law.com, and leading legal services organizations.

Pro bono work at Freshfields is a powerful platform for professional development. Associates are encouraged to take ownership of pro bono matters early in their careers, often leading cases under the guidance of experienced partners. These opportunities allow lawyers to sharpen their advocacy, negotiation, and client management skills while making a meaningful difference in the lives of individuals and communities. Freshfields ensures that every lawyer—regardless of their specialization or location—has access to impactful pro bono work.

At Freshfields, we believe that law can be a powerful tool for change—and we are proud to use our skills to advance equity, opportunity, and justice around the world.

PREVIOUS HONOREES

THE MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

is awarded annually to two of the nation's most accomplished lawyers. We have proudly presented the Gould Award to the following individuals since 1994:

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BENJAMIN BRAFMAN
ZACHARY W. CARTER
EVAN R. CHESLER
PAUL J. CURRAN
EVAN A. DAVIS
FAITH E. GAY
HON. JOHN GLEESON
HELEN GREDD
CAITLIN J. HALLIGAN
CONRAD K. HARPER
MICHELE HIRSHMAN
DANI R. JAMES
HON. JEH C. JOHNSON

HON. BARRY KAMINS
ROBERTA A. KAPLAN
NEAL KUMAR KATYAL
JOON H. KIM
DANIEL F. KOLB
GERALD B. LEFCOURT
ANDREW J. LEVANDER
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HERBERT M. WACHTELL
THEODORE V. WELLS, JR.
MARY JO WHITE
DAVID M. ZORNOW

THE OAD COUNSEL FOR JUSTICE AWARD

recognizes a prominent in-house counsel who exemplifies OAD's commitment to justice. We have proudly presented the Counsel for Justice Award to the following individuals since 2014:

CHRISTINA B. DUGGER
STACEY R. FRIEDMAN
DANIELLE C. GRAY
ELLEN ORAN KADEN

JENNIFER NEWSTEAD
ELLEN R. PATTERSON
CHRISTOPHER P. REYNOLDS
TERESA WYNN ROSEBOROUGH

KATHRYN RUEMLER
AUDREY STRAUSS
TONY WEST

THE OAD BEACON OF HOPE AWARD

celebrates a former client whose life stands as a powerful example of the human capacity for resilience and highlights the importance of centering the administration of criminal justice around the inherent potential of every person. We have proudly presented the Beacon of Hope Award to the following individuals since 2018:

MARVIN CLARK
KHALIL A. CUMBERBATCH
DESHEEN EVANS
RICARDO JIMENEZ

CLEVELAND LOVETT
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EZEQUIEL OCHOA

THE OAD GIDEON AWARD

honors a law firm that has demonstrated exemplary commitment to indigent appellate defense through its participation in OAD's Volunteer Appellate Defender program. We have proudly presented the Gideon Award to the following firms since 2018:

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DEBEVOISE & PLIMPTON LLP
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& JACOBSON LLP

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ORRICK
WACHTELL, LIPTON, ROSEN & KATZ
WEIL, GOTSHAL & MANGES LLP



AWARDS PRESENTERS



Nicolas Bourtin is the Managing Partner of Sullivan & Cromwell's Criminal Defense and Investigations Group and a co-head of the FCPA and Anti-Corruption Group. His practice focuses on white collar criminal defense and internal investigations, regulatory enforcement matters, and securities and complex litigation. He has conducted numerous jury trials and has represented individuals and corporations in high-profile matters.

Previously, Nic served as an Assistant U.S. Attorney in the Eastern District of New York. He has been recognized by *The National Law Journal* as a White Collar, Regulatory and Compliance Trailblazer, and by *Chambers USA* as a leader in White-Collar Crime & Government Investigations. Nic is the Chair of the Board of Directors of the Office of the Appellate Defender and serves on the Criminal Justice Act Panel of the U.S. District Court for the Eastern District of New York.



David Gopstein is a partner at Hecker Fink LLP. He is an experienced trial lawyer who represents individuals and companies in a wide range of white-collar and regulatory matters. David also maintains a broad commercial litigation practice. David is a member of the Board of Directors of the Office of the Appellate Defender and serves on the Criminal Justice Act Panel in the Eastern District of New York.

Prior to joining Hecker Fink, David spent seven years as an Assistant U.S. Attorney in the Eastern District of New York, including as Deputy Chief of the Business & Securities Fraud Section and Healthcare Fraud Coordinator. He clerked for the Honorable Naomi Reice Buchwald in the Southern District of New York and is a graduate of Yale Law School and Princeton University.



Joanna C. Hendon is a co-leader of Alston & Bird's White Collar, Government & Internal Investigations Team. Joanna represents companies and individuals at trial and in arbitration, in civil litigation, and in matters before the Department of Justice, the SEC, and the Federal Reserve, among other entities. Joanna is ranked Band 1 by *Chambers USA* for White Collar Crime and Government Investigations, and in 2019, Chambers shortlisted Joanna for its New York White Collar Crime & Government Investigations Lawyer of the Year Award.

Early in her career, Joanna was as an Assistant U.S. Attorney for the Southern District of New York. As a prosecutor, Joanna received the John Marshall Award, the DOJ's highest honor given to a lawyer for excellence at trial. Joanna served as a clerk for the Hon. Frank M. Coffin, U.S. Court of Appeals for the First Circuit. Joanna serves on the Board of Directors of the Office of the Appellate Defender.



THE BENCH

CHIEF JUSTICE

Cari Gallman

ASSOCIATE JUSTICES



Deborah Colson is an experienced trial and appellate lawyer. Her white collar experience includes accusations of insider trading, securities and wire fraud, money laundering, and health care fraud. In the criminal sphere, she represents clients charged with racketeering, terrorism offenses, and capital and violent crimes. She also handles sensitive matters involving federal and state grand jury proceedings and investigations conducted by government agencies.

Prior to founding Moskowitz Colson Ginsberg & Schulman, Deborah was the principal of Colson Law PLLC. From 2001 to 2006, she was an assistant federal defender in the Eastern District of New York where she served as lead counsel on hundreds of federal criminal cases. She also worked in the Law & Security Department at Human Rights First where she managed the organization's

Guantanamo monitoring program and spoke and wrote frequently on issues related to terrorism and national security.



Teny Geragos, a founding partner of Agnifilo Intrater LLP, defends individuals in federal and state criminal cases at both the trial and appellate level. Most recently, Teny helped secure an acquittal for Sean Combs for the charges of sex trafficking and racketeering conspiracy in the Southern District of New York. Teny is particularly experienced in defending and investigating allegations of sexual misconduct, which involve complex legal issues and emotionally charged situations. She has represented numerous individuals accused of sexual assault, sexual harassment, or other types of sexual misconduct. Teny has also regularly represented victims of sexual assault and violence, helping them navigate the difficulties of reporting to the police, and cooperating with law enforcement investigations. Finally, Teny has led several internal investigations, including in the construction and healthcare industries.

Prior to founding Agnifilo Intrater LLP, Teny was associated with Brafman & Associates, P.C. for approximately eight years, where she successfully defended a wide range of criminal matters including sex assault, securities fraud, wire fraud, public corruption, tax evasion, narcotics, FCPA, and cases that have potentially serious collateral consequences, such as deportation. Teny has been selected as a Super Lawyers Rising Star for five consecutive years and publishes and speaks regularly on various legal topics ranging from "Gag" Orders to

Protective Orders to managing electronic discovery. She serves on the Board of Directors of the New York Criminal Bar Association.



Victor L. Hou is Co-Leader of Cleary Gottlieb's Americas Litigation Group. His practice focuses on high-stakes litigation, government investigations, securities litigation, corporate governance, and general commercial litigation. He has represented numerous financial institutions and multinational corporations in securities, antitrust, and other complex litigation, as well as in criminal and regulatory matters involving the Department of Justice, the Securities and Exchange Commission, the Financial Industry Regulatory Authority, and state attorney general's offices. Victor regularly conducts internal investigations involving allegations of violations of the Foreign Corrupt Practices Act, financial and accounting fraud, and insider trading. He has also advised boards of directors on corporate governance.

Victor joined the firm in 2007 and became a partner in 2010. From June 2001 until July 2007, he worked as an Assistant U.S. Attorney for the Southern District of New York. As a prosecutor, Victor investigated and prosecuted numerous federal offenses, including racketeering, terrorism, murder, securities fraud, money laundering, mail fraud, wire fraud, and international narcotics trafficking. He worked on several high-profile prosecutions, including the successful prosecution at trial of the head of the Gambino Crime Family. He has tried dozens of federal jury trials and has briefed and argued numerous appeals before the U.S. Court of Appeals for the Second Circuit Court of Appeals.



Edward A. Imperatore is a partner in Morrison & Foerster's Investigations + White-Collar Defense Group. Edward represents companies and individuals in internal and government investigations, including before the DOJ, SEC, CFTC, and other federal agencies, and parallel civil litigation. He is experienced in all aspects of white-collar crime, including securities and commodities fraud, accounting and disclosure fraud, insider trading, market manipulation, corporate fraud, BSA/AML violations, and violations of the FCPA.

Before joining Morrison & Foerster, Edward served for nearly a decade as an Assistant U.S. Attorney for the Southern District of New York. He was a senior member of the Office's Securities & Commodities Fraud Unit and tried more than a dozen criminal cases to verdict as an AUSA.



Michelle Levin is an accomplished trial lawyer and strategic advisor with over 20 years of experience defending companies and executives in high-profile white-collar criminal enforcement matters, regulatory enforcement proceedings, and complex commercial litigation. She also conducts internal investigations on behalf of companies and boards, often involving sensitive matters and complex cross-border issues. Michelle serves as the managing partner of Steptoe's New York office and is a member of Steptoe's Executive Committee.

Ranked by *Chambers USA* as a leading lawyer for white collar and government investigations, Michelle has been described as having “enormous talent” and “great judgment.” Her strategic approach to complex issues has resulted in a number of high-profile successes and trial wins. Most recently, she secured a rare complete acquittal for the former CEO of a public company arising from a multi-billion-dollar acquisition in one of Silicon Valley's largest fraud prosecutions.

Michelle handles matters involving allegations of securities and accounting fraud, foreign and public corruption, sanctions violations, and cryptocurrency-related fraud, among other issues, and has particular experience in matters related to the financial services industry.



David B. Massey is the co-chair of the White Collar & Investigations practice at Perkins Coie. He represents global companies and senior executives in government investigations, prosecutions, and civil litigation.

As a federal prosecutor in the U.S. Attorney's Office for the Southern District of New York from 2004 through 2013, David focused on complex cross-border fraud cases.

Chambers USA has praised David as a “super talented lawyer,” and “a great litigator and clear communicator,” who has “a perfect combination of attention to detail and an intuitive and logical approach” and “skill in seeing the overall strategy.”



Benjamin Naftalis is New York Deputy Office Managing Partner at Latham & Watkins LLP and previously served as Global Co-Chair of the firm's White Collar Defense & Investigations Practice.

Ben has broad experience advising companies, boards of directors, and senior executives on a wide range of matters, with a particular emphasis on government and internal investigations, enforcement matters, high-stakes disputes, and corporate crises. He has built a reputation as a go-to litigator with an unusual breadth of experience, including before the DOJ, SEC, and CFTC. Before entering private practice, Ben served as an Assistant U.S. Attorney in the Southern District of New York and left as a senior member of the Securities and Commodities Fraud Task Force, conducting joint and parallel investigations with domestic and foreign regulators.

Ben also advises clients on a range of compliance, litigation, and enforcement matters at the forefront of regulatory developments involving digital assets, blockchain technology, and artificial intelligence. He is recognized by Chambers and *The Legal 500* as a preeminent white collar and fintech practitioner, and was named by Law360 as a 2024 Fintech MVP. Ben is a member of the Council on Foreign Relations.



Avi Weitzman is co-chair of the Complex Litigation and Arbitration practice and a partner in the Investigations and White Collar Defense practice at Paul Hastings, based in the firm's New York office. Avi has successfully served as lead trial counsel in some of the country's highest-profile white collar and civil trials, both while an Assistant United States Attorney in the Southern District of New York (2005-2012) and in private practice since then. He has participated in or led nearly twenty trials and arbitrations over his 25+ year career. Clients, colleagues, and adversaries have described him as a "smart, tenacious" and "quick-witted litigator," with "an unparalleled dedication to figuring out every angle that he can present for clients" because he "leaves no stone unturned." He has been singled out for his "first-rate legal skills," "keen judgment" and "dedication" to his clients.

Avi has had leading roles in a number of high profile civil and criminal trials. Most recently, Avi was trial counsel in the high-profile, 10-week trial of New Jersey Senator Robert Menendez, charged with unprecedented public corruption, foreign agent, and obstruction of justice offenses. He is recognized by most leading trade publications for his skills in both white-collar defense and commercial litigation, including being individually ranked by *Chambers USA* for New York White-Collar Crime & Government Investigations. Avi is a graduate of the Harvard Law School (1999) and the University of Kentucky.

COURT CRIER



Myrna Felder, a matrimonial attorney at both the trial and appellate level, as a member of the Board of Directors of the Office of the Appellate Defender was one of a number of enthusiastic supporters for the creation of the First Monday in October program, for which she has served Court Crier since its inception thirty-two years ago.

A former Chair of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction, Ms. Felder organized the State Bar's day-long CLE program on New York appellate practice and has been a frequent lecturer on appellate practice for the Appellate Division, First Department; the New York State Bar Association; the American Bar Association; the Women's Bar Association of the State of New York; and other bar groups. Ms. Felder serves on the Subcommittee on Appellate Practice of the New York State Office of

Court Administration's Advisory Committee on Civil Practice, of which she has been a member since 1983, and authored the chapter, "Special Considerations in Matrimonial Appeals" in Thomas Newman's *New York Appellate Practice*.

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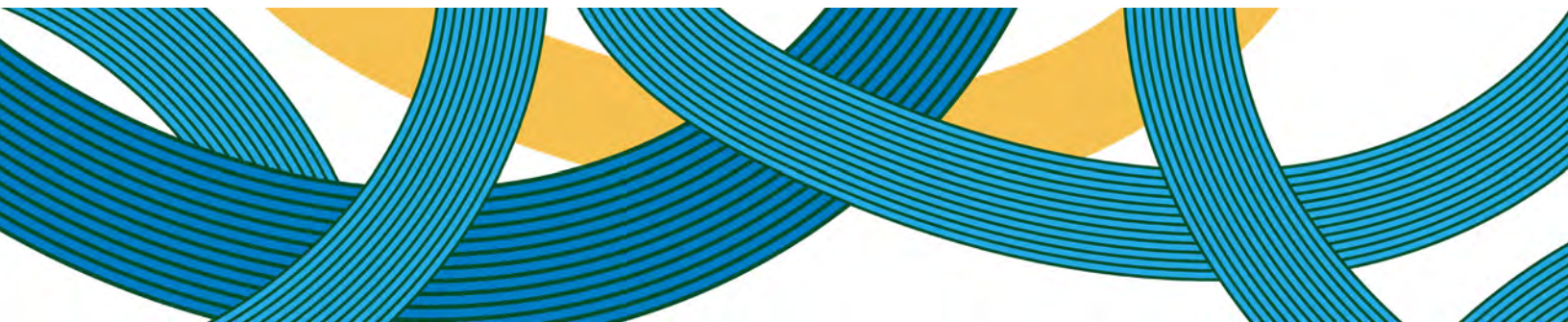
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A SPECTATOR'S PRIMER

NO. 24-872

IN THE MOCK SUPREME COURT OF THE UNITED STATES

JOHN Q. HAMM, COMM'R OF THE ALABAMA DEP'T OF CORR., Petitioner,

v.

JOSEPH CLIFTON SMITH, Respondent.

[CAPITAL CASE]

Introduction

This moot court hypothetical is based on an actual case where the United States Supreme Court has granted certiorari. At issue in the case before this Mock Supreme Court is whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an Atkins claim, i.e., how to weigh or analyze IQ scores as part of the determination that an individual is intellectually disabled such that they cannot be subjected to a death sentence.

Factual and Procedural Background

In 1998, Smith was convicted of murder during a robbery, a capital offense under Alabama law. Smith and another man beat and robbed the victim for \$140, his tools, and his boots. They left him under a mattress near his truck, and his badly beaten body was discovered two days later in the truck—his multiple rib fractures and collapsed lung were likely the immediate cause of death.

At sentencing, Smith's expert, clinical psychologist Dr. James Chudy, testified that Smith was found to have a full-scale IQ of 72, which placed him at the third percentile in comparison to the general population. This test took place at the time of the offense/trial, when Smith was 28 years old. IQ scores, of course, also have a standard error rate or error of measure (SEM). Accounting for the SEM, the score could be viewed as a range from about 69 to 75. Dr. Chudy explained that "69 is considered clearly [intellectually disabled]."

Dr. Chudy additionally testified that his testing, records review, and interview with Smith's mother established that Smith struggled with social interactions from elementary school forward. Smith was reading at a fourth-grade level, spelling at a third-grade level, and performing math at the level of a kindergarten-aged child. Smith's relationships were "typically troublesome," he was "socially ill-suited to sustain a relationship," and his emotional and personality functioning were significantly dysfunctional.

Smith was sentenced to death with the jury recommending the capital sentence 11 to 1. His sentence was imposed before the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), held that "death is not a suitable punishment for [an intellectually disabled] criminal" and that "the Constitution 'places a substantive restriction on the State's power to take the life' of [an intellectually disabled] offender."

Using Alabama's post-conviction relief statute, Smith later raised an *Atkins* claim highlighting his IQ scores over time, starting when he was eight years old and continuing into adulthood, and his documented deficits in adaptive behavior. His claim was denied at the state level, only receiving consideration in a later federal habeas proceeding (after the Eleventh Circuit reversed a district court denial of the habeas, and the district court held an evidentiary hearing).

This table summarizes the five IQ tests at issue in this case:

Date	Age & IQ Test	Score
1979	Age 8: Wechsler Adult Intelligence Scale -Revised (“WAIS-R”)	75
1982	Age 12: Wechsler Intelligence Scale for Children (“WISC-R”)	74
1998	Age 28: WAIS-R	72
2014	Age 44: Stanford Binet Intelligence Scales, Fifth Edition (“SB-5”)	78
2017	Age 47: Wechsler Adult Intelligence Scale - Fourth Edition (“WAIS-IV”)	74

After receiving the additional evidence (of the entire range of Smith’s IQ scores and of his struggles to interact with others and society), the District Court—as affirmed by the Eleventh Circuit opinion at issue in this case—determined that, though it was a close case, Smith had proven “by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior” that “manifested during his developmental period.”

His death sentence was vacated. The Eleventh Circuit affirmed. The Supreme Court issued a GVR (grant, vacate, and remand) asking the circuit to explain how it analyzed the range of scores, since an *Atkins* claim per Alabama law requires an individual’s IQ to be 70 or below. But here, Smith had a range of scores and only the lowest score could be viewed as meeting the threshold if the SEM was used to move the 72 score downward.

On remand, the Eleventh Circuit issued a new opinion “reject[ing] any suggestion that a court may ever conclude that a capital defendant suffers from significantly subaverage intellectual functioning based solely on the fact that the lower end of the standard-error range for his lowest of multiple IQ scores is 69.” *Smith v. Comm’r, Alabama Dep’t of Corr.*, No. 21-14519, 2024 WL 4793028, at *1 (11th Cir. Nov. 14, 2024). According to the panel, “the district court used a ‘holistic approach to multiple IQ

scores that considers the relevant evidence, including as appropriate any relevant expert testimony,' when it determined Smith is intellectually disabled.”

The court noted expert testimony “that Smith’s multiple IQ scores ... taken over a long period of time place him in the borderline range.” Smith’s scores were not “so high,” however, that a court could “disregard[]” what some of them “individually suggest.” Scores “within the ‘range of about 65 to 75,’” the panel held, “individually suggest Smith’s true IQ may be 70 or lower.” Counting four of five scores in that range, the panel identified “consistent evidence” that Smith’s true IQ “could” satisfy the first *Atkins* prong. Thus, the Eleventh Circuit held that the district court had correctly moved on from IQ because Smith’s scores did not “foreclose the conclusion” that he had satisfied the first step.

Alabama has successfully sought certiorari. Oral argument is set for November 4, 2025.

The question presented is: Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim.

Applicable Law

A. Constitutional Provisions and Alabama Law

The Eighth Amendment to the U.S. Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Rule 32.3 of the Alabama Rules of Criminal Procedure provides in pertinent part that a petitioner for post-conviction relief “shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.”

Under Alabama law (which federal law incorporates in this context), an Atkins claimant must show “[1] significantly subaverage intellectual functioning (an IQ of 70 or below), [2] significant or substantial deficits in adaptive behavior[,] **and** [3] [that] these problems ... manifested themselves during the developmental period (i.e., before the defendant reached age 18).” *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

B. Supreme Court Precedent

- *Atkins v. Virginia*, 536 U.S. 304 (2002) (Stevens, J.)

In *Atkins*, the Supreme Court held that death sentences for those with intellectual disabilities are “cruel and unusual punishments” prohibited by the Eighth Amendment. *Id.* at 321.

The Supreme Court explained that the Eighth Amendment prohibits “excessive” penalties, and “‘that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’” *Id.* at 311 (quoting *Weems v. United States*, 217 U.S. 349 (1910)). “A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.” *Id.* at 311. Thus, the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (decided by the Warren Court)).

Though the Court had allowed such executions in 1989 (and, of course, before then), in *Atkins*, the Court concluded “a national consensus has developed against” the practice. *Id.* at 316. The Supreme Court noted that individuals with an intellectual disability “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in

logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. These deficiencies “do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.” *Id.* at 318. The Court also suggested that the retribution and deterrence justifications for the death penalty likely do not apply to people with intellectual disabilities. *Id.* at 318–20.

For Mr. Atkins, whose IQ score was 59, this meant the death penalty could not be imposed. The Court cautioned, however, that “[n]ot all people who claim to be [intellectually disabled] will be so impaired as to fall within the range of [intellectually disabled] offenders about whom there is a national consensus.” *Id.* at 317. Accordingly, the Supreme Court “le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.” *Id.*

- *Hall v. Florida*, 572 U.S. 701 (2014) (Kennedy, J.)

Twelve years later, the Supreme Court addressed the question left open by Atkins: the constitutionally-required parameters for a state scheme for identifying individuals with an intellectual disability in capital punishment cases. In *Hall*, the Court held unconstitutional a Florida law defining intellectual disability to require an IQ test score of 70 or less and foreclosing further exploration of intellectual disability based on that test score. The Court reasoned: “[t]his rigid rule ... creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.” *Id.* at 704.

“Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80 ... but the sentencing court excluded the two scores below 70 for evidentiary reasons, leaving only scores between 71 and 80.” *Id.* at 707. Because of Florida’s rigid rule, a sentencing court in Florida would be barred from considering “even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant’s failure or inability to adapt to his social and cultural

environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances.” *Id.* at 712. According to the Supreme Court’s review of medical literature, “the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70.” *Id.* at 711-12.

Moreover, Florida’s scheme did not take into account that “[t]he professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.” *Id.*

- *Moore v. Texas*, 581 U.S. 1 (2017) (Ginsburg, J.)

In *Moore*, the Supreme Court reversed a Texas appellate court decision that cabined its review to two IQ scores (78 and 74) and concluded that Moore was not intellectually disabled. The Court made clear: the Texas court’s “conclusion that Moore’s IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*. *Hall* instructs that, where an IQ score is close to, but above, 70, courts must account for the test’s ‘standard error of measurement.’” *Id.* at 13. “Moore’s score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79.... Because the lower end of Moore’s score range falls at or below 70, the [state court] had to move on to consider Moore’s adaptive functioning.” *Id.* at 14.

“[W]e do not end the intellectual-disability inquiry, one way or the other, based on Moore’s IQ score. Rather, in line with *Hall*, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits.” *Id.* at 15.

The Supreme Court also disagreed with the Texas court’s analysis regarding Moore’s adaptive deficits. *Id.* at 15–20. The Court reiterated that “[t]he medical

community's current standards supply one constraint on States' leeway in this area." *Id.* at 20.

C. Circuit Decisions Addressing Multiple IQ Scores

- *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017)

The Sixth Circuit considered an *Atkins* claim under Tennessee Law. The defendant had taken several IQ tests over the course of his life, with scores ranging from 57 to 97. *Id.* at 744–45. The Sixth Circuit analyzed the defendant's argument that certain scores overstated his level of intellectual functioning, and that his results should be construed as below 70. *Id.* at 745–46. The circuit noted that "the SEM accounts for the possibility that an individual's true IQ score is either higher or lower than the reported score. And while the Supreme Court has rejected rigid rules that prevent a court from considering evidence of the SEM altogether ... the Court's decisions in no way require a reviewing court to make a downward variation based on the SEM in every IQ score." *Id.* at 746. Thus, the circuit affirmed the district court's conclusion that the defendant "could not carry his burden of showing, by a preponderance of the evidence, that he had significantly subaverage general intellectual functioning before he turned eighteen." *Id.* at 748.

- *Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014) (pre-Moore)

Similarly, the defendant in *Garcia* presented evidence of five IQ scores in support of his *Atkins* claims—75, 100, 91, 83, and 83—under Texas Law. *Id.* at 224. There was also record evidence of adaptive deficits in conceptual skills, social skills, and practical skills. *Id.* The Fifth Circuit approved of the district court's analysis: "The district court observed that although on a post-conviction IQ test, Garcia scored 75, which falls just within the margin of generally recognized testing error of five points,

his actual IQ is as likely to be 80 as it is to be 70. The district court noted that the fact that his four other, pre-conviction, IQ scores ranged from 83 to 100 indicated that his actual IQ is likely higher than 75. Accordingly, Garcia failed to show that his alleged deficits in adaptive behaviors are related to subaverage intellectual functioning, rather than psychological or environmental factors or a personality disorder.” *Id.* at 226.

- *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (pre-Moore)

In *Hooks*, the Tenth Circuit assessed the *Atkins* claim of a defendant who had nine IQ scores from a thirty-four year period, ranging from 53 to 80. *Id.* at 1168. The circuit rejected the defendant’s argument that the Oklahoma state court erred in finding that he had failed to meet his burden to show that he was functioning at a sub-average intellectual level. *Id.* at 1168–1171. The Tenth Circuit explained: “We are left ... with a number of IQ scores, some below and some above a score of 70. We do not believe this set of scores unquestionably qualifies [the defendant] as significantly sub-average in intellect. Given the reliability problems associated with many of the scores and the strong reliability of the scores of 72 and 76 from [the defendant’s] own experts, we agree that [the defendant] falls into a ‘gray area.’ ... A rational trier of fact could conclude from this evidence that [the defendant] indeed functions at a sub-average intellectual level, but it could also rationally draw the conclusion that he does not.” *Id.* at 1170–71. Accordingly, it was not unreasonable for the state court to find that the defendant’s evidentiary burden was not met. *Id.*

- *Sasser v. Payne*, 999 F.3d 609 (8th Cir. 2021) (focusing on the lower end of the range)

In *Sasser*, the Eighth Circuit evaluated an *Atkins* claim (with IQ scores of 79 and 75) under Arkansas law, which requires a substantially similar analysis to those

discussed above. *Id.* at 616–21. The district court had “concluded that only the lowest ends of the IQ ranges ‘had any statistical significance,’ and the other evidence indicated ‘intelligence that ... was not so subaverage as to meet the standard for [an intellectual disability.]’” *Id.* at 616–17. The Eighth Circuit affirmed this approach: “[w] here ‘the lower end of [a defendant’s] score range falls at or below 70,’ courts must ‘move on to consider ... adaptive functioning.’” *Id.* at 619 (quoting *Moore*, 581 U.S. at 14). Here, “[t]he lowest end of [the defendant’s] lower IQ score range was 70, so the district court did not err by considering additional indicia of intellectual disability.” *Id.*

See also, e.g., *Jackson v. Payne*, 9 F.4th 646, 653 (8th Cir. 2021) (“When the low end of an IQ score range falls at or below 70, courts must move on to consider the petitioner’s adaptive functioning.”) (cleaned up).



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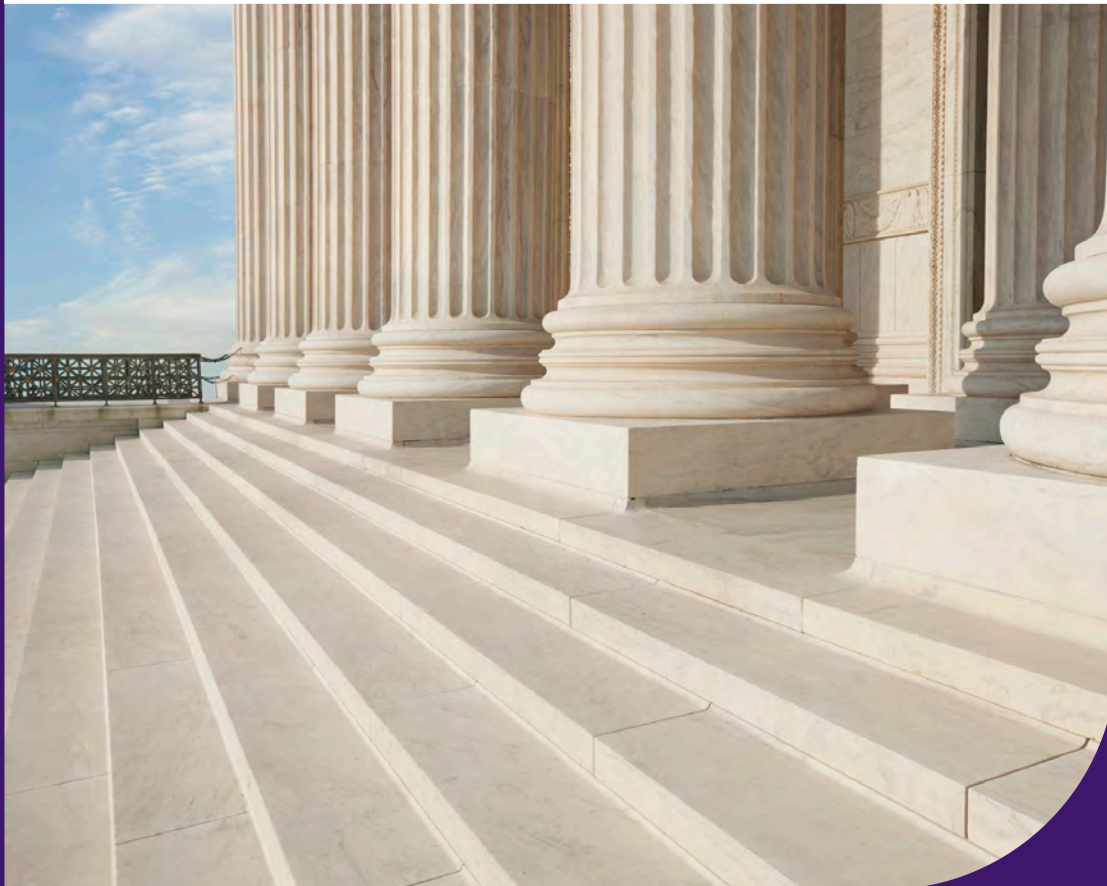
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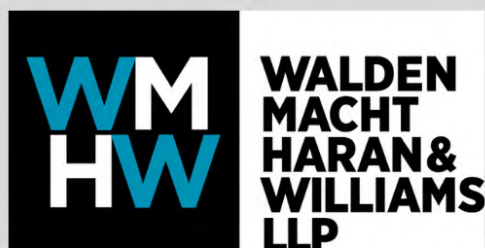
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And a very special thank you to Jim Dignon,
who has facilitated the First Monday journal printing for many
years, and whose support is so deeply appreciated by OAD.

SCENES FROM FIRST MONDAY IN OCTOBER 2024



OAD Board Chair Nicolas Bourtin (center) with guests during the reception.



2024 Counsel for Justice Recipient and First Monday Chief Justice Ellen Patterson.



Associate Justices mingle during the reception.



OAD Board Member Joanna Hendon (right) and guest.



Associate Justices Kristin Mace, Julia Gatto, and Edward Diskant enjoy a break in the argument.



The 2024 First Monday Bench (from left): Kristin Mace; Julia Gatto; Edward Diskant; Kathleen Cassidy; Chief Justice Ellen Patterson; Maria Cruz Melendez; Christian Everdell; Justine Harris; and Jessica Masella.



2024 Gould Award Recipients Helen Gredd and David Patton.



Benjamin Gruenstein accepts the 2024 Gideon Award on behalf of Cravath, Swaine & Moore LLP from OAD President Caprice Jenerson.



Beacon of Hope Award Recipient Desheen Evans.

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