No. 19-

IN THE

Supreme Court of the United States

WILLIE B. SMITH, III,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), and *Moore* v. *Texas*, 137 S. Ct. 1039 (2017), announced new substantive rules that apply retroactively to cases on collateral review.

2. Whether a court assessing a challenge to a prosecutor's use of peremptory strikes under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), may reasonably rely on extra-record evidence about a prosecutor's character.

RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

Smith v. *Comm'r, Ala. Dep't of Corr.*, No. 17-15043 (May 22, 2019), petition for rehr'g denied (Sept. 23, 2019)

United States District Court (N.D. Ala.):

Smith v. *Dunn*, No. 2:13-cv-00557 (July 21, 2017)

Supreme Court of Alabama:

Ex parte Smith, No. 1111480 (Nov. 16, 2012)

Ex parte Smith, No. 1011228 (June 28, 2002)

Alabama Court of Criminal Appeals:

Smith v. *State*, No. CR-08-1583 (May 25, 2012), petition for rehr'g denied (Aug. 10, 2012)

Smith v. *State*, No. CR-91-1975 (Feb. 1, 2002), petition for rehr'g denied (Mar. 15, 2002)

Alabama Circuit Court:

Smith v. *State*, No. CC92-1289 (July 17, 1992)

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CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Willie B. Smith, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit (Pet. App. 1a–18a) is reported at 924 F.3d 1330. The order denying the petition for rehearing and rehearing en banc (Pet. App. 368a) is unreported. The district court's opinions (Pet. App. 19a–161a and 162a–172a) are unreported and available at 2017 WL 1150618 and 2017 WL 3116937, respectively.

JURISDICTION

The Eleventh Circuit entered its judgment on May 22, 2019, and denied a timely filed petition for rehearing by order dated September 23, 2019. On November 12, 2019, Justice Thomas extended the time to file a petition for a writ of certiorari until February 20, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

INTRODUCTION

Willie B. Smith, III, is in a class of individuals who are beyond the State's power to execute under *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), and *Moore* v. *Texas*, 137 S. Ct. 1039 (2017). Those decisions expanded the class of "intellectually disabled" individuals who are categorically exempt from capital punishment. For its part, the State has not disputed that Smith should be granted federal habeas relief from his death sentence if *Hall* and *Moore* were applied to his case. Yet Smith stands to be executed because the Eleventh Circuit

does not apply *Hall* or *Moore* retroactively to habeas petitioners.

Federal courts of appeals and state courts of last resort are intractably divided on the question whether *Hall* and *Moore* apply retroactively on collateral review of state-court judgments. In the Tenth Circuit and the Supreme Courts of Kentucky and Florida, intellectually disabled individuals like Smith are entitled to relief from their death sentences under *Hall* or *Moore*, regardless of when their convictions became final following direct review. But the Sixth, Eighth, and Eleventh Circuits, joined by the Tennessee Supreme Court, do not give *Hall* or *Moore* retroactive effect. In those courts, an intellectually disabled individual is entitled to relief under *Hall* or *Moore* only if those opinions issued before his or her conviction became final following direct review. This split urgently requires this Court's intervention. Constitutional standards for death-eligibility cannot turn on the happenstance of geography.

This case presents an excellent vehicle to resolve this split. As the Eleventh Circuit acknowledged, the underlying state-court decision was irreconcilable with *Hall* and *Moore*. See Pet. App. 13a–14a. The question whether *Hall* and *Moore* apply retroactively on collateral review is therefore dispositive of Smith's right to relief from his death sentence. Moreover, the decision below was wrong. The court of appeals misapplied this Court's retroactivity decisions and relied on obsolete reasoning from Eleventh Circuit cases the Court has since abrogated. The Court should grant certiorari and reverse.

In addition, and independent of the first question presented, this case presents a second question that warrants this Court's review: whether a court assessing a challenge under *Batson* v. *Kentucky*, 476

U.S. 79 (1986), may reasonably rely on extra-record evidence about a prosecutor's character in evaluating the prosecutor's use of peremptory strikes during jury selection.

Lower courts have long been divided on this question, too. The Seventh Circuit and the Supreme Court of Illinois have taken the view that a court may not rely on extra-record evidence about a prosecutor's character under *Batson*. But the Fifth Circuit and the Supreme Court of California, now joined by the Eleventh Circuit, disagree. They permit courts to consider extra-record information about a prosecutor's character and credibility—including information based on the trial judge's personal knowledge of the prosecutor outside the courtroom—in determining whether the prosecutor's peremptory strikes violate *Batson*.

Both questions presented independently merit this Court's review. The Court should grant certiorari on either or both.

STATEMENT OF THE CASE

A. Smith's Capital Trial, *Batson* Hearing, and Direct Appeals

During jury selection in Smith's capital murder trial, the prosecutor used 14 of his 15 peremptory strikes on women. Smith argued that these strikes were based on gender and race in violation of *Batson* and its successors. The trial judge disagreed and held that Smith had not made a prima facie showing of discrimination. In explaining the basis for his ruling, the trial judge credited the prosecutor's credibility based on his race and reputation, stating: "This [prosecutor is] a very prominent black attorney …

[t]hat I have worked with." Pet. App. 211a; see also *id.* at 336a–347a.

The trial proceeded. After finding Smith guilty, the jury recommended capital punishment by a vote of 10–2 (the minimum required under Alabama law, Ala. Code § 13A-5-46(f)), and the judge sentenced Smith to death.

On direct appeal, the Alabama Court of Criminal Appeals held that Smith had made a prima facie showing of gender discrimination in the prosecutor's exercise of peremptory strikes. It remanded the case and ordered that the prosecutor offer reasons for the strikes. At a hearing on remand, the prosecutor explained:

> I struck a lot of these [potential jurors] because they worked in the church; Sunday School teachers and Sunday School leaders, and things of that nature …. I knew the Defense Counsel … would be asking the jurors to show mercy. And, it was my opinion that this argument would be receptive to someone who worked in the church and was well versed in the Bible ….

Pet. App. 375a; see also *id.* at 261a. The trial judge credited this reasoning, which was the sole justification offered for 4 of the 14 strikes at issue, and held that the prosecutor's proffered reasons were not a pretext for discrimination. In so holding, the judge concluded, based on his "extensive in court experience with [the prosecutor] and close acquaintanceship with others that know him," that the prosecutor was "certainly not a person prone to strike minorities denounced in the Batson case and its progeny." *Id.* at 324a; see also *id.* at 270a.

The Alabama Court of Criminal Appeals affirmed. It acknowledged that all of the women who were struck

on the basis of their religious affiliations had stated during voir dire that they would have "no problem imposing the death penalty," contrary to the prosecutor's assumption otherwise. Pet. App. 264a. It also acknowledged that information about the potential jurors' religious affiliations had been elicited during defense counsel's questioning of the venire—not during the prosecutor's—and that the prosecutor had asked no follow-up questions about the potential jurors' religious affiliations or beliefs. *Id.* And the court further explained that when a prosecutor justifies a peremptory strike based on a "group bias" or "group trait" without evidence that the potential juror actually has that trait—or worse, in the face of evidence that the potential juror *lacks* that trait—the justification indicates pretext for discrimination. *Id.* Over a dissent from then-Judge Cobb, the court nevertheless affirmed the decision below in light of the trial judge's conclusion, based solely on extra-record observations about the prosecutor and "others that know him," that the prosecutor was "not a person prone to strike minorities." *Id.* at 270a.

The Supreme Court of Alabama denied Smith's petition for a writ of certiorari. Pet. App. 314a.

B. Smith's *Atkins* Claim

Smith filed a petition for post-conviction relief in state court, asserting (as relevant here) that he is intellectually disabled and thus ineligible for capital punishment under *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

At an evidentiary hearing on his *Atkins* claim, Smith's expert and the State's expert both testified that Smith's IQ fell within a range that extended below a score of 70 (Alabama's cutoff for intellectual disability) when accounting for the standard error of

measurement. See Pet. App. 222a, 226a; see also *Ex parte Perkins*, 851 So. 2d 453, 455–56 (Ala. 2002) (describing Alabama's definition of intellectual disability). In particular, Smith's expert testified that Smith had an IQ score of 64, and that his IQ fell within a range of 61 to 69 with a 95% confidence level. Pet. App. 222a. The State's expert testified that Smith had "low intelligence" and an IQ score of 72, and that his IQ could have been as low as 67 using a standard error of measurement. *Id.* at 226a.

The parties also introduced ample evidence that Smith has significant adaptive deficits as relevant to Alabama's definition of intellectual disability. See *Perkins*, 851 So. 2d at 456; *Morrow* v. *State*, 928 So. 2d 315, 317–22 (Ala. Crim. App. 2004). For example, Smith's expert concluded that Smith has the functional independence of an 11-year-old, based on testing of his skills in social interaction, communication, personal living, and community living, as well as his motor skills. Pet. App. 428a–430a. Evidence further showed that Smith is particularly limited in his ability to engage in tasks involving "social interaction with other people," "deriving information from spoken and written language," "eating and meal preparation," "dressing," "determining the value of items and using money," and "work habits and prevocational skills." *Id.* He has the reading skills of an eighth grader and the math skills of a sixth grader. *Id.* at 225a. The State's expert independently tested Smith's adaptive functioning and similarly concluded that "Smith has some difficulties with community use, health and safety, self-direction, social skills, and leisure skill areas." *Id.* at 226a.

Based on this evidence, the state post-conviction court concluded that Smith "showed deficits in

adaptive functioning" and "has below average intelligence." Pet. App. 223a, 228a. The court nevertheless held that Smith is not intellectually disabled under Alabama's definition of intellectual disability and denied his *Atkins* claim. In doing so, it relied on the testimony of the State's expert that Smith's IQ score was 72 (*i.e.*, above Alabama's cutoff of 70), disregarded without explanation the same expert's testimony about the standard error of measurement, and found that Smith's abilities—such as his ability to keep a job and commit a crime—outweighed his adaptive deficits. *Id.* at 226a–228a.

The Alabama Court of Criminal Appeals affirmed. It acknowledged the testimony of the State's expert regarding the standard error of measurement for IQ scores. But it explained that Alabama courts have "refrained from adopting a margin of error as it would apply to IQ scores, because *doing so would expand the definition of mentally retarded*." Pet. App. 197a (emphasis added). The court likewise rejected Smith's argument that the evidence of his adaptive deficits could not be overcome by evidence of his strengths. In its view, "shortcomings are not evaluated in a vacuum," and "other relevant evidence may weigh against an overall finding of deficiency." *Id.* at 198a.

The Supreme Court of Alabama denied Smith's petition for certiorari in 2012. Pet. App. 217a.

C. Federal Habeas Proceedings

Smith next filed a habeas petition in federal court, seeking relief based on both *Batson* and *Atkins* (among other things). Smith asserted that the state-court decisions denying his claims were unreasonable under 28 U.S.C. § 2254(d)(1) and (2).

On the same day that the district court initially denied Smith's petition, this Court decided *Moore*,

which held that a state court must use the medical community's current diagnostic standards when deciding whether a person is intellectually disabled for purposes of *Atkins*. 137 S. Ct. at 1048–50. The district court then reopened Smith's habeas proceedings and ordered supplemental briefing on *Moore*'s effect on Smith's *Atkins* claim. In his supplemental brief, Smith argued that *Moore* and *Hall* apply retroactively on collateral review and warrant habeas relief in this case. The district court disagreed and entered judgment against Smith. See Pet. App. 168a–172a.

The Eleventh Circuit affirmed. With respect to *Atkins*, the court of appeals recognized that "*Moore* may have the effect of expanding the class of people ineligible for the death penalty." Pet. App. 9a. But it nevertheless held that *Moore* created a new rule of constitutional law that is "procedural" rather than "substantive" and so does not apply retroactively to cases on collateral review. *Id.* at 8a–11a. In so holding, the Eleventh Circuit followed its opinion in *Kilgore* v. *Secretary, Florida Department of Corrections*, 805 F.3d 1301 (11th Cir. 2015), which held for similar reasons that *Hall* is non-retroactive. Pet. App. 13a. The Eleventh Circuit acknowledged in one part of the opinion below that this Court's intervening decision in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), "undermined a core component of *Kilgore*'s retroactivity analysis." Pet. App. 10a n.5. But that did not stop it from relying on *Kilgore* later in the opinion in denying Smith the benefit of *Hall*'s and *Moore*'s application. *Id.* at 13a (quoting *Kilgore*, 805 F.3d at 1311–12).

The Eleventh Circuit's retroactivity analysis was dispositive of Smith's *Atkins* claim. The court correctly observed—and the State has never disputed—that Smith would be entitled to habeas relief if *Hall* and

Moore applied to his case. As the panel explained, it is "abundantly clear" after *Moore* that "states may not weigh a defendant's adaptive strengths against his adaptive deficits," as the state court did here, because "[d]oing so contradicts the medical community's current clinical standards." Pet. App. 14a (citing *Moore*, 137 S. Ct. at 1050–51). In addition, the panel noted that states are "require[d]" under *Hall* to "consider the standard error in assessing IQ scores." *Id.* at 13a. That requirement, if the state court had adhered to it, would indisputably have brought Smith's IQ score below Alabama's 70-point cutoff. The denial of Smith's *Atkins* claim was thus purely "a matter of timing," given the Eleventh Circuit's retroactivity decisions: if Smith had been sentenced after *Hall* and *Moore*, he could not have been sentenced to death. *Id.* at 14a.

On Smith's *Batson* claim, the Eleventh Circuit began by rejecting as "improper" the basis for the state court's decision—*i.e.*, the trial judge's reliance on his personal, extra-record knowledge of the prosecutor's character and reputation. Pet. App. 15a n.10 (emphasis added). The court of appeals nevertheless held that the state court's decision was not unreasonable under 28 U.S.C. § 2254(d) because, in the panel's view: (1) the evidence about jurors with religious affiliations who the prosecutor did not strike was too "limited," and (2) jurors with religious affiliations may be presumed to be receptive to mercy arguments. *Id.* at 17a. The state court had not used either of these rationales to assess pretext under *Batson*, however. See *id.* at 270a.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS WARRANTED TO RESOLVE A SPLIT OVER WHETHER *HALL* AND *MOORE* APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

The decision below deepens a split among the lower courts. In the Tenth Circuit, *Hall* and *Moore* apply retroactively on collateral review. See *Smith* v. *Sharp*, 935 F.3d 1064, 1083–85 (10th Cir. 2019). But in the Sixth, Eighth, and Eleventh Circuits, they do not. See *In re Payne*, 722 F. App'x 534, 538 (6th Cir. 2018); *Williams* v. *Kelley*, 858 F.3d 464, 474 (8th Cir. 2017) (per curiam); *Kilgore*, 805 F.3d at 1314–15. State courts, too, are divided on this issue with regard to *Hall*. Compare *White* v. *Commonwealth*, 500 S.W.3d 208, 214–15 (Ky. 2016), *as modified* (Oct. 20, 2016), *and abrogated in part on other grounds by Woodall* v. *Commonwealth*, 563 S.W.3d 1 (Ky. 2018), and *Walls* v. *State*, 213 So. 3d 340, 346 (Fla. 2016) (per curiam), with *Payne* v. *State*, 493 S.W.3d 478, 489–91 (Tenn. 2016).

This case presents an excellent vehicle to resolve this split because the question whether *Hall* and *Moore* apply retroactively is dispositive of Smith's right to relief from his death sentence. This question also has significant implications for numerous other death-row inmates nationwide. The Court should grant certiorari to answer it.

A. The Decision Below Deepens A Split.

In *Atkins*, this Court held that the federal Constitution prohibits imposition of the death penalty on intellectually disabled persons. 536 U.S. at 321. Executing an intellectually disabled person, the Court explained, amounts to cruel and unusual punishment under the Eighth Amendment because it serves no

legitimate penological purpose, goes against national consensus, and creates a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 313–21 (quotation marks omitted).

Though *Atkins* left to the States the task of developing their own definitions of "intellectual disability," see *id.* at 317, the Court has since held in *Hall* and *Moore* that the Eighth Amendment places limits on those definitions. In particular, *Hall* held that the Eighth Amendment prohibits States from determining intellectual disability using strict IQ-score cutoffs that do not account for the standard error of measurement inherent in IQ scores. 134 S. Ct. at 2000–01. And *Moore* held that States must focus their inquiry on a person's adaptive deficits, rather than his or her adaptive strengths, in assessing intellectual disability. 137 S. Ct. at 1050. Both decisions also emphasized that these limits comport with prevailing clinical standards, and they held that States' definitions of intellectual disability must be "informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000; *Moore*, 137 S. Ct. at 1048–50.

Under the framework set forth in *Teague* v. *Lane*, a newly announced rule of constitutional law typically applies only to cases still pending on direct review when the rule is announced. 489 U.S. 288, 310 (1989) (plurality opinion). But *Teague* permits a new rule to apply retroactively to cases on collateral review when one of two exceptions applies. As relevant here, *Teague* gives retroactive effect to new "substantive rules," which include rules that prohibit "a certain category of punishment for a class of defendants because of their status." *Montgomery*, 136 S. Ct. at 728 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins* v. *Virginia*, 536 U.S. 304

(2002)); see also *id.* at 729 (noting that "substantive rules" also include rules that place certain conduct "beyond the power of the criminal law-making authority to proscribe").[1] In addition, not all new constitutional decisions from this Court generate "new rules" in the *Teague* sense; a person seeking post-conviction relief is entitled to retroactive application of old rules—decisions dictated by existing precedent when a conviction became final—irrespective of whether they are substantive or procedural. See *Teague*, 489 U.S. at 301 (plurality opinion).

The lower courts disagree as to whether *Hall* and *Moore* apply retroactively to cases on collateral review under *Teague*.

1. Three courts—the Tenth Circuit, the Supreme Court of Kentucky, and the Supreme Court of Florida—have held that *Hall*, *Moore*, or both apply retroactively on collateral review.

The Tenth Circuit adopted this position in *Smith*, 935 F.3d 1064. There, the Tenth Circuit held that *Hall* and *Moore* did not create new rules of constitutional law, and thus that they applied retroactively on collateral review of the petitioner's sentence. *Id.* at 1084–85.[2] Applying *Hall*'s and *Moore*'s holdings that intellectual disability determinations must be

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[1] *Teague* also gives retroactive effect to "watershed rules of criminal procedure," 489 U.S. at 311 (plurality opinion), but that exception does not apply here.

[2] In reaching this conclusion, the Tenth Circuit distinguished *Shoop* v. *Hill*, 139 S. Ct. 504 (2019) (per curiam)—which held that *Moore*'s holding was not "clearly established" by *Atkins* for purposes of 28 U.S.C. § 2254(d)(1)—on the basis that § 2254(d)(1) did not apply to the relevant portion of the Tenth Circuit's review of the state court's decision. *Smith*, 935 F.3d at 1083 (citing *Shoop*, 139 S. Ct. at 506); see also *id.* at 1076.

informed by the medical community's existing clinical standards, the court concluded that no reasonable factfinder could disagree that the petitioner was intellectually disabled. *Id.* at 1085–88. It therefore remanded with instructions to vacate the petitioner's death sentence. *Id.* at 1092.

Since *Smith*, the Tenth Circuit has continued to follow this approach. In *Harris* v. *Sharp*, 941 F.3d 962, 982–83 (10th Cir. 2019), the court explained that whether the petitioner had been prejudiced by his counsel's failure to raise an *Atkins* claim during a state-court hearing pre-*Hall* depended on whether the hearing would have likely shown the petitioner to be intellectually disabled "under the existing clinical definitions applied through expert testimony." *Id.* (quoting *Smith*, 935 F.3d at 1077). *Harris*'s language regarding the role of "existing clinical definitions"—an unmistakable reference to the holdings of *Hall* and *Moore*—confirms the Tenth Circuit's position that *Hall* and *Moore* apply retroactively on collateral review. See *id.*

The Supreme Court of Kentucky agrees that *Hall* applies retroactively on collateral review, though for reasons that differ from the Tenth Circuit's. See *White*, 500 S.W.3d 208. In *White*, the trial court denied an *Atkins* claim governed by a state statute that, like the Florida statute at issue in *Hall*, barred execution of an intellectually disabled person only if his or her IQ score was below 70, not accounting for the standard error of measurement. *Id.* at 211 (citing Ky. Rev. Stat. §§ 532.130, 532.140). But the Supreme Court of Kentucky held that *Hall* applied retroactively under *Teague*'s exception for new "substantive" rules. *Id.* at

214–15.[3] Describing *Hall* as a "sea change," the court concluded that *Hall* established a new substantive rule for purposes of *Teague*, rather than an old or procedural one, because it imposed a "restriction on the State's power to take the life of individuals suffering from intellectual disabilities." *Id.* (quotation marks omitted). The court then remanded the case for further proceedings on the issue of whether White was intellectually disabled. *Id.* at 216–17.

The Supreme Court of Florida has likewise applied *Hall* retroactively. In *Walls*, 213 So. 3d 340, the court considered whether *Hall* applies retroactively on collateral review under the test from *Witt* v. *State*, 387 So. 2d 922 (Fla. 1980) (per curiam), which sets forth a retroactivity framework that is based on and co-extensive with *Teague*. Compare *Witt*, 387 So. 2d at 929–31 (citing federal law and holding that new constitutional rules apply retroactively on collateral review if they "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties"), with *Montgomery*, 136 S. Ct. at 729 ("Substantive rules … place certain criminal laws and punishments altogether beyond the State's power to impose."). The court concluded that *Hall* was retroactive under this framework because it "increase[d] the number of potential cases in which the State cannot impose the death penalty." *Walls*, 213 So. 3d at 346. In particular, the court explained, *Hall* redefined the universe of individuals ineligible for the

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[3] State courts must give new substantive rules under *Teague* retroactive effect because *Teague*'s holding regarding new substantive rules "rest[s] upon constitutional premises." *Montgomery*, 136 S. Ct. at 729; see also *id.* ("[W]hen a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.").

death penalty by "plac[ing] beyond the State of Florida the power to impose … the sentence of death for individuals within a broader range of IQ scores than before." *Id.*

Following *Walls*, the Supreme Court of Florida has consistently given *Hall* retroactive effect on collateral review by either vacating death sentences or remanding cases for further factfinding. See *Foster* v. *State*, 260 So. 3d 174, 179–81 (Fla. 2018) (per curiam); *Franqui* v. *State*, 211 So. 3d 1026, 1031–32 (Fla. 2017) (per curiam); *Herring* v. *State*, No. SC15-1562, 2017 WL 1192999, at *1 (Fla. Mar. 31, 2017); *Nixon* v. *State*, No. SC15-2309, 2017 WL 462148, at *1 (Fla. Feb. 3, 2017); *Cherry* v. *Jones*, 208 So. 3d 701, 702 (Fla. 2016) (per curiam).

2. On the other hand, the Sixth, Eighth, and Eleventh Circuits, as well as the Tennessee Supreme Court, have refused to apply *Hall* or *Moore* retroactively on collateral review. As a result, in these jurisdictions, a person whose conviction became final before *Hall* can still be executed by the State even if he or she is intellectually disabled under the medical community's prevailing clinical standards.

The Eleventh Circuit was the first among these jurisdictions to hold that *Hall* does not apply retroactively on collateral review. Shortly after *Hall* was decided, the Eleventh Circuit held in denying an emergency application, over a dissent, that *Hall* announced a new rule that did not apply retroactively under *Teague*. See *In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014). In the majority's view, *Hall* did not affect the set of individuals ineligible for the death penalty and thus did not create a new "substantive" rule. *Id.* at 1161. The panel also analogized to circuit precedent holding that the rule from *Miller* v. *Alabama*, 567 U.S. 460 (2012), likewise is not

substantive. *Henry*, 757 F.3d at 1161 (citing *In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013)).

The circuit precedent that the *Henry* majority relied on was abrogated by this Court in 2016. See *Montgomery*, 136 S. Ct. at 734 (holding that the rule from *Miller* is substantive and applies retroactively). The Eleventh Circuit has nevertheless consistently adhered to its decision in *Henry* and declined to give *Hall* retroactive effect. See, *e.g.*, *Jenkins* v. *Comm'r, Ala. Dep't of Corr.*, 936 F.3d 1252, 1276 (11th Cir. 2019); *In re Bowles*, 935 F.3d 1210, 1219–20 (11th Cir. 2019); *Kilgore*, 805 F.3d at 1314–16.

The decision below falls in line with this series of cases. It rejected Smith's argument about the state court's failure to consider the standard error of measurement for his IQ score, and it reasoned that accounting for the standard error when assessing IQ scores is a "requirement [that] did not emerge until *Hall v. Florida*, well after the Alabama courts considered Smith's case." Pet. App. 13a (citation omitted) (citing *Kilgore*, 805 F.3d at 1312). The decision below also held that *Moore*, too, is not retroactive on collateral review. As with *Hall*, the panel concluded that *Moore* "merely defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty" and thus announced a procedural rather than substantive rule. *Id.* at 9a–11a.

Like the Eleventh Circuit, the Eighth Circuit has held that neither *Hall* nor *Moore* applies retroactively on collateral review. It first addressed the retroactivity of *Hall* in *Goodwin* v. *Steele*, 814 F.3d 901 (8th Cir. 2014) (per curiam). Writing over a dissent, and relying heavily on the Eleventh Circuit's decision in *Henry*, the *Goodwin* court concluded that *Hall* merely created an opportunity to present certain evidence of

intellectual disability, rather than changing the class of individuals ineligible for the death penalty, and that it is therefore procedural. *Id.* at 904. The Eighth Circuit has since held that, for the same reasons as *Hall*, *Moore* is also a procedural decision that does not apply retroactively on collateral review. See *Williams*, 858 F.3d at 473–74.

In a pair of related state and federal cases involving the same death-row inmate, the Tennessee Supreme Court and the Sixth Circuit also adopted this position. The Tennessee Supreme Court refused to apply *Hall* retroactively on collateral review of Pervis Tyrone Payne's conviction. *Payne*, 493 S.W.3d at 489–91. While Payne's federal habeas proceedings were pending, this Court issued its decision in *Moore*. Payne accordingly raised before the Sixth Circuit the question whether both *Hall* and *Moore* apply retroactively. The Sixth Circuit answered in the negative. *Payne*, 722 F. App'x at 538.

* * *

In short, the lower courts have clearly divided on the retroactivity of *Hall* and *Moore*. This split is unlikely to resolve itself, as courts on both sides have now cemented their positions in repeat holdings across multiple cases within their respective jurisdictions.

This Court should resolve this split now. The limits that federal law sets on States' ability to impose the death penalty should not vary by geography.

B. The Decision Below Is Wrong.

This Court also should grant certiorari because the position adopted by the Eleventh Circuit, and by the majority of courts to decide this issue, is wrong. Under this Court's precedents, *Hall* and *Moore* are new

"substantive" decisions of constitutional law, so they apply retroactively on collateral review.

1. As this Court has made clear, a new rule is "substantive" for purposes of retroactivity if it changes the class of individuals that States may punish, or the range of punishments that States may impose. "Substantive" rules therefore include rules that expand the class of individuals who are ineligible for the death penalty. See, *e.g.*, *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990) (holding that rules are "substantive" if they "decriminalize a class of conduct [or] prohibit the imposition of capital punishment on a particular class of persons"); *Penry*, 492 U.S. at 330 ("[T]he first exception set forth in *Teague* should be understood to cover … rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."). "Such rules apply retroactively because they necessarily carry a significant risk that a defendant … faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (quotation marks omitted). *Atkins* itself was a substantive rule because it placed a class of individuals—*i.e.*, individuals deemed to be intellectually disabled under States' unconstrained legal standards—beyond the States' power to execute. See, *e.g.*, *Penry*, 492 U.S. at 330 ("[P]rohibit[ing] the execution of mentally retarded persons … would fall under the first exception to the general rule of nonretroactivity …."); see also *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) ("*Atkins* is retroactively applicable to cases on collateral review.").

By contrast, rules are procedural if they "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis omitted). For example, the rule from *Crawford* v. *Washington*, 541 U.S. 36 (2004)—*i.e.*, that out-of-court

testimonial statements are admissible only if the declarant is unavailable and the defendant had an opportunity for cross-examination—is a "procedural" constitutional rule and thus is not retroactive. See *Whorton* v. *Bockting*, 549 U.S. 406, 417 (2007). So is the rule that a jury, not a judge, must be the factfinder for any aggravating circumstances necessary to impose the death penalty. See *Schriro*, 542 U.S. at 354.

2. *Hall* created a new substantive rule because it expanded the class of individuals who are categorically ineligible for the death penalty. Before *Hall*, *Atkins* had established only that persons deemed to have intellectual disabilities under States' unconstrained standards were ineligible for the death penalty. Because the legal definition of "intellectual disability" was left to the States' discretion, States were free to limit this class—and some did in fact limit it—to individuals with IQ scores of 70 or lower. See, *e.g.*, *Hall*, 134 S. Ct. at 1996–97 (listing States with IQ-score cutoffs of 70). In other words, before *Hall*, individuals with IQ scores above 70 who were intellectually disabled under prevailing clinical standards were *not* categorically ineligible for the death penalty. After *Hall*, the opposite is true: those individuals are now guaranteed to fall within the class of persons ineligible for capital punishment. *Id.* at 2000–01. The class has therefore expanded. Indeed, the dissent in *Hall* recognized that this expansion beyond "the class of defendants … identified in *Atkins*" was a "sea change." *Id.* at 2008–09 (Alito, J., dissenting).

The same can be said of *Moore*. Before *Moore*, States were permitted to execute individuals whose adaptive strengths and abilities outweighed their adaptive weaknesses, but who were intellectually disabled under prevailing clinical standards. After *Moore*, such

individuals fall within the class of individuals who are categorically exempt from capital punishment. 137 S. Ct. at 1048–50. The class has expanded again.

The defendants in *Hall* and *Moore* themselves—along with other individuals whose death sentences have been vacated since *Hall* and *Moore*—are perfect examples of people who were outside the class of protected individuals before those decisions, but are now categorically inside that class. Their cases are proof that the class has grown. See, *e.g.*, *Ex parte Moore*, 587 S.W.3d 787, 788–89 (Tex. Crim. App. 2019) (reforming death sentence to life imprisonment on remand from this Court); *Ex parte Lane*, 286 So. 3d 61, 69 (Ala. 2018) (vacating death sentence and ordering life imprisonment on remand from this Court for further reconsideration in light of *Hall*); *Smith*, 935 F.3d at 1084–88, 1092 (vacating death sentence on the grounds that petitioner was intellectually disabled under retroactive application of *Hall* and *Moore* on collateral review); *Herring*, 2017 WL 1192999, at *1 (vacating death sentence and ordering life imprisonment based on retroactive application of *Hall* on collateral review); *Hall* v. *State*, 201 So. 3d 628, 638 (Fla. 2016) (per curiam) (vacating death sentence and ordering life imprisonment on remand from this Court).

The courts that considered Smith's *Atkins* claim acknowledged that *Hall* and *Moore* expanded the category of persons that are beyond the States' power to execute. The Eleventh Circuit expressly observed that "*Moore* may have the effect of expanding the class of people ineligible for the death penalty." Pet. App. 9a. The Alabama Court of Criminal Appeals came to the same conclusion about *Hall*, explaining that "adopting a margin of error as it would apply to IQ scores … would expand the definition of mentally retarded." *Id.*

at 197a. The failure to give *Hall* and *Moore* retroactive effect, while acknowledging that those cases expand the class of death-ineligible individuals, is directly contrary to this Court's precedents.

3. *Montgomery*, one of this Court's most recent decisions on retroactivity, further confirms that the Eleventh Circuit's decision is wrong.

Montgomery addressed the question whether *Miller*—which prohibits the imposition of mandatory life sentences without parole for juvenile offenders—applies retroactively under *Teague*. It held that *Miller* announced a new substantive rule (and thus applies retroactively) because *Miller* "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." 136 S. Ct. at 734 (quoting *Penry*, 492 U.S. at 330). To be sure, *Miller*'s rule also has a procedural component. It requires courts to consider certain types of evidence—namely, "a juvenile offender's youth and attendant characteristics"—before sentencing a juvenile to life without parole. *Id.* But *Montgomery* made clear that rules with both substantive and procedural components are still treated as substantive. *Id.* at 734–35. "There are instances in which a substantive change in the law must be attended by a procedure that enables a prisoner to show that he falls within the category of persons whom the law may no longer punish." *Id.* at 735. "Those procedural requirements do not, of course, transform substantive rules into procedural ones." *Id.*

Montgomery controls this case. Like the rule in *Miller*, the rules of *Hall* and *Moore* render a certain punishment (the death penalty) unconstitutional for a certain class of individuals because of their status (*i.e.*, individuals who the prevailing clinical standards show

to be intellectually disabled). That class is different from, and bigger than, the class of individuals that was protected under *Atkins* alone (*i.e.*, individuals who the States deemed to be intellectually disabled according to their own standards, regardless of prevailing clinical standards). *Hall* and *Moore* may have a procedural component, insofar as they affect the types of evidence that courts must consider in determining intellectual disability. But, as the Eleventh Circuit recognized (see Pet. App. 9a, 13a–14a), they also have a substantive component. And after *Montgomery*, the law is clear: rules with both substantive and procedural components apply retroactively. 136 S. Ct. at 734–35.

The decision below correctly recognized that *Montgomery* "undermined" the Eleventh Circuit's prior decisions in *Kilgore* and *Henry*, which concluded that *Hall* is non-retroactive. Pet. App. 10a n.5. Indeed, *Kilgore* and *Henry* relied on circuit precedent that held *Miller* to be non-retroactive, which *Montgomery* abrogated. See *Henry*, 757 F.3d at 1161 (citing *Morgan*, 713 F.3d at 1368); see also *Mays* v. *United States*, 817 F.3d 728, 737–38 (11th Cir. 2016) (per curiam) (Jordan, J., concurring) ("*Montgomery* … abrogates our contrary decision (and much of the retroactivity analysis) in *In re Morgan*[.]").

Other courts on the same side of the split as the Eleventh Circuit have also recognized that their approach is in conflict with *Montgomery*. See *Dellinger* v. *State*, No. E2018-00135-CCA-R3-ECN, 2019 WL 1754701, at *5 (Tenn. Crim. App. Apr. 17, 2019) (noting in dicta that *Montgomery* "may very well entitle Petitioner to relief" on his claims under *Atkins*, *Hall*, and *Moore*). And yet, like the Eleventh Circuit, these courts are well-entrenched in their position—notwithstanding *Montgomery*—and will not give *Hall*

and *Moore* the retroactive effect *Teague* requires, absent this Court's intervention. See, *e.g.*, *Williams*, 858 F.3d at 474 ("[There may be] an eventual ruling by the [Supreme] Court that *Moore* will be given a *Montgomery*-like effect, but that is a matter for the Court to decide in due course and not by us ….").

4. In addition, *Hall* and *Moore* necessarily have retroactive effect because they arose on review of state post-conviction proceedings, after the petitioners' respective convictions had already become final on direct review. See *Hall*, 134 S. Ct. at 1991–92; *Moore*, 137 S. Ct. at 1045; see also *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987) (defining finality based on exhaustion of appeals on direct review). Under *Teague*, any new rules that applied to the petitioners in *Hall* and *Moore* on post-conviction review must also apply to others whose convictions were likewise final. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300 (plurality opinion); see also *Penry*, 492 U.S. at 313 (explaining that "new rules will not be applied or announced in cases on collateral review" unless they fall into an exception to the general rule of non-retroactivity); *Henry*, 757 F.3d at 1166 (Martin, J., dissenting) ("The postconviction context of the Court's decision in *Hall* tells us that, at a minimum, the Supreme Court intended its holding to apply retroactively to all cases on collateral review.").

For all of these reasons, the panel's decision below is directly contrary to this Court's retroactivity precedents. The Court should grant certiorari and reverse.

C. The Question Presented Is Important.

Alabama may not execute Smith if *Hall* and *Moore* apply to his case. The State has never disputed that. The question presented is therefore dispositive of Smith's right to relief from his death sentence. As a result, this case presents an ideal vehicle to resolve a significant split among the federal and state courts.

The question presented also has profound consequences for many individuals on death row and the States that have sentenced them. Underlying this Court's retroactivity precedents is the concern that new substantive rules of constitutional law carry a "significant risk" that individuals will face a punishment that is beyond States' power to impose on them. See *Montgomery*, 136 S. Ct. at 734; *Schriro*, 542 U.S. at 352. That risk has now become a certainty in some jurisdictions. By denying capital defendants like Smith the benefit of *Hall* and *Moore*, the courts in those jurisdictions have left intellectually disabled individuals to face the death penalty—even though the Eighth Amendment forbids it—and they will continue to do so until this Court intervenes.

Moreover, until the split is resolved, there will continue to be an "unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Teague*, 489 U.S. at 305 (plurality opinion). Intellectually disabled persons who, for example, have an IQ score of 72 and were sentenced to death pre-*Hall* are entitled to relief in some jurisdictions, but in others are sent to the execution chamber. Compare, *e.g.*, *Hall*, 201 So. 3d at 632, 638 (vacating death sentence of person with IQ scores of 71 and 73), with, *e.g.*, *Goodwin*, 814 F.3d at 904 (denying motion to stay next-day execution of person with an IQ score of 72 on the basis that *Hall* is non-retroactive). Such arbitrary and stark disparities should not be

allowed to persist, particularly when they involve matters of such grave consequence.

II. CERTIORARI IS WARRANTED TO RESOLVE A SPLIT OVER WHETHER COURTS ASSESSING *BATSON* CHALLENGES MAY RELY ON EXTRA-RECORD EVIDENCE OF A PROSECUTOR'S CHARACTER.

The Eleventh Circuit's decision also contributes to another split. The second split involves the application of *Batson*'s three-part test for determining whether a prosecutor has used peremptory strikes in a discriminatory manner.

The Seventh Circuit and the Supreme Court of Illinois have taken the position that a court may not rely on extra-record evidence of a prosecutor's character—including from the trial judge's personal knowledge of the prosecutor—in applying the *Batson* test. See *Coulter* v. *McCann*, 484 F.3d 459, 463–65 (7th Cir. 2007); *People* v. *Andrews*, 588 N.E.2d 1126, 1134–35 (Ill. 1992). The Fifth Circuit and the Supreme Court of California have taken the opposite position. See *United States* v. *Seals*, 987 F.2d 1102, 1109 (5th Cir. 1993); *People* v. *DeHoyos*, 303 P.3d 1, 30 (Cal. 2013). Before the panel's decision below, the Eleventh Circuit had shared the view of the Seventh Circuit and Illinois on this question. See *Adkins* v. *Warden, Holman CF*, 710 F.3d 1241, 1254 & n.11 (11th Cir. 2013). But after the decision below, the Eleventh Circuit is now on the Fifth Circuit and California's side of the split. See Pet. App. 17a.

This split warrants the Court's intervention. This Court has repeatedly recognized that gender- or race-based discrimination in the selection of jurors not only harms defendants, but also jeopardizes "the very

integrity of the courts" and "public confidence in adjudication." *Miller-El* v. *Dretke*, 545 U.S. 231, 238 (2005) (collecting cases). These weighty interests are directly affected by the question whether a judge may consider his or her personal, extra-record observations of a prosecutor when assessing the prosecutor's peremptory strikes under *Batson*. The Court should grant certiorari to address this question, too.

A. The Decision Below Contributes To A Split.

The Equal Protection Clause prohibits prosecutors in criminal trials from exercising peremptory challenges on the basis of potential jurors' gender or race. *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Batson*, 476 U.S. at 89. Exclusion of even a single potential juror on account of gender or race violates the Constitution and "require[s] that [the] petitioner's conviction be reversed." *Batson*, 476 U.S. at 100; see also *Snyder* v. *Louisiana*, 552 U.S. 472, 474, 478 (2008). *Batson* established a three-step test for adjudicating whether peremptory strikes are impermissibly discriminatory. First, the defendant must make a prima facie showing that a peremptory strike was exercised on the basis of gender or race. Second, if that showing is made, the prosecutor must offer a non-discriminatory reason for the strike. Third, the trial judge must decide whether the prosecutor's proffered reasons are merely a "pretext" for discrimination. See, *e.g.*, *Flowers* v. *Mississippi*, 139 S. Ct. 2228, 2241, 2243–44 (2019). The split here concerns the evidence that a trial judge may consider when assessing a *Batson* challenge.

1. Two courts—the Seventh Circuit and the Supreme Court of Illinois—have taken the position that a court may not rely on extra-record evidence about a prosecutor's character when applying *Batson*.

The Supreme Court of Illinois adopted this position first in 1992. In *Andrews*, 588 N.E.2d 1126, the trial judge found that the defendant had failed to make a prima facie showing of racial discrimination under *Batson*'s first step. To support this finding, the judge relied heavily on his observation that "[the] prosecutors had practiced before him on numerous occasions," as well as his belief that "they were not racially prejudiced persons." *Id.* at 1134. The Supreme Court of Illinois reversed. *Id.* at 1135. It held that the trial judge's ruling was against the manifest weight of the evidence, because it placed "far too much emphasis" on his personal, extra-record experiences and "made no mention" of record-based factors relevant to *Batson*. *Id.* at 1134–35.

The Seventh Circuit took a similar approach in *Coulter*, 484 F.3d 459. There, the court considered a race-based *Batson* claim raised in a federal habeas petition. The state trial judge had denied the claim, crediting the prosecutors' proffered reasons for their peremptory strikes based in part on her personal knowledge of their character, even though she had "no experience with those individuals as prosecutors in Coulter's or any other person's trial." *Id.* at 463. Though the Seventh Circuit ultimately denied the habeas petition on other grounds, it strongly rejected the trial judge's approach to this issue. Basing a *Batson* determination on "personal relationships outside of the courtroom," the panel concluded, was "very troubling," "unhelpful," and "[a]t no point … endorse[d]" in *Batson* or its successors. *Id.* at 463, 465. The Seventh Circuit has continued to take this position since deciding *Coulter*, emphasizing that *Batson* determinations must be based on evidence in the record, not outside it. See *United States* v. *Rutledge*, 648 F.3d 555, 562 (7th Cir. 2011) ("[A]t step

three of *Batson*, the district judge must make an individualized credibility determination based on the *actual evidence* of the prosecutor's demeanor and actions *in the courtroom*, as well as any other information properly before the court ...." (emphases added)).

Before its decision below, the Eleventh Circuit had also adopted this approach. In *Adkins*, the court considered a *Batson* claim raised in a federal habeas petition. 710 F.3d at 1246. The trial judge in the underlying state-court proceedings had credited the prosecutor's reasons for the challenged strikes and denied the claim based on his "own personal experience with the prosecutor in other cases." *Id.* The Eleventh Circuit held on collateral review that the trial judge's reliance on this "personal experience" was unreasonable because the petitioner had no opportunity to rebut this extra-record evidence. *Id.* at 1254 & n.11. It accordingly held that the state court's denial of the *Batson* claim was based on both an unreasonable application of *Batson* under § 2254(d)(1) and an unreasonable determination of facts under § 2254(d)(2), and it remanded with instructions to issue the writ of habeas corpus. *Id.* at 1254–55, 1258. As explained below, however, the Eleventh Circuit has since changed sides in this split.

2. There are currently three courts—the Fifth and Eleventh Circuits, joined by the Supreme Court of California—holding that courts may rely on extra-record evidence about a prosecutor's character when applying *Batson*.

The Fifth Circuit first considered this issue in 1993. In *Seals*, 987 F.2d 1102, the defendant had raised a *Batson* claim during jury selection in federal district court. The trial judge denied the claim under *Batson*'s third step based on "his past experience with the U.S.

Attorney's Office, and in particular, his previous contact with [the] prosecutor." *Id.* at 1108. The Fifth Circuit affirmed on direct appeal. It held that the trial judge's denial of the *Batson* claim was not clearly erroneous because he had "personal knowledge and experience" regarding the prosecutor's character and thus was "in the best position to gauge his credibility." *Id.* at 1109.

The Supreme Court of California follows a similar rule. On direct review of a *Batson* claim, the court held that a trial judge can take into account his or her "own experiences as a lawyer and bench officer in the community" in assessing whether a peremptory strike is discriminatory under *Batson*'s third step. See *People* v. *Winbush*, 387 P.3d 1187, 1214 (Cal. 2017) (quoting *People* v. *Lenix*, 187 P.3d 946, 954–55 (Cal. 2008)), *as modified on denial of reh'g* (Mar. 29, 2017). This category of "experiences" includes trial judges' "personal knowledge of the prosecutor or experience with the prosecutor's office." *Id.* at 1253 (Liu, J., concurring in part). In a separate opinion, one Justice suggested that this issue "merit[s] reexamination in an appropriate case." See *id.*

In its decision below, the Eleventh Circuit joined the Fifth Circuit and California on this side of the split. The trial judge in Smith's underlying state-court proceedings had credited the prosecutor's proffered reasons for his peremptory strikes under *Batson*'s third step based on the judge's belief that the prosecutor was "certainly not a person prone to strike minorities." Pet. App. 324a. The source of that belief was the judge's "extensive in court experience" with the prosecutor and his knowledge of the prosecutor's reputation through "close acquaintanceship with others that know him." *Id.* In turn, in affirming the trial court's *Batson* ruling, the Alabama Court of

Criminal Appeals' assessment of *Batson*'s third step relied solely on these comments about the trial judge's personal knowledge of the prosecutor's character. *Id.* at 270a. On collateral review, the Eleventh Circuit noted in dicta that the trial judge's comments were "improper." *Id.* at 15a n.10. But it nevertheless held that reliance on his extra-record personal observations was not unreasonable under § 2254(d)(1) or (2). *Id.* at 17a. In doing so, the court acknowledged but did not attempt to distinguish its prior case law to the contrary. See *id.* at 15a n.10 (citing *Adkins*, 710 F.3d at 1254 & n.11).

The split is clear. All of these cases—whether on direct or collateral review—address whether a trial judge may reasonably consider extra-record evidence of a prosecutor's character in applying *Batson*. The split is nearly three decades old and thus is highly unlikely to resolve without a decision by this Court. For these reasons, this issue warrants the Court's review.

B. The Decision Below Is Wrong.

It is both unfair and a dangerous erosion of the fundamental principle reflected in *Batson* to allow courts to reject *Batson* claims and allow juries to be assembled in an otherwise apparently discriminatory fashion simply because the trial judge holds a personally favorable view of the prosecutor's character. In applying *Batson*'s three-part test, courts must rely only on the evidence that the parties themselves present, rather than evidence outside the record. Record evidence is the type of evidence this Court has recognized to be relevant to the *Batson* test. See *Flowers*, 139 S. Ct. at 2244. That is because the parties have no opportunity to rebut extra-record evidence or test it for accuracy, even though that evidence can be—and, in Smith's case, was in fact—dispositive of the

Batson analysis. Allowing such evidence to control the outcome of *Batson* claims only exacerbates the "practical difficulty" inherent in efforts to accurately "ferret[] out discrimination in selections" of juries. *Miller-El*, 545 U.S. at 238.

Applying these principles, the Eleventh Circuit should have held that the state court's determination of the facts was unreasonable. The trial judge twice relied on his personal, extra-record views in adjudicating Smith's *Batson* claim. He credited the prosecutor's credibility first on the basis that he was "a very prominent black attorney … [t]hat [the judge had] worked with" (Pet. App. 336a–347a; see also *id.* at 211a), and later on the basis that the prosecutor did not have a reputation as "a person prone to strike minorities" (*id.* at 324a). In affirming the denial of Smith's *Batson* claim, the Alabama Court of Criminal Appeals referred exclusively to the trial judge's reliance on his personal experience with the prosecutor in holding that there was no pretext for discrimination under *Batson*'s third step. *Id.* at 270a. That decision was based on evidence outside the record—not "evidence presented in the State court proceeding"—and it therefore was based on an "unreasonable determination of the facts" within the meaning of the federal habeas statute. 28 U.S.C. § 2254(d)(2).

To be sure, the Alabama Court of Criminal Appeals relied on evidence from the record in assessing the *second* step of *Batson*. See Pet. App. 260a–270a. But that does not salvage its exclusive reliance on extra-record evidence in assessing the *third* step. To the extent that the Eleventh Circuit conflated these two steps of the state court's decision, that, too, was wrong. Cf. *Purkett* v. *Elem*, 514 U.S. 765, 768 (1995) (per

curiam) ("The Court of Appeals erred by combining *Batson*'s second and third steps into one ….").

C. The Question Presented Is Important.

Since rendering its decision in *Batson*, "this Court's cases have vigorously enforced and reinforced the decision, and guarded against any backsliding." *Flowers*, 139 S. Ct. at 2243. To that end, this Court has frequently granted certiorari to review and correct denials of *Batson* claims, including in cases on collateral review. See, *e.g.*, *Foster* v. *Chatman*, 136 S. Ct. 1737, 1745, 1755 (2016) (reversing state court's denial of *Batson* claim in state post-conviction proceedings as clearly erroneous); *Snyder*, 552 U.S. at 474 (reversing state court's denial of *Batson* claim as clearly erroneous); *Miller-El*, 545 U.S. at 266 (holding that state court's denial of *Batson* claim was based on an unreasonable determination of the facts under § 2254(d)(2)).

The Court should do the same here. The decision below was unreasonable, contributes to a split, affects the public's foundational interest in "the very integrity of the courts," *Miller-El*, 545 U.S. at 238, and presents a question with nationwide consequences for the manner in which courts adjudicate *Batson* claims.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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