No. 21-579

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

—v.—

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO OPPOSITION

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I. The Eleventh Circuit Misapplied the COA Standard

Contrary to Respondent's contention (Opp. 8–9, 11), Mr. Smith challenges the Eleventh Circuit's denial of a certificate of appealability ("COA") on his constitutional claims. *See* Pet. i. The COA standard necessarily is satisfied where, as here, the district court's decision conflicts with that of other courts and raises fundamental questions about constitutional principles established by this Court.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires the petitioner to establish that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Significantly, a petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003). Rather, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342. Indeed, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338; *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate . . . .").

It follows that a petitioner is entitled to a COA where the district court decision on a constitutional issue raised by the petitioner conflicts with decisions of other courts. *See Lozada v. Deeds*, 498 U.S. 430,

432 (1991) (holding that Court of Appeals erred in denying a certificate of probable cause where "at least two Courts of Appeals have presumed prejudice in this situation" contrary to the district court ruling); *Busby v. Davis*, 677 F. App'x 884, 890 (5th Cir. 2017) (granting a certificate of appealability where "there is a split among the Circuits as to" the constitutional issue raised by petitioner); *Wilson v. Sec'y Pa. Dep't of Corr.*, 782 F.3d 110, 115 (3d Cir. 2015) (holding that "the Sixth Circuit's decision . . . —which conflicts with the District Court's decision in this case—demonstrates that the issue Wilson presents is 'debatable among jurists of reason'" (quoting *Lozada*, 498 U.S. at 432)); *Lambright v. Stewart*, 220 F.3d 1022, 1027–28 (9th Cir. 2000) ("the fact that another circuit opposes our view satisfies the standard for obtaining a COA").

Respondent's reliance on *Buck v. Davis*, 137 S. Ct. 759 (2017) reinforces these principles. There, this Court held that the Fifth Circuit erred in denying a COA to a petitioner by concluding that his underlying constitutional claims ultimately would not succeed because "[t]he COA inquiry . . . is not coextensive with a merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* at 773 (quoting *Miller-El*, 537 U.S. at 336). As the Court explained, "[t]hat a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Id.* at 774. Moreover, where, as here, the Court of Appeals errs in denying a COA, "§ 2253 does not limit the scope of [this Court's] consideration of the underlying merits." *Id.* at 775.

II. Mr. Smith's Claim That the Trial Court's Complicity Instruction Violated Due Process Satisfies the COA Standard

Respondent misreads the district court opinion when he contends that the district court did not find the trial court's complicity instruction ambiguous. Opp. 12. There are two prongs to Mr. Smith's claim that the trial court's complicity instruction relieved the State of its burden to prove all facts necessary for his capital murder conviction in violation of his Fourteenth Amendment due process rights. To succeed on such a claim, a habeas petitioner must prove (1) that "the instruction was ambiguous" and (2) that "there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Respondent conflates the two. The district held: "When reviewing an 'ambiguous' instruction, this court must examine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." Pet. App. 132a (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (internal quotation marks omitted)). While the district court ultimately found that there was not a reasonable likelihood that the jury applied the complicity instruction in violation of the Constitution, there would have been no reason for that inquiry unless the district court concluded in the first instance that the instruction was ambiguous.

Respondent does not dispute that Mr. Smith's *mens rea* was the central disputed fact issue at trial. Pet. 8, 25. Nor does Respondent dispute that the trial court's complicity instruction failed to expressly inform the jury that to support a capital murder

conviction even under a complicity theory, the jury was required to find that Mr. Smith—not another participant—had a specific intent to kill. Pet. 11–12. And Respondent does not dispute that Mr. Smith's proposed instructions—including that: "In order to find that Kenneth Smith is guilty of capital murder as an accomplice to that crime, you must find not only that he aided and abetted John Parker but you must also find that Kenneth Smith specifically intended that Mrs. Sennett be killed"—were accurate statements of Alabama law. Pet. 9–11 (citing Pet. App. 350a, 348a).

Respondent contends that the trial court's instructions were constitutionally compliant because the trial court's separate capital murder instruction correctly stated that specific intent was an element of capital murder, which "clearly and emphatically informed the jury that Smith's *mens rea* was at issue." Opp. 13–14. But Respondent ignores that it was neither clear nor emphatic to Mr. Smith's jury, which expressly requested clarification on "the differences listed between capital murder and murder while acting with extreme indifference to human life, definitions/elements." Pet. 12–13 (quoting Pet. App. 334a). Although the difference in those crimes relates to the *mens rea* element required to support a conviction, the trial court responded by reading the same ambiguous instructions to the jury over Mr. Smith's objection with respect to the complicity instruction that the jurors "be instructed briefly and simply that they cannot convict for capital murder unless they find that Kenneth Eugene Smith had a specific and real intent to kill." Pet. 13 (quoting Pet. App. 342a).

Respondent fails in his attempt to distinguish the decisions of the Sixth and Third Circuits that conflict

with the district court's decision. Respondent contends that in *Langford v. Warden, Ross Correctional Institution*, "the State conceded that 'the trial court failed to instruct on the mens rea of complicity.'" Opp. 16 (quoting *Langford v. Warden, Ross Corr. Inst.*, 593 F. App'x 422, 429 (6th Cir. 2014), *vacated*, 576 U.S. 1049 (2015), *aff'd on remand*, 665 F. App'x 388 (6th Cir. 2016)). While the State did not dispute that, it made the same argument that Respondent makes here "that the jury instructions, in their entirety, sufficiently instructed the jury on the mens rea element." *Langford*, 593 F. App'x at 429. But the Sixth Circuit rejected that argument because, as here, "there was nothing in the jury instructions to convey the principle that an accomplice need act with the same mens rea as the principal offender in order to be found guilty as a complicitor" even though the trial court correctly informed the jury that, to convict on the underlying murder charge, it "'must find that the State has proved beyond a reasonable doubt that . . . the defendant purposely caused the death of Marlon Jones." *Id.* Similarly, while Respondent contends that the complicity instruction in *Bennett v. Graterford SCI*, was "clearly improper," Opp. 15, he ignores that, in *Bennett*, as here, the trial court correctly "instructed the jury that first degree murder is an intentional killing, wherein 'the defendant consciously decided to kill the victim and . . . possessed a fully-formed intent to kill at the time when he acted.'" 886 F.3d 268, 287 (3d Cir. 2018).

III. Mr. Smith's Claim That the Trial Court's Override of the Jury's Sentencing Recommendation Violated His Sixth Amendment Jury Trial Right Satisfies the COA Standard

Respondent contends that, consistent with the Sixth Amendment, a defendant may be found eligible for the death penalty based on a jury finding in the penalty phase of a capital trial. Opp. 17–20. True. And when Mr. Smith was sentenced, Alabama law permitted the trial court to follow that procedure by instructing the jury before its penalty phase deliberations that it already had found an aggravating circumstance in the guilt phase of the trial. Pet. 14 (citing Ala. Code § 13A-5-49(6)). But Respondent does not dispute that the trial court did not follow that procedure in Mr. Smith's case. Instead, the trial court instructed the jury that it was "for the jury alone to determine" whether the State had proved an aggravating circumstance beyond a reasonable doubt and "[t]he fact that I instruct you on such aggravating circumstance or define it for you does not mean that the circumstance has been proven beyond a reasonable doubt." Pet. 14–15 (citing Pet. App. 296a); *see also* Pet. 29.

The question raised in this petition (and that Mr. Smith raised in support of a COA in the Eleventh Circuit) is whether having foregone that avenue, consistent with the Sixth Amendment, a trial judge may impose a death sentence on a defendant based on a general jury verdict for life imprisonment that does not indicate whether the sentencing jury found an aggravating circumstance beyond a reasonable doubt. Respondent contends the answer to that question is not debatable "because when the jury convicted Smith of capital murder for pecuniary gain

. . . it *necessarily* found that the aggravating circumstance that the murder was done for pecuniary gain existed." Opp. 19 (emphasis in original). But the same also was true in *Hurst v. Florida*, 577 U.S. 92 (2016) where Florida argued that the jury's penalty phase recommendation that the defendant receive a death penalty "'necessarily included a finding of an aggravating circumstance.'" *Id.* at 99. That did not save the death sentence imposed by the trial court in *Hurst* because the "trial court *alone* . . . [found] 'the facts . . . [t]hat sufficient aggravating circumstances exist[ed]' and '[t]hat there [were] insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 100 (emphasis in original, quoting Fla. Stat. § 775.082(1)).

So too here. The trial court *alone* "determine[d] [that] the aggravating circumstance[] *it [found]* to exist outweigh[ed] the mitigating circumstances it found to exist" and imposed a death sentence on Mr. Smith. Ala. Code § 13A-5-47(e) (1975) (emphasis added). It is at least debatable whether the district court erred in denying Mr. Smith's claim that the state habeas court unreasonably applied *Ring v. Arizona*, 536 U.S. 584 (2002) and its progeny to deny Mr. Smith's Sixth Amendment claim.

IV. Mr. Smith's Claim That the Trial Court's Form Sentencing Order Violated His Eighth Amendment Right to An Individualized Sentencing Determination Satisfies the COA Standard

Respondent's concession that the "sentencing order from the trial of Thomas Dale Ferguson . . . bears some similarities to the equivalent pages of the sentencing order in [Mr. Smith's] case," Opp. 22, is an understatement. The trial court's explanations for

overriding the jury's sentencing recommendations in the two cases are nearly identical.

SMITH SENTENCING ORDER	**FERGUSON SENTENCING ORDER**
"The Court does find that the jury's recommendation is a mitigating factor and the Court has consider[ed] said mitigating factor at this sentencing hearing. However, the jury was allowed to hear an emotional appeal from the defendant's mother. The Court does not find that the defendant's problems during his childhood is a mitigating factor." Pet. 289a.[1]	"The Court does find that the Jury's recommendation of life imprisonment without parole is a mitigating factor and the Court has considered said mitigating factor at the sentence hearing. However, the Jury was allowed to hear an emotional appeal from the defendant's wife. The Court further finds that the defendant's problems during his childhood is not a mitigating factor." Vol. 40, Tab R-82 at 904.
"Also there was evidence presented to the jury that the husband of the victim was the instigator of the killing of his wife, but the	"There was also evidence presented to the jury that Mark Moore was the instigator of the killing of Harold and Joey Pugh,

[1] Elsewhere in Mr. Smith's sentencing order, the trial court found that the fact that Mr. Smith was "neglected and deprived in his early childhood" was a mitigating factor. Vol. 6, Tab R-4 at 1094. At the Court of Criminal Appeals request, "the trial court . . . corrected its order to reflect that it did find Smith's childhood to be a mitigating factor but that it gave that mitigating circumstance little weight." *Smith v. State*, 908 So.2d 273, 300 (Ala. Crim. App. 2000), Vol. 27, Tab R-40.

SMITH SENTENCING ORDER	**FERGUSON SENTENCING ORDER**
fact that the victim's husband conspired with the defendant and his co-defendants to kill his wife does not make this defendant any less culpable and is not a mitigating factor." Pet. 289a–290a.	but that fact alone does not make the defendant any less culpable and is not a mitigating factor. The defendant was able and capable to make choices." *Id.*
"The Court having considered the aggravating circumstances and the mitigating circumstances, finds that the aggravating circumstances due to the nature of the crime and the defendant's involvement in it outweighs the mitigating circumstances presented and the mitigating factor that the jury recommended a sentence of life without parole and the vote was eleven (11) for life and one (1) for death." Pet. 290a.	"The Court having considered the aggravating circumstances and the mitigating circumstances, finds that the aggravating circumstances due to the nature of the crime and the defendant's involvement in it outweighs the mitigating circumstances presented, and the mitigating factor that the jury recommended a sentence of life imprisonment without parole and the vote was 11 for life and 1 for death." *Id.*
"The Court does find that there is a reasonable basis for enhancing the jury's recommendation	"The Court does find that there is a reasonable basis for enhancing the jury's recommendation of

SMITH SENTENCING ORDER	**FERGUSON SENTENCING ORDER**
sentence for the reasons stated herein that this was a murder for hire and the defendant had the opportunity to reflect and withdraw[] from his actions and chose not to do this; he was paid for his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired." *Id.*	life imprisonment without parole for the reasons stated herein, and this was a murder of an adult man and his young son during a robbery, and the defendant had the opportunity to reflect and withdraw from his actions and chose not to do so; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired." *Id.*

That the trial court's descriptions of the trials and evidence submitted in the respective sentencing orders differs is not germane. Opp. 22. There is nothing in the trial court's nearly identical explanations for its sentencing decisions that reflects "'consideration of the character and record of the *individual offender* and the circumstances of the *particular offense*,'" which is "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted). Respondent dismisses the trial judge's commentary on his decision to override

the jury sentencing recommendation in Mr. Smith's case, Pet. 33, contending that "nothing in it contradicts the trial court's findings in the sentencing order." Opp. 23.[2] That is true. Rather, the trial court's comments confirm that its findings in Mr. Smith's sentencing order are based on his view of "the way the crime[]" was and a mistrust of the jurors to fulfill their responsibilities as they pledged to do. Neither is a constitutionally permissible basis for a death sentence.

[2] Respondent complains that the copy of the article that contains the trial judge's comments is partly obscured in the habeas record. Opp. 23. If there is any doubt about the contents of the trial judge's remarks, the article that contains them is available online. *See* Beyerle, *Bill Would Give Future Juries More Influence*, The Gadsden Times, Feb. 20, 2004, https://www.gadsdentimes.com/story/news/2004/02/20/bill-would-give-future-juries-more-influence/32323315007/.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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