No. 19-7745

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

HUGH ABRAMS
SHOOK, HARDY & BACON, LLP
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
(312) 704-5332

STEVEN J. HOROWITZ*
KELLY J. HUGGINS
CAROLINE A. WONG
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
shorowitz@sidley.com

TUNG NGUYEN
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Suite 2000
Dallas, TX 75201
(214) 981-3478

Counsel for Petitioner

* Counsel of Record

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CAPITAL CASE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This capital case presents a now-undisputed split on an undisputedly important question of constitutional law. Petitioner Willie B. Smith, III, is subject to a death sentence that is, in the Eleventh Circuit's view, simply "a matter of timing." Pet. App. 14a. If *Hall* v. *Florida*, 134 S. Ct. 1986 (2014), and *Moore* v. *Texas*, 137 S. Ct. 1039 (2017), were applied retroactively to cases on collateral review, then Smith would be entitled to relief from his sentence. But the Eleventh Circuit decided that *Hall* and *Moore* do not apply retroactively, and therefore Smith awaits an execution that is unconstitutionally cruel under prevailing standards for intellectual disability.

Crucially, the State does not even attempt to deny the existence or importance of the split over *Hall* and *Moore*'s retroactivity. Instead, the State devotes its opposition primarily to asserted vehicle problems based on arguments the State has never before raised and no court has previously addressed. The State's late-breaking theories present no obstacle to this Court's review of the dispositive retroactivity question presented by this case.

Additionally, this case presents the important question whether courts assessing *Batson* challenges may rely on extra-record evidence about a prosecutor's character. Here, the State attempts to cast doubt on the existence of a split, but it does so by pointing to cases that predate the split. The State provides no reason to doubt that a split exists *today*, or that this question that has divided the lower courts warrants this Court's review.

The Court should grant certiorari.

I. THE UNDISPUTED SPLIT OVER THE RETROACTIVITY OF *HALL* AND *MOORE* WARRANTS REVIEW.

The State does not dispute that federal courts of appeals and state courts of last resort are divided over the question whether *Hall* and *Moore* apply retroactively to cases on collateral review. Nor does it dispute that this split has profound consequences, or that the question requires this Court's urgent attention.[1]

Instead, the State conjures purported vehicle problems and asserts that the decision below is correct. But this case is an excellent vehicle to resolve the undisputed split, and the State's merits arguments—which do not detract from the urgent need to resolve the split in any event—fall short.

A. This Case Is An Excellent Vehicle To Resolve The Split.

The court of appeals made clear that the first question presented by the petition was dispositive of Smith's right to habeas relief. In the Eleventh Circuit's words, "Smith's success on this [*Atkins*] claim is a matter of timing." Pet. App. 14a. Alabama's approach to assessing intellectual disability "was acceptable at the time" of Smith's sentencing, but "after *Moore*, it no

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[1] Further confirming the urgent need for guidance from this Court, the Supreme Court of Florida recently issued a not-yet-final split decision in which it left open the question whether *Moore* applies retroactively on collateral review, but declined to apply *Hall* retroactively, despite having consistently done so in numerous post-conviction cases since *Hall* was decided. Compare *Phillips* v. *State*, No. SC18-1149, 2020 WL 2563476, at *9 (Fla. May 21, 2020) (per curiam) (non-final pending determination of or expiration of time to file rehearing motion), with Pet. 15–16 (collecting decisions in which the Supreme Court of Florida applied *Hall* retroactively on collateral review).

longer is." *Id.* Had the Eleventh Circuit applied *Hall* and *Moore* retroactively—as the Tenth Circuit does, for example—it would have granted Smith relief. This case is therefore an ideal vehicle for resolving the undisputed split.

The State makes two primary arguments in response.

1. First, the State submits that AEDPA bars the relief Smith seeks under *Atkins*, regardless of whether *Hall* and *Moore* apply retroactively. Opp. 5–9. But there is no hint in any of the opinions below that AEDPA might bar relief if *Hall* or *Moore* were to apply retroactively, and for good reason: the State never raised the issue until filing its opposition brief in this Court. As a result, the case as it comes to this Court does not even present the question whether 28 U.S.C. § 2254(d)(1) would bar a habeas petitioner from obtaining the relief to which *Teague* otherwise entitles him. This case turns entirely on retroactivity, as the court of appeals made plain.

The State concedes, as it must, that § 2254(d)(1) and *Teague* present "distinct" inquiries that must be conducted independently of each other, Opp. 5, 7 (quoting *Horn* v. *Banks*, 536 U.S. 266, 272 (2002)), and the Court in *Greene* v. *Fisher* expressly left unresolved the question of how those inquiries interact, 565 U.S. 34, 39 n.* (2011) ("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." (citation omitted)). There is no need in this case for the Court to address the question it left open in *Greene*, because the question was neither addressed nor even raised below. Indeed, this Court has recently

and repeatedly granted certiorari to address retroactivity questions on federal habeas review, notwithstanding AEDPA. See, *e.g.*, *Edwards* v. *Vannoy*, No. 19-5807, 2020 WL 2105209 (U.S. May 4, 2020) (granting certiorari to address retroactivity of *Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020)); *Whorton* v. *Bockting*, 549 U.S. 406 (2007) (retroactivity of *Crawford* v. *Washington*, 541 U.S. 36 (2004)); *Beard* v. *Banks*, 542 U.S. 406 (2004) (retroactivity of *Mills* v. *Maryland*, 486 U.S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U.S. 433 (1990)).

In any event, developments since *Greene* make clear that AEDPA does *not* bar relief to a federal habeas petitioner who is otherwise entitled to the benefit of a substantive rule that applies retroactively under *Teague*. Specifically, this Court held in *Montgomery* v. *Louisiana* that "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. 718, 729 (2016). In other words, *Teague*'s exception for new substantive rules "rest[s] upon *constitutional premises*," *id.* (emphasis added), which means that § 2254(d)(1) cannot withhold from a federal habeas petitioner the constitutionally protected benefit of a controlling substantive rule that is retroactive under *Teague*. See *id.* Nothing in *Shoop* v. *Hill*, 139 S. Ct. 504 (2019), suggests otherwise. *Contra* Opp. 9. *Shoop* did not address the interaction between *Teague*'s exceptions and § 2254(d)(1), because that issue was not presented in the case, just as it is not presented here.

2. The State also asserts that, AEDPA aside, Smith would not be entitled to habeas relief even if *Hall* and *Moore* applied retroactively to his case. See Opp. 10–18. Of course, the court of appeals saw things differently, explaining that Smith's entitlement to relief was

entirely a "matter of timing." Pet. App. 14a. And the undisputed evidence shows that Smith is intellectually disabled under the now-prevailing standards.

Alabama courts hold that a person is intellectually disabled for *Atkins* purposes if (1) he has "significantly subaverage intellectual functioning," defined to mean an IQ score of 70 or lower; (2) he has "substantial deficits in adaptive behavior"; and (3) those deficits manifested before the age of 18. Pet. App. 191a (quoting *Ex parte Perkins*, 851 So.2d 453, 456 (Ala. 2002)). The state court decided that Smith did not meet this test for two reasons, neither of which survives scrutiny under *Hall* and *Moore*.

First, the state court held that Smith did not have "significantly subaverage intellectual functioning," because his full IQ score was too high. See Pet. App. 192a–197a. But that IQ assessment undisputedly ignored the standard error of measurement, contrary to *Hall*'s requirement that courts "'take into account the standard error of measurement' when assessing a defendant's IQ." Opp. 17 (citation omitted) (quoting *Hall*, 134 S. Ct. at 2001). The standard error of measurement would have made all the difference in Smith's case. Smith received full scores from two IQ tests, yielding a 64 from one and a 72 from the other. The state court credited the latter score, Pet. App. 192a–193a, 195a, but, crucially, the expert who administered that preferred test testified that Smith's IQ score could have been as low as 67 using a standard error of measurement. *Id.* at 226a. The state court declined to consider that testimony because adopting a "margin of error" would "expand the definition of mentally retarded established by the Alabama Supreme Court." *Id.* at 197a; see also *id.* at 222a, 226a. *Hall* forecloses the state court's reasoning. After *Hall*, the state court would have been required to find that

Smith's IQ—even on the State's preferred test—fell within a range that stretched *below* 70, which is the cutoff that Alabama uses to decide whether an individual has "significantly subaverage intellectual functioning."

Second, the state court found that Smith did not have "substantial deficits in adaptive behavior" sufficient to meet the second and third parts of Alabama's test for intellectual disability. See Pet. App. 197a–198a. In so finding, the state court weighed Smith's adaptive deficits against his adaptive strengths, contrary to *Moore*'s undisputed holding that state courts "should not weigh adaptive strengths in one area against adaptive deficits in another area." Opp. 17 (citing *Moore*, 137 S. Ct. at 1050). As it did in the court of appeals, the State argues that the state court did not engage in the kind of "balancing" forbidden by *Moore*. *Id.* But the Eleventh Circuit "firmly disagree[d]." Pet. App. 14a. As that court explained, the state court considered factors that "weighed against 'an overall finding of deficiency,'" and it "treat[ed] the adaptive functioning prong like a balancing test" in a manner that is "no longer" acceptable after *Moore*. *Id.* Because the record has evidence of Smith's adaptive deficits in the areas of social skills, language, community use, health and safety, and self-direction, among others, *id.* at 225a–226a, 428–430a—evidence that the petition discussed and the State ignores, see Opp. 10–18—Smith indisputably meets the second and third prongs of Alabama's test for intellectual disability after *Moore*.[2]

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[2] The State leans heavily on certain experts' ultimate conclusions on intellectual disability in the state-court proceedings, Opp. 11–15, but even the state court acknowledged that expert opinions on ultimate conclusions are not binding, Pet. App. 185a, 228a, and, in any event, the experts offered opinions

In short, Smith's *Atkins* claim does not turn on factual disputes. The relevant evidence is unchallenged, and the success of the claim is simply "a matter of timing." Pet. App. 14a.

B. The Decision Below Was Wrong.

Although the State never disputes the existence or importance of the split, it does argue that the decision below was correct. Opp. 18–22. Of course, the State's merits arguments are irrelevant to the split's certworthiness. They also fall flat.

The State relies primarily on its view that *Shoop* "implicitly recognized" that *Moore* announced a new procedural rule. Opp. 21. But *Shoop* does not address or even mention *Teague*. It addresses only the application of § 2254(d)(1), and on the State's own view, that inquiry is necessarily "distinct" from *Teague*. *Id.* at 5, 7. *Shoop* is thus beside the point.

Beyond its invocation of *Shoop*, the State offers little more than *ipse dixit*, asserting that *Hall* and *Moore* "did not expand the class of persons" ineligible for the death penalty, Opp. 22, while ignoring the Eleventh Circuit's and the state court's contrary conclusions, Pet. App. 9a, 197a. And the State does not even attempt to contend with many of the merits arguments raised in the petition, including that *Montgomery* confirms that the Eleventh Circuit's decision is wrong, and that *Hall* and *Moore* are necessarily retroactive because they arose on review of state post-conviction proceedings.

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on a standard of "intellectual disability" that did not survive *Hall* and *Moore*.

The decision below was wrong, and the Court should grant certiorari to resolve the undisputed and undisputedly important split over the retroactivity of *Hall* and *Moore*.

II. THE SPLIT OVER WHETHER COURTS MAY RELY ON EXTRA-RECORD EVIDENCE IN ASSESSING *BATSON* CHALLENGES ALSO WARRANTS REVIEW.

Independent of the question whether *Hall* and *Moore* apply retroactively on collateral review, this case also presents the important question whether courts may consider extra-record evidence about a prosecutor's character in assessing the third step of *Batson*. As explained in the petition, lower courts are split on that question. The State claims that the split is "illusory," Opp. 23, but the only cases it cites to support its view predate the decisions that gave rise to the split in the first place. Compare *United States* v. *Williams*, 934 F.2d 847, 850 (7th Cir. 1991) (cited at Opp. 23), with *Coulter* v. *McCann*, 484 F.3d 459, 463–65 (7th Cir. 2007), and *United States* v. *Rutledge*, 648 F.3d 555, 562 (7th Cir. 2011); compare also *People* v. *Evans*, 530 N.E.2d 1360, 1367 (Ill. 1988) (cited at Opp. 25), with *People* v. *Andrews*, 588 N.E.2d 1126, 1133–35 (Ill. 1992).

The State does not point to any decision indicating that this split has narrowed, or that it is likely to be resolved without review by this Court. And the Court can and should resolve the question in this case, because the decision below deepens an existing split on an important issue. Although the Eleventh Circuit "cautioned in *dicta*" that trial courts should not rely on extra-record evidence of a prosecutor's character, as the State acknowledges, Opp. 26 (citing Pet. App. 15a–16a n.10), it nevertheless authorized the use of such evidence by holding that the state court's reliance on it was not unreasonable. Pet. App. 15a–18a.

The State also argues that Smith's *Batson* claim fails on the merits. Opp. 27–31. But the State's arguments on this front only underscore the need for this Court's review, and, in any event, they ignore the key parts of the record that support Smith's claim. Though the trial judge rejected the claim based in part on his "observations of … the proceedings conducted on remand," Pet. App. 324a, he also expressly based his decision on the fact that he had "known [the prosecutor] for many years," as well as his determination that, "[i]n [his] judgment, formed on the basis of extensive in court experience with [the prosecutor] and close acquaintanceship with others that know him," the prosecutor was an "equitable and just" person who was "certainly not … prone to strike minorities." *Id.*

The trial judge's discussion of these personal, extra-record views about the prosecutor's character, contrary to the State's characterization otherwise (Opp. 28–30), was not merely an off-hand response to inconsequential comments by Smith's trial counsel. They directly addressed trial counsel's arguments about the third step of *Batson*, and formed the basis for the trial court's rejection of those arguments. More importantly, the Alabama Court of Criminal Appeals relied on that discussion in affirming the denial of Smith's claim. Pet. App. 270a. That decision cannot be reconciled with the core principles underlying *Batson*, and the State does not even attempt to do so.

When the extra-record evidence about the prosecutor's character is stripped away, there is ample reason to conclude that the prosecutor's proffered justification for using 14 of his 15 peremptory challenges to strike female veniremembers was pretextual. During the *Batson* hearing on remand, the prosecutor claimed to have struck female veniremembers not on the basis of their gender, but instead on the basis of their religious

affiliations. The prosecutor explained that, in his view, people with religious affiliations are more likely to be "receptive" to arguments in capital cases "asking the jurors to show mercy." Pet. App. 374a–375a; see also *id.* at 261a. During voir dire, however, the prosecutor showed no interest in determining the veniremembers' religious affiliations. All of the information in the record about potential jurors' religious affiliations was elicited during defense counsel's questioning, not the prosecutor's, and the prosecutor did not ask any questions to follow up on the subject. *Id.* at 264a.

The voir dire process also confirmed that the prosecutor's assumptions about persons with religious beliefs were unsupported: all of the women struck on the basis of religious affiliation stated that they would have "no problem imposing the death penalty." Pet. App. 264a. When viewed in light of this record, the weight that the trial judge gave to extra-record facts about the prosecutor's character becomes all the more clear. Reliance on those facts was unreasonable, and without them, Smith's *Batson* claim would have prevailed.

The Court should grant certiorari to resolve the question whether courts assessing *Batson* challenges may rely on extra-record evidence about a prosecutor's character.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HUGH ABRAMS
SHOOK, HARDY & BACON, LLP
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
(312) 704-5332

STEVEN J. HOROWITZ*
KELLY J. HUGGINS
CAROLINE A. WONG
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
shorowitz@sidley.com

TUNG NGUYEN
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Suite 2000
Dallas, TX 75201
(214) 981-3478

Counsel for Petitioner

* Counsel of Record

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