No. 21-579

In the
Supreme Court of the United States

KENNETH EUGENE SMITH,
Petitioner,
v.
JEFFERSON S. DUNN, Commissioner,
Alabama Department of Corrections,
Respondent.

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

BRIEF IN OPPOSITION

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December 30, 2021

CAPITAL CASE

QUESTIONS PRESENTED (RESTATED)

1. Smith's constitutional claims were denied on the merits by state courts. When he brought the claims through a federal habeas petition under 28 U.S.C. § 2254(d), the district court denied them as well. When Smith sought a certificate of appealability from the Eleventh Circuit, that court considered whether the district court's decision to reject Smith's claims under § 2254(d) was debatable. Did the Court of Appeals apply the correct COA standard?

2. Did the Eleventh Circuit properly deny Smith's request for a COA on his claim that the trial court's instruction on accomplice liability violated *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *In re Winship*, 397 U.S. 358 (1970)?

3. Did the Eleventh Circuit properly deny Smith's request for a COA on his claim that the judicially imposed sentence of death violated *Ring v. Arizona*, 536 U.S. 584 (2002)?

4. Did the Eleventh Circuit properly deny Smith's request for a COA on his claim that he did not receive an individualized sentencing determination?

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STATEMENT OF THE CASE

A. Proceedings and Disposition Below

On April 7, 1988, the appellant, Kenneth Eugene Smith, was indicted for capital murder by the Grand Jury of Colbert County, Alabama, for the murder of Elizabeth Dorlene Sennett. Specifically, he was charged with murder made capital because it was "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire," § 13A-5-40(a)(7), Ala. Code 1975. (C.R. 65-66.)

On February 28, 1989, venue was transferred from Colbert County to Jefferson County, where the case was originally tried. On November 3, 1989, Smith was convicted of capital murder. The jury recommended that Smith be sentenced to death, which recommendation the trial court accepted on November 14, 1989. In 1992, the case was twice remanded to the circuit court, which set aside Smith's conviction and a new trial was ordered, finding that the State's explanation of its challenges to black venire members did not meet its burden under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court of Criminal Appeals dismissed the State's appeal. *Smith v. State*, 620 So. 2d 732, 732-34 (Ala. Crim. App. 1992). The initial 1989 conviction is not at issue in this appeal.

Smith was retried and again convicted of capital murder and the jury recommended a sentence of life imprisonment without parole by a vote of 11 to 1. On May 21, 1996, the trial court held a sentencing hearing and, after carefully weighing the aggravating

circumstances against mitigating circumstances, sentenced Smith to death, pursuant to authority granted by § 13A-5-47(e), Ala. Code 1975. Vol. 1, Tab R-3; C. 31-37.

Smith's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals (hereinafter "ACCA") on December 22, 2000. *Smith v. State*, 908 So. 2d 273 (Ala. Crim. App. 2000); Vol. 27, Tab. R-40. Rehearing was denied on February 23, 2001. *Id*. The Alabama Supreme Court granted certiorari on June 4, 2003, but quashed the writ of certiorari as having been improvidently granted on March 18, 2005. *Ex parte Smith*, 908 So. 2d 302 (Ala. 2005); Vol 29, Tab. R-47. The certificate of judgment issued that same day. Review was denied by this Court on October 3, 2005. *Smith v. Alabama*, 546 S.Ct. 928 (2005). Vol. 29, Tab R-50.

On March 16, 2006, Smith filed a Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The procedural history of Smith's state postconviction action was complex and lengthy, involving multiple remands, but detailed description is not necessary to address Smith's current claims. The state circuit court ultimately denied relief on Smith's Rule 32 petition, and that decision was affirmed by the ACCA on March 22, 2013. Vol. 44, Tab R-100. On February 7, 2014, the ACCA overruled Smith's application for rehearing and issued a substituted memorandum affirming the circuit court's denial of relief. Vol. 45, Tab R-102.

On February 21, 2014, Smith filed a petition for certiorari in the Alabama Supreme Court. Vol. 45-46,

Tab R-103. On August 22, 2014, the Alabama Supreme Court denied Smith's petition without opinion. Vol. 46, Tab R-104.

On September 30, 2014, Smith filed his petition for writ of habeas corpus in the District Court for the Northern District of Alabama. After briefing by the parties, the District Court denied relief in its final order issued on September 12, 2019. *Smith v. Dunn*, No. 2:15-CV-0384-AKK, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019). The Eleventh Circuit granted a certificate of appealability (hereinafter "COA") with respect to a single issue on January 9, 2020. The Eleventh Circuit denied COA on the issues that Smith raises in the petition for certiorari review that Smith has now filed with this Court.

B. Statement of the Facts

On March 18, 1988, the Reverend Charles Sennett, a minister in the Church of Christ, discovered the body of his wife, Elizabeth Dorlene Sennett, in their home on Coon Dog Cemetery Road in Colbert County. *Smith v. State*, 908 So. 2d 273, 279-281 (Ala. Crim. App. 2000). The coroner testified that Elizabeth Sennett had been stabbed eight times in the chest and once on each side of the neck, and had suffered numerous abrasions and cuts. *Id.* It was the coroner's opinion that Sennett died of multiple stab wounds to the chest and neck. *Id.* The evidence established that Charles Sennett had recruited Billy Gray Williams, who in turn recruited Smith and John Forrest Parker, to kill his wife. *Id.* He was to pay them each $1,000 in cash for killing Mrs. Sennett. *Id.* There

was testimony that Charles Sennett was involved in an affair, that he had incurred substantial debts, that he had taken out a large insurance policy on his wife, and that approximately one week after the murder, when the murder investigation started to focus on him as a suspect, Sennett committed suicide. *Id.* Smith detailed the following in his statement to police:

> About one month prior to March 18, 1988, I was contacted by Billy Williams. Billy came over to my house and we talked out on the front porch. It was late afternoon. Billy said that he knew someone that wanted somebody hurt. Billy said that the person wanted to pay to have it done. Billy said the person would pay $1500 to do the job. I think I told Billy I would think about it and get back with him. Billy lives at the corner of Tuscaloosa Street and Cypress Street near the telephone company. Billy drives a red and white Thunderbird. Billy and I are good friends. Billy and I talked about this several times before I agreed to do it. I had already talked with John Parker about helping me. I think I first met Charles Sennett about two weeks prior to the murder. Billy arranged the meeting. At the time I met Mr. Sennett I did not know who he was. I did not ask his name and he did not ask what my name was. Mr. Sennett told me that he wanted somebody taken care of. Mr. Sennett said that the person would be at home, that they never had any visitors. Mr. Sennett said that the house was out in the country. At that time I just listened

to his proposal and told him I would get back with him. When we talked we sat in Mr. Sennett's truck in front of Billy's apartment. I gave him my phone number. Mr. Sennett called me a couple of times to see if I had made a decision. Sometime between the Monday prior to the murder and the Thursday prior to the murder, Mr. Sennett learned that John and I would do what he wanted. I met with Mr. Sennett on Tuesday prior to the murder in the coffeehouse at ECM. At this meeting Mr. Sennett drew me a diagram of his house and told me that his wife and he would be out of town on Wednesday, to go down to the house and look around. By the time Sennett and I met at ECM I had learned through conversations with him that it was his wife that he wanted killed and the price agreed was $1,000 each—excuse me—$1,000 each for Billy Williams, John Parker and I. The next meeting was on Thursday prior to the murder in front of Billy's apartment again. Billy, Mr. Sennett and I sat in Mr. Sennett's silver car and talked. I don't recall what time it was exactly. I think it was in the morning. At this meeting Sennett gave me $200 and showed us the rest of the money. Two hundred dollars was for anything we needed to do the job. John Parker sat in my car while Billy and I talked with Mr. Sennett. The murder was supposed to look like a burglary that went bad. This was Mr. Sennett's idea. Sennett told me to take whatever I wanted from the house. It was agreed for John and I to do the murder

and then come back to Billy's apartment—to Billy's house—excuse me—and get the rest of our money. This meeting only lasted a short while. Sennett told us that he would be gone from 8:30 until noon. Then on 3/18 of '88 ... Friday, John and I got together around 8:30. We were in John's car, a Pontiac Grand Prix, gold. John drove to Muscle Shoals, then I drove down to the Sennett house. John had brought a black handle survival knife and a black holster. At this time we still did not know how we were going to kill Mrs. Sennett. John and I got to the Sennett house around 9:30, I think. I parked at the back of the house near a little patio that led into the house. I went to a door to the left of the car. I think there was a white freezer nearby. I knocked on the door and Mrs. Sennett came to the door. I told Mrs. Sennett that her husband had told us that we could come down and look around the property to see about hunting on it. Mrs. Sennett asked my name. I told her I was Kenny Smith. She went to the phone and called her husband and came back and told us it was okay to look around. John and I looked around the property for a while then came back to the house. John and I went back to the door. We told Mrs. Sennett we needed to use the bathroom and she let us inside. I went to the bathroom nearest the kitchen and then John went to the bathroom. I stood at the edge of the kitchen talking with Mrs. Sennett. Mrs. Sennett was sitting at a chair in the den. Then I heard John coming through the house.

John walked up behind Mrs. Sennett and started hitting her. John was hitting her with his fist. I started getting the VCR while John was beating Mrs. Sennett. John hit Mrs. Sennett with a large cane and anything else he could get his hands on. John went into a frenzy. Mrs. Sennett was yelling just stop, we could have anything we wanted. As John was beating up Mrs. Sennett, I messed up some things in the house to make it look like a burglary. I took the VCR out to the car. The last place I saw Mrs. Sennett she was lying near the fireplace covered with some kind of blanket. I had gone outside to look in the storage buildings when I saw John run out to the pond and throw some things in it. I also took a small stereo from the house—"also," is the last word. I don't know what brand it was or where in the house I got it. The VCR was a Samsung. I got it from under the TV set in the den. When John got back to the car we drove back to Billy's apartment to get our money. On the way back John told me that he had stabbed her once in the neck. I never stabbed Mrs. Sennett at all. When John and I got to Billy's, we were given $900 a piece. Billy gave us the money. At the time of the murder I never [knew] Charles Sennett's name or his wife's. It was only when it came out in the newspaper that I learned the name of the lady that was killed and Charles Sennett. I took the Samsung VCR home with me. The last time I saw the stereo it was in John's car. It was around noon when we got to Billy's

> apartment. Then on 3/31/88—in parenthesis, Thursday—my house was searched by investigators and they found the VCR. I was brought to the Colbert County Courthouse where I was advised of my rights. After being advised of my rights, I gave Investigator May this written statement.

Id. Smith's statement to police was corroborated at trial. *Id.* at 281. Donald Buckman, a friend of Smith's, testified that Smith approached him about one week before the murder and asked him if he would be interested in participating in beating someone up in exchange for money. *Id.* Another witness, Brent Barkley, testified that Smith told him that he had been hired to beat up someone. *Id.* Barkley also stated that he saw Smith on the evening of the murder and that Smith's hand was "bruised and wrapped." *Id.* There was also testimony that Smith had in his possession a large amount of money immediately after the murder. *Id*.

REASONS FOR DENYING THE PETITION

The first and clearest reason to deny Smith the relief that he asks for is that his petition asks for improper relief. Smith seeks to have this court "resolve" alleged circuit splits and to "decide important federal questions." Pet. at 4-6. In his "Reasons for Granting the Petition" Smith alleges three grounds for granting certiorari review: 1) an alleged circuit split regarding his claim that the trial court's complicity instruction was improper, 2) an

alleged conflict regarding his claim that the judicially imposed sentence was unconstitutional, and 3) an alleged conflict regarding trial judge's sentencing order. Pet. at 21-33. While Smith sought a COA as to all three of these claims, the Eleventh Circuit only granted COA on a single claim not raised here. The Eleventh Circuit did not address these claims in its opinion, nor did its opinion create any circuit split or conflict with this Court's rulings.[1] Thus, Smith's request for this Court to "resolve" issues is improper, for "[t]he COA inquiry asks only if the District Court's decision was debatable." *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (cleaned up).

Consequently, the question before this Court is whether the Eleventh Circuit applied the wrong standard when it denied Smith's motion for COA. The answer to this question is no—a COA was properly denied because Smith failed to make "a substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). Pet. App'x C at 14a. The court's decision to deny a COA is entirely consistent with *Buck v. Davis*, where this Court held, "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims ….'" 137 S. Ct. 759, 773 (2020).

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1. "This court granted Smith a certificate of appealability on the single issue of whether the district court erred in holding that Smith was not prejudiced by his trial counsel's failure to object to the validity of the search warrant even though it was directed to *any* sheriff of the state of Alabama." Pet. App'x B at 7a.

As set forth below, the Eleventh Circuit properly determined that Smith was not entitled to a COA on any of the claims raised in his application because the claims did not meet the COA standard. Smith has not raised any cert-worthy issue. The decision below does not implicate any split, involves only fact-bound claims, and presents no novel issue. This Court should, therefore, deny Smith's petition for writ of certiorari. *See* Sup. Ct. R. 10.

I. The Eleventh Circuit applied the correct COA standard to Smith's claims.

Smith's claims fail because both the district court and the Eleventh Circuit applied the correct COA standard to the claims in Smith's habeas petition. As this Court has explained:

> A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack,* 529 U.S. at 482; *Hohn v. United States,* 524 U.S. 236, 248 (1998). … § 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack, supra,* at 483, we recognized that Congress codified our standard, announced in *Barefoot v. Estelle,* 463 U.S. 880 (1983), for determining what constitutes the requisite showing. Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate

> whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.' " 529 U.S. at 484 (quoting *Barefoot, supra,* at 893, n. 4, 103 S.Ct. 3383).

Miller-El, 537 U.S. 322, 336. This was precisely the standard that the Eleventh Circuit applied when it denied Smith's requests for a COA. Pet. App'x C at 14a. Smith "faces a high bar" in demonstrating that he was entitled to a COA on his claims. *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). While the Eleventh Circuit did not cite this Court's opinion in *Buck v. Davis*, 137 S. Ct. 759 (2017), the court's denial of the COA in Smith's case is entirely consistent with *Buck*. As this Court explained in *Buck*: "At the COA stage, the only question is whether the application has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" 137 S. Ct. at 773. Because Smith does not couch his petition in terms of whether a COA was improperly denied, he fails to mention the standard used to deny it. As such, there is no dispute that the correct standard was used. Further, as set forth below, the Eleventh Circuit correctly applied this standard to deny a COA regarding the claims in Smith's petition. Consequently, this Court should decline to grant certiorari review.

II. The Eleventh Circuit properly determined that Smith was not entitled to a COA on his claim regarding the complicity instruction, and no circuit split exists.

Smith's first claim alleges that the Eleventh Circuit created a circuit split by denying his motion for a COA on his claim that the trial court's complicity instruction was "ambiguous" and lessened the State's burden of proof. Pet. at 21, 23-24. As an initial matter, Respondent notes that Smith's argument is founded on a misreading of the district court's opinion. Smith claims that the trial court's complicity instruction was "ambiguous" and alleges that the district court agreed with him. Pet. At 24. It did not. Rather, the district court discussed the standard for addressing "ambiguous" claims set forth in *Estelle* and *rejected* the notion that the instructions in the present case misled the jury. Pet. App'x at 132a. Indeed, as the district court held, "the trial court made it *clear* that the jury needed to find that Smith had a specific intent to kill before it could convict Smith of capital murder under *any theory*." Pet. App'x at 132a-133a (emphasis added).

Further, the Eleventh Circuit's refusal to grant a COA on this issue was not the product of any circuit split or conflict with this Court's decisions – it was simply the product of Smith's failure to show that reasonable jurists could disagree over the district court's determination that the ACCA did not unreasonably reject Smith's claim regarding the complicity instruction. Under Alabama law, when the

State is proceeding under an accomplice theory, Alabama law provides that:

> It is not necessary for the state to prove capital murder that the defendant personally inflicted the wounds or any particular wounds to the deceased. What the state must prove is that the defendant had a particularized intent to kill the deceased, and/or that [he] sanctioned and facilitated the commission of the intentional killing….

Sneed v. State, 1 So. 3d 104, 124 (Ala. Crim. App. 2007). Thus, the ACCA closely scrutinized the actual instructions given by the trial court and correctly held:

> We have thoroughly examined both the original jury instructions and the supplemental instructions given to the jury. The trial court followed the pattern jury instructions in giving its instructions on the elements of the two convictions. In regard to the capital murder conviction, the trial court, on more than one occasion, instructed the jury that to be convicted of capital murder the accused must have a specific or particularized intent to kill.

Pet. App'x at 269a-270a. At bottom, nothing in the trial court's instruction was ambiguous, misleading, or in any way reduced the State's burden of proof. As Smith himself concedes, the jury was instructed that, under the complicity theory:

> the Defendant Kenneth Eugene Smith is guilty of that intentional killing type of murder if but only if you find beyond a reasonable doubt either that the Defendant, Kenneth Eugene Smith, intentionally procured, induced, or caused the other person or persons to commit the murder and that the Defendant Kenneth Eugene Smith intentionally aided the other person or person's commission of the murder.

Pet. at 12, *quoting* Pet. App'x at 321a. This instruction clearly and emphatically informed the jury that Smith's *mens rea* was at issue.

Moreover, Smith has failed to cite to any Eleventh Circuit decision that demonstrates a circuit split. The Eleventh Circuit's rejection of his complicity claim as "undebatable" speaks to the lack of merit in his claim, but it does not establish that the Eleventh Circuit is mistaken about Alabama law. Indeed, the Eleventh Circuit has long recognized that, under Alabama law, complicity requires proof of intent. *Johnson v. Alabama*, 256 F.3d 1156, 1172–73 (11th Cir. 2001), *quoting Ex parte Raines,* 429 So.2d 1111, 1112-13 (Ala.1982) (Complicity "requires proof that Johnson, with an intent to kill, aided another in the killing Mr. Cantrell.") The cases Smith cites for his purported circuit split don't conflict with any decision of the Eleventh Circuit, much less with their rejection of Smith's request for a COA.

Smith principally relies on two cases: *Bennett v. Graterford SCI*, 886 F.3d (3d Cir. 2018) and *Langford v. Warden*, 593 F. App'x 422 (6th Cir. 2014). However,

both cases are readily distinguishable and demonstrate clear errors in the trial courts' instructions. In *Bennett*, the problematic instruction informed the jury that accomplices were "equally guilty with the principal" and "the act of one was the act of all," but did not instruct the jury on the required *mens rea*. *Bennett*, 886 F.3d at 275-275. The instructions were so clearly improper that a state court concluded that "the jury instructions on conspiracy and accomplice liability 'did not tell the jurors that they needed to find Bennett possessed the specific intent to kill.' " *Id.* at 277. As the Sixth Circuit held: "[t]he trial court repeatedly suggested that the jury could convict Bennett of first degree murder based upon the shooter's specific intent to kill." *Id*. at 286. But, as Smith acknowledges, the jury in his trial was correctly informed that, in order to convict under the complicity theory, the jury had to find that he "intentionally procured, induced, or caused the other person or persons to commit the murder… ." Pet. At 12. Thus, even if the Eleventh Circuit had granted Smith a COA and denied on the merits, it would not have come into conflict with the Third Circuit.

Just so for *Langford* and the Sixth Circuit. In *Langford*, an unreported decision, the Sixth Circuit considered jury instructions that allowed a jury to convict on complicity without complying with Ohio's requirement that complicity requires proof that the defendant "shared the criminal intent with the principal." *Langford*, 593 F. App'x at 4. This resulted from an apparent misplacement of the adverb "purposefully" so that it referenced the mental state of the perpetrator, not of the accomplice. *Id.* at 429-

430. Even the State conceded that "the trial court failed to instruct on the mens rea of complicity." *Id.* at 429. Again, in contrast, the jury in Smith's case was correctly informed that the intent that mattered was that of "Kenneth Eugene Smith," not his accomplice. Pet. at 12.

Because Smith has failed to show any conflict among the circuits, certiorari review should be denied.

III. The Eleventh Circuit properly determined that Smith was not entitled to a COA on his claim regarding judicial sentencing because reasonable jurists would not find the district court's rejection of this claim "debatable or wrong."

The jury in Smith's trial convicted him of capital murder for pecuniary gain, which is also an aggravating circumstance under Alabama law. As the ACCA explained:

> The record shows that the trial court found that only one aggravating factor had been proven—that the murder was done for a pecuniary gain. The fact that this aggravating factor is also an element of the capital offense does not make this finding unlawful.

Pet. App'x F at 276a. While the jury returned a recommendation that Smith be sentenced to life imprisonment without the possibility of parole, at the time, Alabama's capital sentencing process vested ultimate sentencing authority in the trial judge.

§13A-5-47 (e), Ala. Code (1975). Smith now claims that his sentence violates the Sixth Amendment because the judge was allowed to determine whether to sentence him to either death or life-without parole based upon the aggravating circumstance found by the jury because "there is no way to determine that … in the penalty phase … the jury found … an aggravating circumstance … to make Mr. Smith death eligible. Pet. at 29. He relies on two decisions to support this argument: *Ring v. Arizona*, 536 U.S. 584 (2002) and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Smith misunderstands *Ring*, *Hurst*, and the way that Alabama's capital sentencing statute works.

Of course, there *is* a way to determine whether the jury found that an aggravating circumstance existed: the jury convicted Smith of capital murder for pecuniary gain. As the district court explained:

> Smith became death-eligible when the jury convicted him of murder for pecuniary gain, which is also an aggravating circumstance under Ala. Code § 13A-5-49(6). As explained above, Alabama law requires the existence of only one aggravating circumstance for a defendant to be death-eligible, which the jury found when it found Smith committed murder for pecuniary gain by returning a guilty verdict. *See* 13A-5-45(e). Thus, every fact that made Smith death-eligible was found by the jury, beyond a reasonable doubt, at the guilt phase of his trial. That is what *Ring* requires.

Pet. App'x D at 73a-74a. This much is plain, and Smith makes no effort to contest it. Smith's

misunderstanding is evident because he apparently contends that *Hurst* and *Ring* required the jury to find the existence of an aggravating circumstance during the penalty phase.

This Court has clearly distinguished two separate determinations to be made in capital sentencing: "the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 970–971 (1994). "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Id.* (citing *Coker v. Georgia*, 433 U.S. 584 (1977)). That includes a finding of an "'aggravating circumstance' (or its equivalent) at *either the guilt or penalty phase*." *Tuilaepa*, 512 U.S. at 972 (emphasis added). But the Court has recognized "a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.* That question involves whether the aggravating factors outweigh any mitigating factors.

The Court revisited the issue of capital sentencing in *Ring v. Arizona*, 536 U.S. 584 (2002), and applied the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to death penalty cases. In *Ring*, the Court held that, although a judge can make the "selection decision," the jury must find the existence of any fact that makes the defendant "eligible" for the death penalty by increasing the range of punishment to include the imposition of the death penalty. The Court held that Arizona's death penalty statute violated the Sixth Amendment right to a jury trial "to the extent that it allows a sentencing judge, sitting without a

jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585.

Hurst did not add anything of substance to *Ring*. In *Hurst*, the State of Florida prosecuted a defendant for first-degree murder, which carried a maximum sentence of life without parole. *Hurst*, 136 S. Ct. at 620. Florida did not ask a jury to find the existence of any aggravating circumstance at the guilt phase. *Id.* At the sentencing phase, the jury also did not find the existence of any particular aggravating circumstance. Because the jury found no aggravating factor at the guilt or sentencing phase, the judge should have imposed a life without parole sentence. Instead, the judge found an aggravating circumstance herself and imposed a death sentence, making both the eligibility and selection determinations. *Id.* Applying *Ring*, the Court held the resulting death sentence unconstitutional because "the judge alone [found] the existence of an aggravating circumstance" that expanded the range of punishment to include the death penalty. *Id*. at 624.

But no similar problem exists in the present case because when the jury convicted Smith of capital murder for pecuniary gain pursuant it *necessarily* found that the aggravating circumstance that the murder was done for pecuniary gain existed.

> Certain capital offenses, like the murder for pecuniary gain for which Smith was convicted, have a built-in aggravating circumstance that corresponds to one of the aggravating circumstances listed in § 13A-5-

> 49. *Compare* Ala. Code § 13A-5-40(a)(7) (listing as a capital offense "murder done for pecuniary or other valuable consideration or pursuant to a contract or for hire") *with* Ala. Code § 13A-5-49(6) (listing as an aggravating circumstance that the "capital offense was committed for pecuniary gain").

Pet. App'x D at 71a-72a. Smith's only argument against this clear and undebatable fact is to myopically read the jury's verdict form alone and argue that it "does not contain an explicit jury finding of an aggravating circumstance." Pet. At 29. But that approach defies reason and the virtually universal approach of reviewing courts to eschew reading parts of the record in isolation. *See, e.g., United States v. Young,* 470 U.S. 1, 19 (1985) (prosecutor's remarks must be "viewed in context"); *United States v. Park*, 421 U.S. 658, 674–75 (1975) ("Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial.") (citation omitted). Smith can only reach his fanciful conclusion by completely ignoring the context in which the jury's verdict was returned. Smith's jury was clearly instructed on the fact that Smith was charged with murder for pecuniary gain and instructed more than once that to convict him of that crime it was required to *find* that the murder was "committed by the defendant for pecuniary gain… ." Pet. App'x at 307a, 311a, 313a, 336a, 338a. Thus, taken in proper context, the jury's verdict was a clear and undebatable finding that an aggravating circumstance existed. As the district court found, "that is what *Ring* require[d]."

Pet. App'x D at 73a-74a. Because Smith has shown no debatable claim, the Eleventh Circuit properly denied the COA, and this Court should deny certiorari review.

IV. The Eleventh Circuit properly determined that Smith was not entitled to a COA on his claim regarding the factual basis of the trial court's sentencing decision.

Smith's petition also includes a second attack on the judicially imposed sentence: a perfunctory and fact-bound claim that the allegation that the court failed to give him an individualized sentence and "considered the nature of the crime to the exclusion of evidence concerning Mr. Smith's character and background… ." Pet. at 32, 33.

As for the first prong of Smith's claim, the district court explained that the trial court properly considered Smith's age, his mental maturity, the jury's recommendation, and:

> as the Court of Criminal Appeals concluded [] the trial court properly exercised its sentencing authority in placing more weight than the jurors on the murder for hire aspect of the case. And, in doing so, the trial court gave Smith the individualized sentencing consideration required by the Constitution.

Pet. App'x D at 62a-64a. The trial court also considered other aspects of Smith's individualized sentencing profile, including his lack of prior criminal

history, his remorse and voluntary confession, his good conduct in jail, his "neglected and deprived" childhood, and the contents of the presentence investigation report. App'x G at. 287a-289a. Thus, Smith's claim that "the trial court's sentencing determination failed to provide [him] with the individualized sentencing determination to which" he was entitled, is not only wrong, it is indubitably so.

Nor does Smith's claim regarding the trial judge's subsequent public statement or his sentencing order from another case alter the equation. As the district court explained:

> [n]either the similarity of the sentencing order in Smith's case with the order in the other capital case, nor the trial judge's comment in the *Gadsden Times* lends merit to the contention that the trial judge failed to consider Smith's particularized characteristics in sentencing him to death.

Pet. App'x D at 66a. First, Smith cites to *a single page* of a sentencing order from the trial of Thomas Dale Ferguson that bears some similarities to the equivalent pages of the sentencing order in his case. Pet. at 32. But Smith again entirely ignores context. Both the sentencing order in his case and in the Ferguson case contain *extensive* discussions of the individual circumstances of each man's crime and of each man's individualized sentencing profile. *Cf.* Pet.

App'x 281a-289a and Vol. 40, R32 C.[2] 859-903. Again, Smith's fact-bound contention is not simply wrong, it is indubitably wrong. Nor is Smith's reliance on the subsequent newspaper article availing. Smith contends that the judge sentenced Smith to death solely based on "the way the crime[]" was. Pet. at 33, *citing* Vol. 40, R32 C. 908. He also suggests some impropriety in an alleged general statement that some jurors "don't want the responsibility to sentence someone to death." *Id.* But upon inspecting that page of the record, one finds only a partial quote by the judge with the remainder of the quote *blacked out*. *Id.*[3] Despite this, even reading the article as Smith contends it reads, nothing in it contradicts the trial court's findings in the sentencing order or even suggests, much less proves, that the trial court's decision was not based on Smith's individualized sentencing profile. Thus, despite Smith's fact-bound disagreement with the district court's conclusion, his claim that the trial court's sentencing determination "exclu[ded] evidence concerning Mr. Smith's character and background" is not just wrong, but indubitably wrong. Therefore certiorari should be denied.

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2. Smith cites to the postconviction clerk's record as "P.C. _." However, Respondent will cite to the equivalent portion of the habeas record by volume and page number.

3. The district court also gives the entire quote as "I thought they deserved the death penalty the way the crimes were,' [Judge] Tompkins said. "Some people serving on juries especially on these cases have never been in court before and they don't want the responsibility to sentence someone to death." But the district court was quoting Smith's habeas petition's quotation of the record, not the record itself. Pet. App'x "D" at 65a.

CONCLUSION

For the foregoing reasons, this Court should deny Smith's petition for writ of certiorari.

Respectfully submitted,

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