No. 19-7745
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

WILLIE B. SMITH, III,

Petitioner,

v.

JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED
(Rephrased)

1. The state court rejected Willie Smith's *Atkins* claim in 2012, years before this Court decided *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017). In his federal habeas petition, Smith argued that he was entitled to relief under *Hall* and *Moore*, even though the decisions were not "clearly established Federal law" at the time the state courts rejected his claim. 28 U.S.C. § 2254(d)(1). Did the federal courts err in denying his petition?

2. The state court rejected Smith's claim that the prosecutor unconstitutionally struck jurors on the basis of gender. Was that decision contrary to *J.E.B. v. Alabama*, 511 U.S. 127 (1994), an unreasonably application of *J.E.B.*, or an unreasonable determination of the facts in light of the evidence before the state court?

RELATED CASES

Underlying Trial and Direct Appeal:

State of Alabama v. Willie B. Smith, III, CC-92-1289, Circuit Court of Jefferson County, Alabama.
Judgment Entered: July 17, 1992.
Remanded With Instructions: January 17, 1997.
Order on Remand: October 9, 1997.

Smith v. State, CR-91-1975, 698 So. 2d 1166 (Ala. Crim. App. 1997), Alabama Court of Criminal Appeals.
Remanded With Instructions: January 17, 1997.

Smith v. State, CR-91-1975, 838 So. 2d 413 (Ala. Crim. App. 2002), Alabama Court of Criminal Appeals.
Judgment Entered: February 1, 2002.
Rehearing Denied: March 15, 2002.

Ex parte Smith, No. 1011228, Alabama Supreme Court.
Judgment Entered: June 28, 2002.

Smith v. Alabama, No. 02-6678, 537 U.S. 1090 (2002) (mem.), United States Supreme Court.
Judgment Entered: December 16, 2002.

State Postconviction (Rule 32) and Appeal:

Smith v. State, CC-92-1289.60, Circuit Court of Jefferson County, Alabama.
Judgment Entered: June 5, 2009.

Smith v. State, CR-08-1583, 112 So. 3d 1108 (Ala. Crim. App. 2012), Alabama Court of Criminal Appeals.
Judgment Entered: May 25, 2012.
Rehearing Denied: August 10, 2012.

Ex parte Smith, No. 1111480, 112 So. 3d 1152 (Ala. 2012), Alabama Supreme Court.
Judgment Entered: November 16, 2012.

Federal Habeas (2254) and Appeal:

Smith v. Dunn, 2:13-cv-00557, United States District Court for the Northern District of Alabama, Southern Division.
Judgment Entered: July 21, 2017.

Smith v. Comm'r, Ala. Dep't of Corr., No. 17-15043, 924 F.3d 1330 (11th Cir. 2019), Eleventh Circuit Court of Appeals.

Judgment Entered: May 22, 2019.

Rehearing Denied: September 23, 2019.

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STATEMENT OF THE CASE

A. Statement of the Facts

There is no doubt about Smith's guilt or the seriousness of his crime. Smith abducted Sharma Ruth Johnson from an ATM. Pet. App. 178a. An accomplice approached Johnson's vehicle and pretended to ask for directions, and then Smith—armed with a gun—approached that vehicle and forced Johnson into the trunk. *Id.* Held at gunpoint, Johnson revealed her bank-card password, and Smith used that bank card to withdraw funds, which was recorded by a surveillance camera. *Id.* Smith then drove around with her in the trunk, threatening her with sexual assault while she cried for help. *Id.* After picking up another passenger, Smith drove to a cemetery, where he shot Johnson execution-style. *Id.* Smith abandoned Johnson's car but later returned and set it on fire. *Id.* He subsequently confessed what he had done to several others, including a wired informant. *Id.*

B. The Proceedings Below

On May 7, 1992, a Jefferson County, Alabama, jury found Smith guilty of the capital offenses of murdering Sharma Ruth Johnson during the course of a kidnapping and during the course of a robbery, in violation of sections 13A-5-40(a)(1) and (a)(2) of the Code of Alabama. Doc. 31-1 at C. 148.[1] The jury recommended by a vote of ten to two that he should be sentenced to death. *Id.* at 148-49. The trial court followed the jury's recommendation. *Id.* at 167.

[1] Document numbers refer to the district court proceedings below.

On direct appeal, the Alabama Court of Criminal Appeals held that Smith made a prima facie showing that the State exercised its peremptory strikes on the basis of gender, in violation of *J.E.B. v. Alabama*, 511 U.S. 127 (1994), and remanded his case to the trial court with instructions to hold a hearing on that claim. Pet. App. 326a-30a (*Smith v. State*, 698 So. 2d 1166, 1169 (Ala. Crim. App. 1997)). The trial court did as ordered. Pet. App. 369a-425a. Thereafter, the court entered an order holding that "based on the Court's observation of the voir dire proceedings, observation of the venire persons in the courtroom and in chambers and upon the proceedings conducted on remand, the Court finds no juror was struck by the State for the reason that she was a female." Pet. App. 316a-25a.

On return to remand, the Court of Criminal Appeals affirmed Smith's convictions and sentence. Pet. App. 247a-313a (*Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002)). The Alabama Supreme Court denied certiorari, Pet. App. 314a, as did this Court later that year, Doc. 31-34, Tab #R-73 (*Smith v. Alabama*, 537 U.S. 1090 (2002)).

Smith next filed a Rule 32 petition for state postconviction relief, which he twice amended. After conducting an evidentiary hearing, the state circuit court denied Smith's second amended petition. Pet. App. 220a-46a. The Court of Criminal Appeals affirmed the circuit court's judgment, and the Alabama Supreme Court denied certiorari. Pet. App. 173a-219a (*Smith v. State*, 112 So. 3d 1108 (Ala. Crim. App.), *cert. denied*, 112 So. 3d 1152 (Ala. 2012)).

His state remedies exhausted, Smith filed a petition for writ of habeas corpus in the Northern District of Alabama. Doc. 1. On March 28, 2017, the district court denied and dismissed the petition. Pet. App. 19a-161a (Doc. 45.); Doc. 46. The district court granted Smith a certificate of appealability as to his claim that he is intellectually disabled and, therefore, ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). Doc. 46. The district court then reopened Smith's habeas proceeding for the sole purpose of considering the effect, if any, of *Moore v. Texas*, 137 S. Ct. 1039 (2017), on Smith's *Atkins* claim. Doc. 47. Following supplemental briefing by the parties, the district court again denied and dismissed Smith's petition on July 21, 2017. Pet. App. 162a-72a (Doc. 57.); Doc. 58.

Smith moved the Eleventh Court to expand the certificate of appealability. The court granted a certificate of appealability as to Smith's *Batson*/*J.E.B.* claim but otherwise denied his motion. After briefing and oral argument, the court of appeals affirmed the district court's judgment. Pet. App. 1a-18a (*Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330 (11th Cir. 2019)).

REASONS FOR DENYING THE PETITION

The Court should not grant certiorari on either of the questions presented by Smith. Smith's case is a particularly poor vehicle for considering whether *Hall* and *Moore* apply retroactively because his case arises under AEDPA's deferential standard and neither *Hall* nor *Moore* were clearly established precedent of this Court when state courts rejected Smith's *Atkins* claim. Smith argues that the Eleventh Circuit should have granted him relief anyway, but just last year, after the Sixth Circuit relied on *Moore* to grant relief under § 2254(d)(1), this Court unanimously and summarily reversed. *See Shoop v. Hill*, 139 S. Ct. 504 (2019). Smith ignores this recent holding and the broader problem that, even if *Hall* or *Moore* are new substantive rules, it is unlikely that federal courts have authority under § 2254(d) to grant Smith relief. The Court should thus deny Smith's petition, rather than opine on an issue that, for Smith, is merely academic.

And Smith's case is a worse vehicle still because even if *Hall* and *Moore* were applied to his case, his claim would still fail. Indeed, Smith's own experts testified that he is not intellectually disabled.

Finally, the Eleventh Circuit correctly determined that *Hall* and *Moore* announced new procedural rules of law that do not apply retroactively to cases on collateral review. That decision should not be disturbed.

Smith's second claim—that the Eleventh Circuit erred in denying habeas relief as to his *J.E.B.* claim—likewise is unworthy of certiorari because the split he alleges is illusory. All the courts that sit on either side of Smith's purported split allow trial

courts to consider "extra-record evidence" regarding a prosecutor's past conduct or the past conduct of the prosecutor's office in striking juries. Thus, there is no split, and the Eleventh Circuit's decision is correct. This Court, therefore, should deny Smith's petition.

I. This Court should decline to review Smith's claim regarding the import of *Hall* and *Moore* because AEDPA bars the relief he seeks, Smith's claim fails under those new precedents, and the Eleventh Circuit correctly held that those decisions did not announce new substantive rules.

Smith contends that this Court should grant certiorari to determine whether *Hall* and *Moore* apply retroactively to cases on collateral review. Pet. at 11-26. Certiorari is unwarranted here for three reasons. First, even if *Hall* and *Moore* did apply retroactively, AEDPA would bar the relief Smith seeks. Second, even apart from AEDPA, this case is a poor vehicle for deciding the retroactivity question because Smith's *Atkins* claim would fail under those recent decisions. And, third, the Eleventh Circuit correctly determined that *Hall* and *Moore* announced new procedural rules that do not apply retroactively to cases on collateral review.

A. AEDPA bars the relief that Smith seeks.

Smith's case is a poor candidate for cert because AEDPA bars the relief Smith seeks, regardless of whether *Hall* and *Moore* apply retroactively under *Teague v. Lane*, 489 U.S. 288 (1989). This Court has explained that "the AEDPA and *Teague* inquiries are distinct." *Horn v. Banks*, 536 U.S. 266, 272 (2002). "Whereas the *Teague* doctrine provides two exceptions to its bar against the application of new rules, the text of § 2254(d)(1) does not: if the law was not 'clearly established'—the

rule was not dictated by precedent—§ 2254(d)(1) precludes habeas relief," full stop. Brian R. Means, *Federal Habeas Manual* § 7:17 (West 2019 ed.). Here, Smith concedes that the holdings in *Hall* and *Moore* announced new constitutional rules. Pet. at 18-19 ("*Hall* and *Moore* are new … decisions of constitutional law."); *id.* at 24 (discussing the "new rules that [were] applied to the petitioners in *Hall* and *Moore* on [state] post-conviction review"). Smith also agrees that his final state court adjudication concluded years before this Court decided *Hall* or *Moore*. Pet. at ii, vi, vii. *Hall* and *Moore* were thus not "clearly established" law at the time of Smith's last state-court adjudication. AEDPA operates as an independent bar to relief.

The cases from this Court that Smith cites do not dispute that AEDPA would preclude relief. For instance, Smith relies heavily on *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which held, as Smith quotes, "when 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." 136 S. Ct. at 729 (emphasis added). But state collateral review proceedings would not have to consider Section 2254(d)'s deferential standard; federal habeas courts analyzing a Section 2254 petition would. And this Court has held that "[t]he retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by AEDPA; neither abrogates or qualifies the other." *Greene v. Fisher*, 565 U.S. 34, 39 (2011). As this Court has unanimously explained, "[i]f § 2254(d)(1) was, indeed, pegged to *Teague,* it would authorize relief when a state-court merits adjudication 'resulted in a decision that *became* contrary

to, or an unreasonable application of, clearly established Federal law … .' The statute says no such thing, and we see no reason why *Teague* should alter AEDPA's plain meaning." *Id.*

To be sure, this Court has not explicitly decided the issue of how AEDPA and *Teague* interact. *Id.* at n.* ("Whether § 2254(d)(1) would bar a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* is a question we need not address to resolve this case." (internal citation omitted)). But to the extent that its "post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct" and that courts must perform independent analyses. *Horn*, 536 U.S. at 272. If this Court were to grant cert, it would first have to decide whether AEDPA independently bars relief. *See Peters v. Hobby*, 349 U.S. 331, 338 (1955) (explaining that this Court must "at the outset" address the non-constitutional question that answer may dispose of the case, and this Court should avoid answering "a question of constitutional law in advance of the necessity of deciding it"). And because AEDPA does independently preclude relief for Smith regardless of *Teague* retroactivity, this Court would not even reach the issue Smith asks this Court to review—whether *Hall* and *Moore* are new substantive rules of constitutional law. *Cf. Arizona v. Evans*, 514 U.S. 1, 33 (1995) (Ginsburg, J., dissenting) ("[T]his Court will avoid constitutional questions when an alternative basis of decision fairly presents itself." (citation omitted)); *West v. Atkins*, 487 U.S. 42, 47 n.8 (1988) (declining to reach an Eighth Amendment issue "in light of

settled doctrine that [this Court] avoid[s] constitutional questions whenever possible" (citations omitted)).

None of the cases that Smith cites suggest otherwise. Clearly, no State Supreme Court considered whether Section 2254(d) independently precludes relief. That leaves only one Tenth Circuit decision on Smith's side of his purported split. But that case is inapposite here for two reasons. One, the Tenth Circuit was not constrained by AEDPA in performing its analysis. *See* Pet. at 13 n.2 (explaining that "the Tenth Circuit distinguished *Shoop v. Hill*, 139 S. Ct. 504 (2019) (per curiam) … 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." (citing *Smith*, 935 F.3d at 1083, 1076)). Indeed, the *Smith* court explicitly stated that because it was conducting a "de novo review, [it was] not constrained to consider only Supreme Court precedent 'clearly established at the time of the [state] adjudication,' as required under AEDPA." *Smith v. Sharp*, 935 F.3d 1064, 1083 (10th Cir. 2019) (second alteration in original). Instead, it "appl[ied] the general rule for retroactive application of law to convictions under collateral attack." *Id.* Two, even if it had been assessing whether *Hall* and *Moore* applied retroactively on Section 2254(d) review, the court concluded "that *Hall* and *Moore* did not create new rules of constitutional law," Pet. at 13, and held that the state court decision violated *Atkins*, not *Hall* or *Moore*, *Sharp*, 935 F.3d at 1083-84. Smith rejects that argument and argues that *Hall* and *Moore* did create new rules. Pet. at 18-19, 24.

Smith has thus failed to show that even if *Hall* and *Moore* did apply retroactively under *Teague*, AEDPA would allow relief. It would not. Indeed, this Court has held that reliance on *Moore* in analyzing a federal habeas petition under Section 2254(d)(1) is improper if the last relevant state court adjudication occurred before *Moore*. *Shoop*, 139 S. Ct. at 509. This Court explained that AEDPA "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases" and that "[t]he statute respects the authority and ability of state courts and their dedication to the protection of constitutional rights." *Id.* at 506. Therefore, under "28 U.S.C. § 2254(d)(1), habeas relief may be granted only if the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' Supreme Court precedent that was 'clearly established' at the time of the adjudication." *Id.* (citations omitted). This Court, thus, summarily reversed the Sixth Circuit "[b]ecause the reasoning of the Court of Appeals lean[ed] so heavily on *Moore*," and then remanded for the Sixth Circuit to "determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of this Court at the relevant time." *Id.* at 509. This Court emphasized that "the posture in which *Moore* reached this Court (it did not arise under AEDPA) and the *Moore* majority's primary reliance on medical literature that postdated the Ohio courts' decisions, provide additional reasons to question the Court of Appeals' analysis." *Id.* at 508 (citation omitted). Those reasons also apply to Smith's case.

In sum, "*Shoop* … held that *Moore*'s holding was not 'clearly established' by *Atkins* for purposes of 28 U.S.C. §2254(d)(1)." Pet. at 13 n.2. That almost certainly bars relief for Smith, and it unquestionably makes his case a poor vehicle for considering the retroactive scope of *Hall* and *Moore*.

B. Smith's case is a poor vehicle because his claim would fail even under *Hall* and *Moore*.

Even assuming AEDPA did not preclude relief in Smith's case, his case presents this Court with a poor vehicle for analyzing the reach of *Hall* and *Moore* because Smith's claim would fail under those decisions. Indeed, Smith's own experts testified that he is not intellectually disabled.

Smith raised an *Atkins* claim in his state postconviction petition, and he was afforded a full and fair evidentiary hearing on that claim. The state courts carefully considered and rejected it. Pet. App. 180a-85a, 190a-99a, 221a-29a. The evidence in the record establishes that Smith would not be entitled to relief on his *Atkins* claim even if this Court ultimately holds that *Hall* and *Moore* apply retroactively to cases on collateral review. This case is, thus, a poor vehicle for determining the import of those decisions.

As the Eleventh Circuit correctly explained:

> [T]he Alabama Supreme Court held that to be intellectually disabled under *Atkins* a defendant must prove by a preponderance of the evidence: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below);" (2) "significant or substantial deficits in adaptive behavior," and (3) that both the subaverage intellectual functioning and the deficits in adaptive functioning manifested before the age of eighteen.

Pet App. 11a (quoting *Ex parte Perkins*, 851 So. 2d 453, 456 (2002)).

Significantly, no expert witness has ever testified that Smith is intellectually disabled. Indeed, Smith's expert at trial, Dr. Alan Blotcky, and his expert at the evidentiary hearing on his state postconviction petition, Dr. Karen Salekin, testified that he is *not* intellectually disabled. The State's postconviction expert, Dr. Glen King, agreed with Dr. Salekin.

i. Dr. Alan Blotcky

Smith called Dr. Blotcky, a psychologist, at the penalty phase of his trial. Doc. 31-9 at R. 1492. Smith generated an IQ score of 75 on the verbal portion of an IQ test that Dr. Blotcky administered to him. *Id.* at 1493. Dr. Blotcky testified that Smith's score places him in the borderline range of intellectual functioning, "the category in between mildly retarded and low average."[2] *Id.* at 1494.

ii. Dr. Karen Salekin

Smith called Dr. Salekin, a clinical psychologist, at the evidentiary hearing on his state postconviction petition. Doc. 31-29 at R. 70-71. Dr. Salekin administered the Stanford-Binet Intelligence Scales, Fifth Edition ("Stanford-Binet"), and the extended battery of the Woodcock-Johnson III Test of Cognitive Abilities ("Woodcock-Johnson") to Smith. *Id.* at 68, 96-98. To assess his adaptive functioning, she

[2] Courts previously employed the term "mental retardation" in addressing *Atkins* claims, but Respondent will follow this Court's decision in *Brumfield v. Cain*, 135 S. Ct. 2269, 2274, n.1 (2015), by using the term "intellectual disability," except when quoting or discussing earlier court decisions and documents in the state-court record.

administered the Scales of Independent Behavior-Revised ("SIB-R") to Smith's mother and Smith's younger brother, Lorenzo Smith ("Lorenzo"). *Id.* at 68-69, 94.

Dr. Salekin explained that the Stanford-Binet is a "comprehensive measure of intelligence" that provides three main scores: the verbal IQ score, the non-verbal IQ score, and the full-scale IQ score. *Id.* at 72. She testified that Smith generated a full-scale IQ score of 64 on that test, but she was not asked about his verbal or non-verbal IQ scores. *Id.* at 73.

Turning then to the SIB-R, Dr. Salekin explained that the test "requires asking a respondent, which is a person who knows the person that you're testing, questions about their abilities in different areas." *Id.* at 76. She agreed that one of the "drawbacks" of administering the SIB-R is that the respondent has to base his or her answers on memories of the subject's behavior at an earlier time. *Id.* at 93. She also conceded that Lorenzo was required to base his answers to the questions on the SIB-R on his memory of Smith's behavior when Smith was seventeen years old. *Id.* And "[a]t best (for Smith), his 'younger brother was in his middle teens when the events that he was questioned about occurred.'" Pet App. 64a. Notably, when asked how many years Lorenzo would have had to think back to accomplish that task, Dr. Salekin replied, "I believe it's about thirty." Doc. 31-29 at R. 93.

She testified that Lorenzo's answers to the questions on the SIB-R pertaining to personal-living skills indicated that Smith was functioning at the level of someone who is "twelve years, eight months" old when he was seventeen. *Id.* at 94-95. The results Dr. Salekin received after administering the test to Smith's mother, however,

indicated that Smith was functioning at the level of someone who is "fifteen years, six months" old when he was seventeen. *Id.* at 95. When asked whether she would agree that there is a large difference in the scores on the SIB-R that she obtained from Lorenzo and their mother, she replied, "Yeah, I would say so." *Id.*

Dr. Salekin further testified that she administered the Woodcock-Johnson to assess Smith's current functioning in, among other areas, "oral language skills, written language skills, mathematics, [and] reading." *Id.* at 97. She explained that the mean on that test is 100 and that the standard deviation is 15. *Id.* at 99. She testified that Smith's standard score on that test was 89, which is less than one standard deviation below the norm. *Id.*

When asked to state his scores on the individual sub-parts of that test, Dr. Salekin testified that he obtained a score of 84 in oral expression, 93 on listening comprehension, 88 in broad reading, 97 in broad written language, and 92 in broad math. *Id.* at 99-100. She also testified that Smith obtained a score of 101 in calculation, 101 in math fluency, and 107 in spelling. *Id.* at 100-01. In terms of grade equivalency, Dr. Salekin explained that Smith's math scores would place him "at the end of the 12th grade essentially." *Id.* at 101. She further explained that his spelling score would place him at the grade equivalency level of "13.9," meaning that he is functioning at the level of a "freshman college" student in terms of his spelling ability. *Id.*

When asked whether Smith's performance on the Woodcock-Johnson is inconsistent with a diagnosis of mental retardation, Dr. Salekin replied, "Yes." *Id.* at

102, 104. She was asked to identify Smith's scores on the Woodcock-Johnson that are inconsistent with a diagnosis of mental retardation, and she testified:

> I would say broad math, which is 8.5 grade level; broad written language, which is also at 8.5; math calculation at 11.0; basic writing skills at 9.8; academic skills at 10.5; and if we're going into the individual rather than the cluster tests, we would get math fluency at a 12.9; spelling at 13.9; oral comprehension at 8.4. And I think comfortably I will stop there at things that are clearly outside of the typical range for individuals with mild mental retardation.

Id. at 106.

Asked to offer her opinion as to Smith's intellectual functioning, Dr. Salekin testified, over Smith's objection, "I don't believe Mr. Smith has mental retardation." *Id.* at 113. She explained that she reached that opinion based on her "full *Atkins* evaluation" of Smith. *Id.*

iii. Dr. Glen King

Dr. King is a clinical and forensic psychologist. Doc. 31-30 at R. 240-41. He reviewed "numerous and voluminous documents," conducted a clinical interview and mental status examination of Smith, and administered several tests. *Id.* at 250. He administered the Wechsler Adult Intelligence Scale-Third Edition ("WAIS-III"), the Wide Range Achievement Test, Fourth Edition ("WRAT-IV"), and the Adaptive Behavior Assessment System, Second Edition ("ABAS-2"), to Smith. *Id.* at 253.

Dr. King explained that the WAIS-III is an individually administered test of intelligence, "one of two instruments that are probably most commonly recognized in the profession as providing the best estimate of intellectual functioning." *Id.* at 253-

54. He testified that Smith generated a verbal IQ score of 75, a performance or non-verbal IQ score of 74, and a full-scale IQ score of 72. *Id.* at 254.

Dr. King then testified that the WRAT-IV is an achievement test used to assess an "individual's ability to read, write, and do arithmetic." *Id.* at 255. The "standard score would be based on a hundred being average with the standard deviation of 15 points." *Id.* Smith obtained standard scores of 85 in word reading, 93 in spelling, and 84 in math computation, which indicate that Smith is "reading words at the 8.6 grade level or in the middle of the eighth grade, spelling at the 11.5 grade level—that's the eleventh grade—and doing math computation at the 6.3 grade level." *Id.* at 257-58.

Dr. King administered the ABAS-2 to Smith to assess his adaptive functioning. *Id.* at 259. He used the ABAS-2 as opposed to the SIB-R or another test because "it's the only one of all of them that has norms for the individual filling it out himself; in other words, self-report." *Id.* at 299-300. When asked whether he considered administering a test such as the SIB-R to Lorenzo Smith, he replied, "You can't do that because there aren't any norms for that." *Id.* at 300. He agreed that Smith's performance on the ABAS-2 reveals that he has "some difficulties" in certain areas of adaptive functioning. *Id.* at 296.

Asked to offer his opinion as to Smith's intellectual functioning, Dr. King testified, over Smith's objection, "My opinion is that Mr. Smith is not mentally retarded and that he likely functions somewhere in the high borderline to low average range of intellectual ability." *Id.* at 268.

In affirming the state circuit court's holding that Smith is not mentally retarded, the Alabama Court of Criminal Appeals reasoned:

> "Based upon the testimony presented at the Rule 32 hearing, relevant portions of the trial transcript, and other matters outlined herein, this Court finds that [Smith] has failed to establish that he is mentally retarded so as to preclude him from receiving a death sentence in this case. Two experts expressly stated that in their opinion Willie Smith was not mentally retarded, and the other experts who testified did not refute those opinions. The record indicates that Willie Smith properly functioned in society prior to his arrest for the offense in question. Although testimony was presented regarding possible deficits in [Smith's] adaptive functioning based upon test results, there was no testimony regarding deficiencies in [Smith's] actual ability in areas such as 'communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.' *Ferguson v. State*, [13 So. 3d 418] (Ala. Crim. App. 2008). In numerous test categories, the Defendant tested in the average range or above average, and those test scores were inconsistent with a finding that [Smith] was mentally retarded.
>
> "Based upon the foregoing, this Court finds that [Smith] has failed to meet the burden of proving that he is mentally retarded so as to preclude opposition [sic] of the death sentence that was imposed in this case. This Court finds that [Smith's] limitations are not 'significant' enough to meet the requirements previously outlined herein."

Pet. App. 195a (quoting state circuit court's order). That court further concluded that "Smith did not prove by a preponderance of the evidence that he was mentally retarded. The greater weight of the evidence indicated that, although he suffered with some mental deficiencies, they did not rise to the level at which an impartial mind would conclude from the evidence that he was mentally retarded." *Id.*

In short, the evidence in the record—particularly the testimony of Dr. Salekin—reveals that Smith is not intellectually disabled and that he would not be entitled to habeas relief on his *Atkins* claim even if *Hall* and *Moore* applied

retroactively to cases on collateral review. *Hall* requires only that courts "take into account the standard error of measurement," 572 U.S. at 724, when assessing a defendant's IQ and if the IQ score falls within that margin of error to allow the defendant "to present additional evidence of intellectual disability, including testimony regarding adaptive deficits," *id.* at 723. Here, Smith was allowed "to present [extensive] additional evidence of intellectual disability, including testimony regarding adaptive deficits," so his case does not run afoul of *Hall*.

Nor would applying *Moore* to the evidence in the record provide Smith relief. *Moore* held (relying on medical literature that had not yet been published at the time of Smith's Rule 32 hearing) that courts should not weigh adaptive strengths in one area against adaptive deficits in another area. 137 S. Ct. at 1050. However, the Alabama Court of Criminal Appeals did not perform such a balancing. In Smith's case the evidence of whether Smith had adaptive deficits in certain areas and whether those deficits were significant enough to show intellectual disability was disputed. The Alabama Court of Criminal Appeals held that "[a]lthough there was some evidence of deficiencies in Smith's adaptive behavior, these deficiencies were not significant." Pet. App. 197a; *see also Atkins*, 536 U.S. at 318 ("[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also *significant limitations* in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." (emphasis added)). The court agreed that Smith only needed to show significant deficits in at least two areas of adaptive behavior to show intellectual disability but explained that "[e]ven

where there are indications of shortfalls in adaptive behavior, other relevant evidence may weigh against an overall finding of deficiency *in this area*." Pet. App. 198a (emphasis added).

Far from finding substantial adaptive deficits in certain areas but concluding that Smith was not intellectually disabled because of his adaptive strengths in other areas, the court considered all the evidence and determined that any adaptive "deficiencies were not significant," and Smith, thus, was not intellectually disabled. Pet. App. 197a. Although *Moore* clarifies that the focus of the adaptive functioning analysis is on what adaptive deficits a petitioner may have and the significance of those deficits, it does not forbid a court from considering evidence of both strength and weakness in a certain adaptive functioning area to determine if there is a significant adaptive deficit in that area. And that is what the Alabama Court of Criminal Appeals did in Smith's case. Pet. App. 197a-98a ("[T]hese deficiencies were not significant … . [because] [e]ven where there are indications of shortfalls in adaptive behavior, other relevant evidence may weigh against an overall finding of deficiency *in this area*." (citation omitted) (emphasis added)). Even if *Moore* were applied retroactively and AEDPA did not bar relief, Smith's claim of intellectual disability would fail. Because this case presents this Court with a poor vehicle to decide the import of *Hall* and *Moore*, certiorari should be denied.

C. Certiorari should be denied because the Eleventh Circuit correctly held that *Hall* and *Moore* do not apply retroactively.

This Court should also decline to review the Eleventh Circuit's decision because it correctly determined that *Hall* and *Moore* announced new rules that are

procedural, not substantive, and correctly refused to apply those cases retroactively in resolving Smith's *Atkins* claim. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion); *see also Chaidez v. United States*, 568 U.S. 342, 347 (2013) ("*Teague* makes the retroactivity of our criminal procedure decisions turn on whether they are novel."). In other words, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality opinion) (emphasis in original).

A new rule of constitutional law does not apply retroactively to criminal cases that became final before the rule's announcement unless the rule falls into one of two narrow exceptions. *Chaidez*, 568 U.S. at 347 n.3 (citing *Teague*, 489 U.S. at 311). Those exceptions are for "new substantive rules" and for "a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[3] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) (internal quotations and citations omitted). Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016).

On the other hand, procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's

[3] Smith concedes that the second *Teague* exception for non-retroactivity—watershed rules of criminal procedure—is not relevant here. Pet. at 13 n.1.

culpability.'" *Id.* at 730 (quoting *Summerlin*, 542 U.S. at 353). Additionally, "a rule that is procedural for *Teague* purposes still can be grounded in a substantive constitutional guarantee." *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016). By way of example, this Court "has adopted certain rules that regulate capital sentencing procedures in order to enforce the substantive guarantees of the Eighth Amendment. The consistent position has been that those rules are procedural, even though their ultimate source is substantive." *Id.*

Here, the Eleventh Circuit correctly concluded that this Court announced new rules that are procedural, not substantive, in *Hall* and *Moore*. Pet. App. 9a-10a. In reaching that result, the court reasoned that "*Moore* established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled. *Moore* effectively narrowed the range of permissible methods—the procedure—that states may use to determine intellectual disability." *Id.* at 9a. The court further reasoned that *Moore* "merely defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty." *Id.* The same analysis and result apply equally to this Court's decision in *Hall*. *See*, *e.g.*, *Kilgore v. Sec'y, Fla. Dept. of Corr.*, 805 F.3d 1301, 1314 (11th Cir. 2015), *cert. denied*, 138 S. Ct. 446 (2017) (mem.).

The Eleventh Circuit's determination that *Hall* and *Moore* announced new rules of constitutional law that are procedural and, thus, do not apply retroactively to cases on collateral review is correct for at least two reasons.

First, this Court's decision in *Shoop v. Hill*, 139 S. Ct. 505 (2019), implicitly recognized that *Moore* announced a new procedural rule.[4] *Shoop* held that *Moore*'s rule was not dictated by *Atkins* and implied that it did not place the death penalty entirely beyond the States' power to impose on any new class of persons by remanding for the Sixth Circuit to "determine whether its conclusions can be sustained based strictly on [the 'old'] legal rules." 139 S. Ct. at 508-09. This Court rejected the Sixth Circuit's "assert[ion] that the holding in *Moore* was 'merely an application of what was clearly established by *Atkins*.'" *Id.* at 508 (quoting *Hill v. Anderson*, 881 F.3d 483, 487 (6th Cir. 2018)). In so ruling, this Court noted that the Sixth Circuit "did not explain how the rule it applied can be teased out of the *Atkins* Court's brief comments about the meaning of what it termed 'mental retardation.'" *Id.*; *see also id.* ("[W]hile *Atkins* noted that standard definitions of mental retardation included as a necessary element 'significant limitations in adaptive skills that became manifest before age 18,' *Atkins* did not definitively resolve how that element was to be evaluated but instead left its application in the first instance to the States." (quoting *Atkins*, 536 U.S. at 318)).

Second, *Hall*'s and *Moore*'s new rules do not protect any class of persons that the *Atkins* rule does not already protect. *See Atkins*, 536 U.S. at 321 (holding that the Constitution protects the mentally retarded [now intellectually disabled] from the death penalty). Indeed, those decisions simply provide new procedures for ensuring

[4] Alternatively, the *Shoop* Court implicitly recognized that new constitutional rules cannot be applied retroactively to grant relief under 28 U.S.C. § 2254(d)(1), whether the new rule is substantive or procedural. *See* Part I.A.

that States follow the rule that was announced in *Atkins*. *See Hall*, 572 U.S. at 704, 711-12 (holding Florida's "rigid rule" foreclosing an inmate from presenting evidence regarding adaptive functioning where the inmate's IQ is above 70 unconstitutional because it "creates an unacceptable risk that persons with intellectual disability will be executed"); *Moore*, 137 S. Ct. at 1051-53 (holding that the lower court's "attachment" to the evidentiary factors set forth in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), "impeded its assessment" of the inmate's adaptive functioning and therefore tainted its "intellectual-disability determination"). Thus, those decisions did not expand the class of persons—the intellectually disabled—who are protected by *Atkins* but, rather, limited the power of the States to define the class of persons already protected.

The Eleventh Circuit correctly determined that *Hall* and *Moore* announced new rules of constitutional law that are procedural and, thus, should not be applied retroactively. Certiorari accordingly should be denied.

II. This Court should decline to review Smith's splitless and meritless *J.E.B.* claim.

Smith's second question presented is likewise unworthy of certiorari review. He contends that this Court should grant his petition to settle a split concerning the evidence that a trial judge can consider in resolving a challenge made pursuant to *J.E.B. v. Alabama*, 511 U.S. 127 (1994), or *Batson v. Kentucky*, 476 U.S. 79 (1986).

Pet. 26-33. Certiorari is unwarranted because the purported circuit split is illusory and Smith's *J.E.B.* claim is meritless.

A. Certiorari should be denied because the decision below neither contributed to nor created a circuit split.

Smith argues that the Eleventh Circuit's decision "contributes to a split." Pet. at 27-31. In his telling, the Seventh Circuit and the Illinois Supreme Court have held that a trial judge may not rely on "extra-record evidence" in resolving *Batson* or *J.E.B.* claims, while the Fifth Circuit, the California Supreme Court, and now the Eleventh Circuit "have taken the opposite approach." *Id.*

But there is no meaningful divergence in how these courts approach *Batson* and *J.E.B.* claims. Each of these courts has recognized that a trial judge may consider—either in determining whether a prima facie case of discrimination has been made or in completing the third step of the *Batson* inquiry—"extra-record evidence" regarding a prosecutor's past conduct or the past conduct of the prosecutor's office in striking juries. Because the split that Smith identifies is illusory, this Court should deny certiorari.

1. *Seventh Circuit*. The Seventh Circuit has held that a trial judge "may take into consideration a prior pattern or practice of jury selection made by a particular prosecutor as part of the analysis of the credibility of the prosecutor's reasons for exclusion of venire members." *United States v. Williams*, 934 F.2d 847, 850 (7th Cir. 1991); *see also United States v. Cooper*, 19 F.3d 1154, 1162 (7th Cir. 1994) ("In some cases, such as here, the judge has had the opportunity to observe patterns and practices of particular attorneys during prior jury selections. The

district judge in this trial specifically addressed his prior experiences with the government prosecutors in assessing whether their proffered reasons were credible. He noted that his prior experience with these prosecutors buttressed his conclusion that race played no part in their selection of the Davis jury.").

The two decisions cited in Smith's brief are not to the contrary. In *Coulter v. McCann*, 484 F.3d 459, 470 (7th Cir. 2007), the Seventh Circuit reversed the district court's judgment granting a writ of habeas corpus on the petitioner's *Batson* claim. Although the court of appeals characterized the trial judge's comments regarding the prosecutors "as an unhelpful step *in this particular case*," the court did so only because "the trial judge had no experience with those individuals as prosecutors in Coulter's or any other person's trial." *Id.* at 463 (emphasis added). And, in *United States v. Rutledge*, the Seventh Circuit recognized that a trial judge "may consider a variety of factors in making a credibility determination" but cautioned that "it would be wrong for a judge *to assume* that a prosecutor of the same race as a juror would not engage in discrimination against that juror simply because of their shared race." 648 F.3d 555, 562 (7th Cir. 2011) (emphasis added). Thus, the court in neither case disturbed the rule that judges may consider a prosecutor's prior conduct in assessing the credibility of that prosecutor's reasons for striking jurors provided that the judge "has had the opportunity to observe patterns and practices of [the prosecutor] during prior jury selections." *Cooper*, 19 F.3d at 1162.

2. *Illinois Supreme Court*. The Illinois Supreme Court has held that trial judges can consider a prosecutor's prior conduct in determining whether a defendant

has established a prima facie case of discrimination. *See*, *e.g.*, *People v. Evans*, 530 N.E.2d 1360, 1367 (Ill. 1988) ("Trial judges are especially well suited to make this determination because they are familiar with local conditions and prosecutors, and can draw upon their power of observation and judicial experience as a guide in distinguishing a true case of discrimination from a false one."). The decision cited in Smith's petition is not to the contrary. There, the court held the trial judge erred in relying "almost exclusively on his observations regarding the prosecutors involved and the local conditions in Cook County" in finding that the defendant failed to establish a prima facie case of racial discrimination. *People v. Andrews*, 588 N.E.2d 1126, 1134 (Ill. 1992). The court recognized that a "trial judge's experience with local prosecutors and knowledge of local conditions are relevant factors in a prima facie case analysis" but held simply that the trial judge "erred in failing to consider all of the relevant factors in determining whether a prima facie case had been established." *Id.* at 1134-35.

3. *Fifth Circuit*. The Fifth Circuit has held that trial judges may consider a prosecutor's past conduct in assessing the credibility of the prosecutor's reasons for striking jurors. *See*, *e.g.*, *United States v. Seals*, 987 F.2d 1102, 1109 (5th Cir. 1993) ("The trial judge had dealt previously with this prosecutor, and was in the best position to gauge his credibility. In this regard, not only did the trial judge investigate the prosecutor's race-neutral explanations, he also stated his personal knowledge and experience concerning the prosecutor's honesty and integrity.").

4. *California Supreme Court*. The California Supreme Court has held that trial judges may consider a prosecutor's past conduct in evaluating the credibility of the prosecutor's reasons for striking jurors. *See*, *e.g.*, *People v. DeHoyos*, 303 P.3d 1, 30 (Cal. 2013) (approving trial judge's consideration of prosecutor's past conduct in striking juries in completing third step of *Batson* inquiry).

5. *Eleventh Circuit*. The Eleventh Circuit has held that evidence regarding a prosecutor's and a prosecutor's office's history of discrimination, or lack thereof, are relevant factors that a trial judge can consider in completing the third step of the *Batson* inquiry. *See*, *e.g.*, *McNair v. Campbell*, 416 F.3d 1291, 1312 (11th Cir. 2005) ("The only argument with any force at all is McNair's list of cases in which convictions obtained by this district attorney's office have been reversed or criticized on the basis of *Batson*…. McNair has wholly failed to connect any conduct criticized in the cited cases to McNair's own prosecutor, much less his conduct in this case. Such disconnected history cannot carry McNair's burden[.]"). *But cf. Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1254 n.11 (11th Cir. 2013) (criticizing trial judge's determination of no purposeful discrimination based on judge's opinion of prosecutor's reputation and prosecutor's "*ex parte* affidavit" where "Adkins did not have notice or an opportunity to be heard on these matters"). In the decision below, the court did not disturb that rule. Instead, the court merely cautioned in *dicta* that a trial judge should not "personally attest to the prosecutor's character" or "provide its own reasons" for a prosecutor's peremptory strikes. Pet. App. 15a-16a n.10.

Thus, rather than establishing a circuit split, Smith has done the opposite. In light of the foregoing decisions, the consensus among the circuit courts and state courts of last resort is that judges may consider "extra-record evidence" regarding an individual prosecutor's or a prosecutor's office's history of striking juries in adjudicating a *Batson* or *J.E.B.* claim. Because Smith has failed to establish a split with regard to this issue, the writ should be denied.

B. Certiorari should be denied because Smith's *J.E.B.* claim is without merit.

The Eleventh Circuit correctly applied AEDPA deference in holding that Smith failed to establish that the state courts' adjudication of his *J.E.B.* claim "was contrary to the standard laid out in *Batson* and its progeny, an unreasonable application of *Batson*, or an unreasonable determination of the facts in light of the evidence presented to the state courts." Pet. App. 18a. Because Smith's *J.E.B.* claim is meritless, certiorari should be denied.

As with a claim of racial discrimination, a criminal defendant making a *J.E.B.* challenge bears the burden of proving a prima facie case of gender discrimination by showing "'that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Johnson v. California*, 545 U.S. 162, 168 (2005) (quoting *Batson*, 476 U.S. at 93-94); *see also J.E.B.*, 511 U.S. at 144-45. Once a defendant establishes a prima facie case of gender discrimination, the burden shifts to the State to offer gender-neutral explanations for the challenged strikes that are not pretextual. *J.E.B.*, 511 U.S. at 144-45. The third step in the *Batson*/*J.E.B.*

framework requires the trial judge to decide whether the defendant has proven purposeful discrimination. *Johnson*, 545 U.S. at 168.

In its order on remand, the trial court summarized the prosecutor's reasons for the peremptory strikes that he exercised against female venire members and then held: "In summary, based on the Court's observations of the voir dire proceedings, observation of the venire persons in the courtroom and in chambers and upon the proceedings conducted on remand the Court finds no juror was struck by the State for the reason that she was a female." Pet App. 316a-25a. *Those* were the reasons why the trial court found that Smith failed to satisfy his burden of proving purposeful discrimination at the third step of the *Batson/J.E.B.* inquiry—because the prosecutor's gender-neutral reasons were not pretextual; the venire members were struck for reasons detached from their gender. *Id.* at 324a. The Court of Criminal Appeals affirmed that judgment. Pet. App. 259a-70a.

After completing the *Batson/J.E.B.* analysis, the trial court set forth several statements about its "in court experience" with the prosecutor in Smith's case and in prior cases in which that prosecutor struck juries. Pet. App. 324a. Critically, the court did so *only* because Smith's counsel had levied attacks at both the prosecutor who struck the jury and at the prosecutor's office. In fact, the court prefaced its statements about the prosecutor by noting that it was making those statements "in light of some of the commentary by defense counsel during the *Batson* motion at trial and during the remand proceedings[.]" Pet. App. 324a.

In particular, the following colloquy occurred after the parties exercised their peremptory strikes:

> MR. TURBERVILLE [Defense Counsel]: … We also bring to the Court's attention that this prosecutor's office has been reversed on many, many, many occasions for systematically excluding blacks.
>
> THE COURT: I don't agree with that, I really don't.
>
> MR. TURBERVILLE: Judge, I have reversed them myself –
>
> THE COURT: Many, many, many, many occasions?
>
> MR. TURBERVILLE: Many times.
>
> THE COURT: This is Doug Davis, a very prominent black attorney –
>
> MR. TURBERVILLE: Yes, sir, I understand that, judge.
>
> THE COURT: That I have worked with and you have too.
>
> MR. TURBERVILLE: Yes, sir. But also this same attorney came out in the paper, was quoted as saying that prosecutors do not use their strikes to eliminate blacks. And we feel like at least a prima facie case has been made out.
>
> THE COURT: Well, I respectfully call your attention to the record. Ms. Gilchrist, the one that leans to the defendant; Ms. Ogletree who has a problem with capital punishment. Ms. Henderson who is nervous and doesn't want to see the pictures, she's on whatever that stuff is –
>
> DR. SHEALY [Defense Jury Consultant]: Sloft [sic].
>
> THE COURT: And I have sat up here for ten years and I know that – well, I don't want to say too much because you will say I am putting words in their mouths.
>
> MR. TURBERVILLE: Yes, sir.
>
> THE COURT: So I don't want to say anything else but other than to decline to say that you have made a prima facie case, Dan.

Pet. App. 344a-47a. The trial court's statements about the prosecutor in its remand order certainly are understandable when viewed in the context of Smith's counsel's remarks during that colloquy. But, again, the court set forth those statements only after it first properly completed the third step of the *Batson/J.E.B.* inquiry.

The Eleventh Circuit correctly summarized the trial court's findings and conclusions regarding Smith's *J.E.B.* claim:

> On remand, the prosecutor offered explanations for striking each female venire member. Those explanations included employment, marital status, age, knowledge of criminal law, and work with various churches and religious groups. In its order on remand, the state trial court evaluated the prosecutor's reasoning for striking each female venire member. The trial court found that the prosecutor's explanation for each member was supported by the record. The court confirmed, for example, that each woman allegedly struck for her religious affiliations stated during voir dire, or indicated on her questionnaire, that she was active in her church or taught Sunday School. The court noted that excluding potential jurors who were susceptible to mercy arguments was a sound trial strategy. Further, where the prosecutor explained a strike based on a venire member's demeanor, the trial court corroborated the prosecutor's explanation with its own trial notes. The state trial court ultimately held that the prosecutor's reasons for striking the female venire members were gender neutral, that those reasons were credible, and that Smith had failed to prove that the prosecutor had acted in a discriminatory manner.

Pet. App. 15a.

In addition, the Eleventh Circuit correctly found that the Court of Criminal Appeals "ultimately affirmed the trial court's credibility determination only after noting that the trial court found that (1) the prosecutor's reasons for striking venire members were supported by the record and (2) the prosecutor's approach in excluding those who were susceptible to mercy arguments was a sound trial strategy." *Id.* at 17a. The court further correctly determined that "[t]he Alabama CCA thoroughly

documented the prosecutor's reasons for strikes, the trial court's corroboration of the prosecutor's stated reasons, and Smith's arguments for why those reasons were pretextual. Only after conducting this analysis did the Alabama CCA affirm the trial court's credibility determination." *Id.* at 17a-18a.

The Eleventh Circuit correctly denied habeas relief as to Smith's *J.E.B.* claim. Certiorari accordingly should be denied.

CONCLUSION

This Court should deny Smith's petition for writ of certiorari.

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