No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITIONER'S APPENDIX

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0934

Ex parte Kenneth Eugene Smith

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Kenneth Eugene Smith

v.

State of Alabama)

(Jefferson Circuit Court: CC-89-1149.61; Court of Criminal Appeals: CR-2023-0594)

SHAW, Justice.

WRIT DENIED. NO OPINION.

Parker, C.J., and Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Cook, J., concurs specially, with opinion.

Wise, J., recuses herself.

COOK, Justice (concurring specially).

I concur with denying Kenneth Eugene Smith's petition for a writ of certiorari. I write specially to explain (1) why I initially dissented when the State of Alabama asked this Court to set a second execution date to carry out Smith's death sentence and (2) why I now believe that Smith has failed to show that he is entitled to certiorari relief.

Smith was originally convicted of capital murder and sentenced to death in 1989, but that conviction was reversed on appeal, and a new trial was ordered. See Smith v. State, 588 So. 2d 561 (Ala. Crim. App. 1991), on return to remand, 620 So. 2d 727 (Ala. Crim. App. 1992), on return to second remand, 620 So. 2d 732 (Ala. Crim. App. 1992). Following his new trial in 1996, Smith was again convicted of capital murder and sentenced to death. The Court of Criminal Appeals affirmed Smith's conviction and sentence. See Smith v. State, 908 So. 2d 273 (Ala. Crim. App. 2000), cert. quashed, 908 So. 2d 302 (Ala. 2005).

In 2006, Smith filed his first petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., which was denied by the Jefferson

Circuit Court.[1] The judgment denying that Rule 32 petition was later affirmed by the Court of Criminal Appeals. See Smith v. State, 160 So. 3d 40, 55 (Ala. Crim. App. 2010).

On June 24, 2022, the State filed a motion to set Smith's execution date. This Court granted that motion on September 30, 2022, setting Smith's execution for November 17, 2022.

During that time, Smith raised and litigated in federal court a method-of-execution challenge to Alabama's use of lethal injection. After considering Smith's challenge, the United States Supreme Court concluded that Smith's execution should go forward on November 17, 2022. However, on that date, the execution could not proceed because the Alabama Department of Corrections was unable to set intravenous lines for the lethal injection.

After that occurred, Smith filed a challenge to Alabama's continued use of lethal injection for his method of execution in the United States District Court for the Middle District of Alabama. As part of his prayer

[1]Smith also sought relief in federal court, which was likewise denied. Smith v. Commissioner, Alabama Dep't of Corr., 850 F. App'x 726 (11th Cir. 2021).

for relief in that case, Smith sought execution by means of nitrogen hypoxia, as authorized under Alabama law. See § 15-18-82.1, Ala. Code 1975. The State ultimately agreed that it would use the nitrogen-hypoxia method for Smith's execution and that it would not attempt to execute him again by lethal injection.

In May 2023, Smith filed a second Rule 32 petition in the circuit court in which he alleged that a second attempt to execute him, by any means, would constitute cruel and unusual punishment in violation of the United States and Alabama Constitutions. Smith further alleged that he could not have raised this argument in his direct appeal or in his previously filed Rule 32 petition because, he said, the circumstances supporting such an argument had not occurred. The circuit court issued an order dismissing that petition, which Smith appealed to the Court of Criminal Appeals.

While that appeal was pending before the Court of Criminal Appeals, the State asked this Court to set a second execution date for Smith. That request was granted on November 1, 2023. Because I believed that, before setting Smith's second execution date, the Court of Criminal Appeals -- and, perhaps, this Court -- should have the

opportunity to decide whether there was any legal basis for Smith's new argument that a second execution attempt would constitute cruel and unusual punishment, I dissented to the issuance of Smith's death warrant at that point.[2]

Less than a month after this Court granted the State's request, the Court of Criminal Appeals issued an opinion unanimously affirming the

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[2]In particular, I believed that our courts should have had the opportunity to consider whether there was any authority that would bear on the original public meaning of the Eighth Amendment's text regarding "cruel and unusual" punishment as applied to a second execution attempt, including any historical evidence bearing on such original public meaning. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 33 (Thomson/West 2012) (explaining that a court should consider "how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued"); Jay Mitchell, Textualism in Alabama, 74 Ala. L. Rev. 1089, 1092 (2023) (explaining that "the meaning of a law is its original public meaning"); see also New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 15-17, 19 (2022) (explaining that the framework for analyzing a constitutional challenge includes "text, as informed by history"); id. at 79 (Kavanaugh, J., concurring) (summarizing the majority opinion's framework as "text, history and tradition"). For instance, I was aware that there were some commentators who had argued that there was scattered historical evidence indicating that if a defendant survived an execution attempt, there might be a choice not to attempt a second execution. See, e.g., Sara McDougall & David Perry, In the Middle Ages, Botched Executions Were a Sign, Slate, Dec. 4, 2022 (at the time of this decision, a copy of this article could be located at: https://slate.com/news-and-politics/2022/12/alabama-executions-kenneth-eugene-smith-history-capital-punishment.html).

circuit court's dismissal of Smith's second Rule 32 petition after concluding that his petition was meritless and was insufficiently pleaded. See Smith v. State, [Ms. CR-2023-0594, Dec. 8, 2023] ___ So. 3d ___ (Ala. Crim. App. 2023). In support of its decision, the Court of Criminal Appeals heavily relied on a factually similar case, State v. Broom, 146 Ohio St. 3d 60, 51 N.E.3d 620 (2016), in which the Supreme Court of Ohio rejected a defendant's challenge under the Eighth Amendment and Ohio's constitutional prohibition on cruel and unusual punishment to a second execution attempt after the first had failed because intravenous lines could not be established.

After his application for rehearing was overruled, Smith, on December 18, 2023, filed the instant petition seeking certiorari review of the Court of Criminal Appeals' decision.

In his petition, Smith alleges, pursuant to Rule 39(a)(1)(D), Ala. R. App. P., that a conflict exists between the Court of Criminal Appeals' decision and decisions from the United States Supreme Court. He also alleges, pursuant to Rule 39(a)(1)(C), Ala. R. App. P., that a material

question of first impression exists in this case.[3] As explained below, I do not believe that Smith has adequately demonstrated that he is entitled to relief under either of those grounds and, thus, concur with denying his petition.

First, Smith alleges that the Court of Criminal Appeals' decision "directly conflicts with multiple precedents governing … the scope of the Eighth Amendment's prohibition on cruel and unusual punishment." Petition at 3 (citing Rule 39(a)(1)(D), Ala. R. App. P.). Specifically, he alleges:

> "[T]he Court of Criminal Appeals' opinion failed to acknowledge, much less apply, the correct legal test to Mr. Smith's Eighth Amendment claim: that a State's successive attempt to execute a condemned person after 'a series of abortive attempts or even a single, cruelly willful attempt' is prohibited. La. ex rel. Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring); Baze v. Rees, 553 U.S. 35,

[3]Nowhere in his petition does Smith overtly mention the Court of Criminal Appeals' reliance on State v. Broom, 146 Ohio St. 3d 60, 51 N.E.3d 620 (2016). However, he does allege in a footnote that the Court of Criminal Appeals' reliance on "a decision from the Ohio Supreme Court" was erroneous because, he says, the Supreme Court of Ohio failed to use the "correct test" in reaching its holding in that case. Petition at 7 n.2. In making this argument, however, Smith does not allege any grounds for certiorari review or otherwise explain how the Court of Criminal Appeals' reliance on Broom was improper. I therefore see no reason to consider Smith's brief argument on this point as a basis for determining whether he is entitled to certiorari relief.

50 (2008) (plurality op.)."

Petition at 4.

Although Smith alleges that the Court of Criminal Appeals' decision conflicts with "multiple precedents," he cites only (1) Justice Frankfurter's concurring opinion in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), and (2) a plurality opinion in Baze v. Rees, 553 U.S. 35 (2008), in support of his conflict ground. (Emphasis added.) Neither a lone concurring opinion nor a plurality opinion of the United States Supreme Court constitutes a "prior decision" for purposes of the conflict ground under Rule 39(a)(1)(D), Ala. R. App. P. See Ex parte Dearman, 322 So. 3d 5, 6 n.1 (Ala. 2020) (noting that, a plurality decision "is not a 'prior decision[]' of the Court of Civil Appeals for purposes of Rule 39(A)(1)(D), Ala. R. App. P."); Ex parte Ball, 323 So. 3d 1187, 1188 (Ala. 2020) (Parker, C.J., concurring specially) (noting that "by allowing certiorari review of decisions that conflict with a 'prior decision' of an appellate court, Rule 39(a)(1)(D) provides a vehicle for this Court to ensure that the courts of appeals decide cases consistently with controlling precedent and for this Court to resolve inconsistencies between binding precedents of the courts of appeals. Therefore, a 'prior

decision' is necessarily a prior case that constitutes binding precedent on a relevant point."); Peraita v. State, [Ms. CR-17-1025, Aug. 6, 2021] ___ So. 3d ___, ___ n.6 (Ala. Crim. App. 2021) (noting that "plurality opinions … are not binding 'prior decisions'"). Because Smith has failed to properly allege that the Court of Criminal Appeals' decision conflicts with actual "prior decisions of the Supreme Court of the United States" as required by Rule 39(a)(1)(D), I concur with denying his petition on his asserted conflict ground.

Even if the portions of Justice Frankfurter's special concurrence in Resweber and the Supreme Court's plurality opinion in Baze on which Smith relies qualified as "prior decisions of the Supreme Court of the United States" for the purposes of Rule 39(a)(1)(D), Smith's allegation that they "directly conflict[]" with the Court of Criminal Appeals' decision is wrong. (Emphasis added.) For example, in Resweber, the United States Supreme Court examined whether the use of the same method of execution for a second time following an initial failed execution attempt constituted cruel and unusual punishment in violation of the Eighth Amendment. In Baze, the United States Supreme Court examined whether a particular lethal-injection protocol was unconstitutional under

the Eighth Amendment. In both cases, the United States Supreme Court concluded that the challenged actions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. See Resweber, 329 U.S. at 463-64 (holding that a second attempt at execution was not cruel and unusual punishment); Baze, 553 U.S. at 41 (holding that a particular lethal-injection protocol was not unconstitutional).

Here, Smith does not challenge the new method of execution. Instead, he alleges that an attempt to execute him for a second time by a different method of execution would constitute cruel and unusual punishment under the Eighth Amendment. As stated previously, the Court of Criminal Appeals concluded that a second execution attempt under such circumstances would not constitute cruel and unusual punishment in violation of the United States and Alabama Constitutions -- a conclusion that is not contradicted by the Supreme Court's rulings in Resweber and Baze.

This Court will grant certiorari review only if we conclude "that there is probability of merit in the petition." Rule 39(f), Ala. R. App. P. Because the Court of Criminal Appeals' decision does not appear to be contradicted by Resweber and Baze, this is a second reason not to grant

Smith's petition on his asserted conflict ground.

Second, at the very end of his petition, Smith also alleges, pursuant to Rule 39(a)(1)(C), Ala. R. App. P., that a material question of first impression exists as to whether his execution is barred by Article I, § 15, of the Alabama Constitution. That provision provides that "excessive fines shall not be imposed, nor cruel or unusual punishment inflicted." After quoting a portion of § 15, Smith alleges in a single paragraph:

> "[W]hether Article I, Section 15 of the Alabama Constitution also prohibits a second execution attempt in the circumstances alleged here is one of first impression. Accordingly, this Court should grant the writ of certiorari to address that question of first impression, which implicates a foundational right to be free from cruel and unusual punishment at the hands of the State."

Petition at 15.

Smith cites no Alabama caselaw to support this argument, and he cites no authority on the original public meaning of this provision of our Constitution. Smith fails to explain why the Alabama Constitution would prohibit his execution in this case, whether the slightly differing language employed in the United States and Alabama Constitutions would change the analysis of the challenge he is raising, or how this constitutional provision should be applied differently from the Eighth

Amendment. In fact, other than quoting Article I, § 15, of the Alabama Constitution, he makes no attempt at all to discuss this Alabama constitutional provision. By failing to do so, Smith has not demonstrated any probability of merit as to this claim under Rule 39(a)(1)(C). It is for this additional reason that I concur with denying his petition.

REL: December 8, 2023

Alabama Court of Criminal Appeals

OCTOBER TERM, 2023-2024

CR-2023-0594

Kenneth Eugene Smith

v.

State of Alabama

Appeal from Jefferson Circuit Court
(CC-89-1149.61)

KELLUM, Judge.

The appellant, Kenneth Eugene Smith, who is currently an inmate incarcerated on death row at Holman Correctional Facility, appeals the circuit court's summary dismissal of his second petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In 1988, Smith was indicted for murdering Elizabeth Dorlene Sennett for pecuniary gain, an offense defined as capital by § 13A-5-40(a)(7), Ala. Code 1975. In 1989, Smith was convicted of that charge and sentenced to death. On appeal, after twice remanding the case to the trial court, this Court found that Smith was entitled to a new trial based on a violation of the holding in Batson v. Kentucky, 476 U.S. 79 (1986). See Smith v. State, 588 So. 2d 561 (Ala. Crim. App. 1991), on return to remand, 620 So. 2d 727 (Ala. Crim. App.), on return to second remand, 620 So. 2d 732 (Ala. Crim. App. 1992).

In 1996, Smith was again convicted of capital murder and sentenced to death. This Court affirmed his conviction and sentence on direct appeal. See Smith v. State, 908 So. 2d 273 (Ala. Crim. App. 2000), writ quashed, 908 So. 2d 302 (Ala.), cert. denied, 546 U.S. 928 (2005). In doing so, we set out the following facts surrounding Smith's conviction:

> "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. 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. It was the coroner's opinion that Sennett died of multiple stab wounds to the chest and neck.

> "The evidence established that Charles Sennett had recruited Billy Gray Williams, who in turn recruited [Kenneth Eugene] Smith and John Forrest Parker, to kill his wife. He was to pay them each $1,000 in cash for killing Mrs. Sennett. 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."

Smith, 908 So. 2d at 280. Testimony was also presented indicating that Smith had confessed to his part in the murder and had given a detailed account of how he and his codefendant, John Forrest Parker, had obtained access to the victim's home and had beaten and shot her. This Court issued a certificate of judgment on March 18, 2005.

In 2006, Smith timely filed his first Rule 32 petition for postconviction relief, attacking his capital-murder conviction and sentence of death. The circuit court denied that petition, and Smith appealed. After remanding the case three times, twice by opinion, see Smith v. State, 160 So. 3d 40 (Ala. Crim. App. 2010), and once by order, this Court ultimately affirmed, by unpublished memorandum, the circuit court's order denying the petition.

In 2015, Smith filed a petition for a writ of habeas corpus in federal court, alleging that his counsel at his capital-murder trial had been

ineffective. The federal court denied relief, and that denial was affirmed on appeal. See Smith v. Commissioner, Ala. Dep't of Corr., 850 F. App'x 726 (11th Cir. 2021), cert. denied, Smith v. Hamm, ___ U.S. ___, 142 S.Ct. 1108 (2022).

In August 2022, Smith filed in federal court a 42 U.S.C. § 1983 civil action against the Commissioner of the Alabama Department of Corrections, alleging, in part, that the Alabama Department of Corrections ("DOC") "ha[d] substantially deviated from its Execution Protocol to the point that [to execute him] would subject Smith to intolerable pain and torture in violation of the Eighth Amendment." Smith v. Commissioner, Ala. Dep't of Corr., No. 22-13781, November 17, 2022, (11th Cir. 2022) (not reported in Federal Reporter). That action was dismissed, and Smith's subsequent request to amend the complaint was denied. On appeal, the United States Court of Appeals for the Eleventh Circuit remanded the case to allow Smith to amend the complaint. Id. In September 2022, while Smith's appeal in the § 1983 action was pending before the Eleventh Circuit Court of Appeals, the Alabama Supreme Court, at the request of the State, set Smith's execution for November 17, 2022. Smith moved to stay his execution,

but the Alabama Supreme Court denied that motion. On November 17, 2022, the State could not execute Smith "because []DOC was unable to set intravenous lines through which it could inject Mr. Smith with the lethal drugs." (C. 39.) Smith's § 1983 action remains pending in federal court. See Smith v. Hamm, No. 2:22-cv-497-RAH, July 5, 2023, (M.D. Ala. 2023) (not reported in Federal Supplement).

In May 2023, Smith filed a second Rule 32 petition for postconviction relief -- the petition that is the subject of this appeal. In the 11-page petition, Smith alleged that a second attempt to execute him, by any means, would constitute cruel and unusual punishment in violation of the United States and Alabama Constitutions because, he said, the failed attempt to execute him in November 2022 had "cause[ed] him severe and ongoing physical and psychological distress, including post-traumatic stress disorder." (C. 37.) The State moved that Smith's petition be dismissed, arguing that his claim was meritless and precluded by Rule 32.2(b), Ala. R. Crim. P., as successive. Smith filed a written objection to the State's motion. On August 11, 2023, the circuit court issued an order summarily dismissing Smith's petition, finding that his

claim was insufficiently pleaded. Smith timely filed a notice of appeal, and this appeal was submitted for decision on November 14, 2023.

On appeal, Smith argues that the circuit court erred in summarily dismissing his petition without first conducting an evidentiary hearing because, he says, his claim is sufficiently pleaded and not precluded as successive. For the reasons explained below, we agree with the circuit court that Smith's claim was insufficiently pleaded, and we also find the claim to be meritless. Because we affirm the circuit court's judgment on those grounds, it is unnecessary for us to address whether the claim is precluded as successive.

As noted above, in his petition, Smith alleged that a second attempt to execute him, by any means, would constitute cruel and unusual punishment in violation of the United States and Alabama Constitutions because, he said, the failed attempt to execute him in November 2022 had "cause[ed] him severe and ongoing physical and psychological distress, including post-traumatic stress disorder." (C. 37.) Smith alleged that before his attempted execution in November 2022, the State had attempted to execute two other death-row inmates but was unable to do so for the same reason it had failed to execute him in November 2022 --

the inability to insert intravenous ("IV") lines in the inmates. Despite the two previous failed attempts, Smith said, the DOC did no investigation before his November 2022 attempted execution and was forced to abort the November 2022 execution "nearly two hours" after first attempting to insert the IV lines. (C. 43.) Smith then alleged:

> "In an unsuccessful attempt to establish IV lines by the standard procedure, the IV Team jabbed [him] repeatedly, sliding the catheter needle continuously in and out of his arms and hands, while ignoring [his] complaints that they were penetrating his muscles, causing severe pain.
>
> "Having failed to establish IV access by the standard procedure, the IV Team next tried to do so using a central line procedure.
>
> "Sometime before midnight, the IV Team returned to the execution chamber and [he] was informed that the execution had been aborted.
>
> "Mr. Smith continues to be in a great deal of physical and emotional pain from the attempted execution in November.
>
> "[]DOC's failed attempt to execute Smith has had chronically severe psychological consequences, including severe post-traumatic stress disorder. In addition to difficulty sleeping, Smith's symptoms include nightmares, hypervigilance, hyperarousal, and disassociation (a defense mechanism to suppress threatening thoughts)."

(C. 44.)

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading ... the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., requires that the petition "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." As this Court noted in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003):

> "'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle[s] a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

913 So. 2d at 1125.

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the

> petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003)."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

Smith alleged generally that he had suffered physical pain during the November 2022 execution attempt when the execution team "repeatedly" attempted to insert needles in his arms and hands for "nearly two hours" and that he had told the team that "they were penetrating his muscles and causing severe pain." However, he did not allege specifically how many times the team attempted to insert the IV lines, or exactly how long the attempts continued. He also made only a bare allegation that he "continues" to suffer physical pain, without alleging specific facts describing that pain. Finally, he made a bare allegation that he suffers from post-traumatic stress disorder causing difficulty sleeping, nightmares, hypervigilance, hyperarousal, and disassociation, without alleging specific facts regarding how those symptoms rise to the level of a constitutional violation. Smith's general assertions in his petition are wholly insufficient to satisfy his burden of pleading.

Moreover, Smith's claim is meritless. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), the defendant was sentenced to death, and the State of Louisiana attempted to execute that sentence by use of an electric chair. "The executioner threw the switch but, presumably because of some mechanical difficulty, death did not result. [The defendant] was thereupon removed from the chair and returned to prison. ... A new death warrant was issued by the Governor of Louisiana." 329 U.S. at 460-61. The defendant then filed a petition for a writ of habeas corpus alleging, in part, that it would be cruel and unusual punishment to subject him to a second execution. A plurality of the United States Supreme Court rejected the argument, stating:

> "Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the

> unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty."

329 U.S. at 464. If it is not cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed execution attempt, then it is certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt.

Indeed, the Ohio Supreme Court so held in State v. Broom, 146 Ohio St. 3d 60, 51 N.E.3d 620 (2016), in which it rejected an argument that it would be a violation of the Ohio Constitution to execute Romell Broom after state officials had been unsuccessful in inserting IV lines in the first attempted execution.

> "Broom has also sought relief under the Ohio Constitution. Article I, Section 9 of the Ohio Constitution provides, 'Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.' This court has long held that the Ohio Constitution is a 'document of independent force.' Arnold v. Cleveland, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. The United States Constitution provides a floor for individual rights and civil liberties, but state constitutions are free to accord greater protections. Id. And recently, this court held for the first time that Article I, Section 9 provides

> protection 'independent of' the Eighth Amendment. In re C.P., 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 59. But we have also noted that cases involving cruel and unusual punishments are rare, 'limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' McDougle v. Maxwell, 1 Ohio St. 2d 68, 70, 203 N.E.2d 334 (1964).
>
> "When the execution team was unable to establish IV lines, the attempt to execute Broom was halted. Because the lethal-injection drugs were never introduced into the IV lines, the execution was never commenced. The state also demonstrated in the executions that were conducted after September 2009 that it is committed to following the protocols as written. Because Broom's life was never at risk since the drugs were not introduced, and because the state is committed to carrying out executions in a constitutional manner, we do not believe that it would shock the public's conscience to allow the state to carry out Broom's execution. We therefore conclude that Article I, Section 9 of the Ohio Constitution does not bar the state from executing Broom's death sentence."

146 Ohio St. 3d at 73-74, 51 N.E.3d at 633. Similarly, here, based on Smith's pleadings in his Rule 32 petition, when the execution team was unable to insert the IV lines, the attempt to execute Smith was aborted and Smith's life was never at risk because the drugs were never administered. In addition, in Alabama, "[a] death sentence shall be executed by lethal injection, unless the person sentenced elects to be executed by electrocution or nitrogen hypoxia." § 15-18-82.1(a), Ala. Code 1975. In his reply brief, Smith asserts that the State has "moved to

execute [him] using [nitrogen hypoxia]" (Smith's reply brief at p. 5, n.2), and in his § 1983 action in federal court, Smith "sufficiently pleaded that nitrogen hypoxia will significantly reduce his pain." Smith v. Commissioner, Ala. Dep't of Corr., No. 22-13781, November 17, 2022 (11th Cir. 2022) (not reported in Federal Reporter). Accordingly, a second attempt at execution will not be cruel and unusual punishment, and his claim to the contrary is without merit.

Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings ...."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). "Summary disposition is also appropriate when the petition is obviously without merit or where the record directly refutes a Rule 32 petitioner's claim." Lanier v. State, 296 So. 3d 341, 343 (Ala. Crim. App. 2019). Because Smith's claim is insufficiently pleaded and meritless, summary disposition of his Rule 32

petition without an evidentiary hearing was appropriate.

For the foregoing reasons, we affirm the circuit court's summary dismissal of Smith's second Rule 32 petition.

AFFIRMED.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.

AlaFile E-Notice

01-CC-1989-001149.61

Judge: MICHAEL STREETY

To: JOHNSON ANDREW BURNS
ajohnson@babc.com

NOTICE OF COURT ACTION

IN THE CIRCUIT CRIMINAL COURT OF JEFFERSON COUNTY, ALABAMA

STATE OF ALABAMA V. SMITH KENNETH EUGENE
01-CC-1989-001149.61

A court action was entered in the above case on 8/11/2023 2:22:13 PM

ORDER

[Filer:]

Disposition:	GRANTED
Judge:	M-S
Notice Date:	8/11/2023 2:22:13 PM

JACQUELINE ANDERSON SMITH
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01-CC-1989-001149.61
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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
BIRMINGHAM DIVISION

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1989-001149.61
	)	
SMITH KENNETH EUGENE	)	
Defendant.	)	

ORDER

This matter has come before the Court as a Petition for Relief from Sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The petition is based on the petitioner's conviction by a jury for capital murder and the subsequent imposition of a sentence of death. On April 26, 1996, the defendant was convicted by a jury, and the punishment of death was imposed on May 21, 1996, by the Court, overriding the jury's recommendation for a sentence of life without the possibility of parole. On March 18, 2005, the conviction was affirmed by a certificate of judgment issued by the Alabama Court of Criminal Appeals. The Petitioner filed his first Rule 32 Petition on March 16, 2006, which was denied on December 12, 2012.

On May 19, 2023, the petitioner filed this petition pursuant to Rule 32 A.R.Crim.P., seeking relief from his sentence of death. The petitioner asserts in his petition that because the State's failed attempt at execution failed, the failed attempt has caused "severe and ongoing physical and psychological distress, including post-traumatic stress disorder," and "any second attempt to execute," regardless of the manner of execution, would trigger additional severe psychological distress in violation of his rights to be free from cruel and unusual punishment, violating his rights under the Eighth and Fourteenth Amendments to the United States Constitution and under Article I, § 15 of the Alabama Constitution.

The Petitioner asserts that the Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." Equally, Article I, § 15 of the Alabama Constitution prohibits the same. Supporting his claim, he relies on Baze v. Rees, 533 U.S. 35, 49 (2008), stating "punishments are cruel when they involve torture or lingering death."

In reviewing the petitioner's claim, the Court is of the opinion that the petition is insufficiently pleaded as it amounts to bare allegations that the petitioner's constitutional rights have been violated. The petitioner has failed to plead sufficient facts to show that he is entitled to relief or that a manifest injustice would result if relief were denied. His citing of the U.S. Constitution, Article I, § 15 of the Constitution of Alabama, and the [bare] allegations listed in his petition amount to mere conclusions of law and warrant no further proceedings. Rule 32. (b), Ala. R. Crim P.

Petitioner's Rule 32 petition is due to be denied for the reasons stated above. Consequently, this Court has determined that there are no material issues of law or facts that would entitle the Petitioner to relief under Rule 32 and that no purpose would be served by any further proceedings. Rule 32.7, Alabama Rules of Criminal Procedure.

Therefore, the petitioner's Rule 32 Petition is **DENIED** and is hereby **DISMISSED.**

DONE this 11th day of August, 2023.

/s/ MICHAEL STREETY
CIRCUIT JUDGE

IN THE SUPREME COURT OF ALABAMA

November 1, 2023

1000976

Ex parte Kenneth Eugene Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Kenneth Eugene Smith v. State of Alabama) (Jefferson Circuit Court: CC-89-1149.80; Criminal Appeals: CR-97-0069).

ORDER

On August 25, 2023, the State of Alabama filed a motion requesting that this Court, pursuant to Rule 8(d)(1), Ala. R. App. P., enter an order authorizing the Commissioner of the Department of Corrections to carry out Kenneth Eugene Smith's sentence of death within a time frame set by the governor. Upon due consideration of such motion,

IT IS ORDERED that the Motion is GRANTED.

IT IS FURTHER ORDERED that the Commissioner of the Department of Corrections is authorized to carry out Kenneth Eugene Smith's sentence of death within a time frame set by the Governor of the State of Alabama.

IT IS FURTHER ORDERED that the Governor shall set a time frame, which shall not begin less than 30 days from the date of this order, within which the Commissioner of the Department of Corrections shall carry out Kenneth Eugene Smith's sentence of death.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this Order electronically or by mailing a copy thereof by United States mail, postage prepaid, to the following:

- the attorney of record for Kenneth Eugene Smith;
- the Governor of Alabama;
- the Attorney General of Alabama;
- the Commissioner of the Department of Corrections;
- the Clerk of the Alabama Court of Criminal Appeals; and

- the Clerk of the Jefferson Circuit Court.

This Order authorizing the Commissioner to carry out Kenneth Eugene Smith's sentence of death constitutes the execution warrant for Kenneth Eugene Smith.

Shaw, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Parker, C.J., and Cook, J., dissent.

Wise, J., recuses.

I, Megan B. Rhodebeck, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true, and correct copy of the judgment and order of the Supreme Court of Alabama regarding Kenneth Eugene Smith as the same appears of record in this Court.

Witness my hand and seal this 1st day of November, 2023.

Megan B. Rhodebeck

Megan B. Rhodebeck
CLERK OF COURT
SUPREME COURT OF ALABAMA

OFFICE OF THE GOVERNOR

KAY IVEY
GOVERNOR

STATE CAPITOL
MONTGOMERY, ALABAMA 36130

(334) 242-7100
FAX: (334) 242-3282

STATE OF ALABAMA

November 8, 2023

John Q. Hamm, Commissioner
Alabama Department of Corrections
301 S. Ripley Street
Montgomery, AL 36130

Dear Commissioner Hamm:

The Supreme Court of Alabama has entered an order authorizing you to carry out inmate Kenneth Eugene Smith's sentence of death for the capital murder of Elizabeth Dorlene Sennett. According to the Supreme Court's order, the execution must occur within a time frame to be set by the governor to begin not less than 30 days from November 1, 2023, the date of the order.

Accordingly, I hereby set a thirty-hour time frame for the execution to occur beginning at 12:00 a.m. on Thursday, January 25, 2024, and expiring at 6:00 a.m. on Friday, January 26, 2024.

The order of the Supreme Court of Alabama, which I enclose with this letter, constitutes the death warrant.

Although I have no current plans to grant clemency in this case, I retain my authority under the Constitution of the State of Alabama to grant a reprieve or commutation, if necessary, at any time before the execution is carried out.

Sincerely,

Kay Ivey

Kay Ivey
Governor

Enclosure

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

KENNETH EUGENE SMITH	*	
	*	
Petitioner,	*	
	*	
v.	*	**No. CC 1989-1149-60**
	*	
STATE OF ALABAMA,	*	
	*	
Respondent.	*	

SECOND PETITION FOR RELIEF FROM DEATH SENTENCE UNDER ALABAMA RULE OF CRIMINAL PROCEDURE 32

Petitioner Kenneth Eugene Smith, now incarcerated on death row at William C. Holman Correctional Facility ("Holman") in Atmore, Alabama, petitions this Court for relief from his death sentence. The State through the Alabama Department of Corrections ("ADOC") attempted, but failed, to execute Mr. Smith on November 17, 2022, causing him severe and ongoing physical and psychological distress, including post-traumatic stress disorder. Mr. Smith has pending in the United States District Court for the Middle District of Alabama certain federal-law claims, under 42 U.S.C. § 1983, to recover for his injuries and damages arising out of that failed execution attempt, and to prevent the State from attempting to execute him again by lethal injection. But *any* second attempt to execute Mr. Smith, by whatever means, would trigger additional severe psychological distress in violation of his right to be free from cruel and unusual punishment and would itself be a violation of Mr. Smith's rights under the Eighth and Fourteenth Amendments to the United States Constitution and under Article I, § 15 of the Alabama Constitution—particularly because the State's last two attempts to conduct an execution, before the State attempted to execute Mr. Smith in November 2022, had been botched or aborted. This petition raises that separate constitutional claim.

This is Mr. Smith's second petition seeking relief under Alabama Rule of Criminal Procedure 32. There is good cause to consider and grant this petition because the single ground for relief stated herein was not—and, indeed, could not have been—known to Mr. Smith before his aborted execution in November 2022, which occurred years after the judgment denying his first petition became final in August 2014. Any failure to consider this petition would result in manifest injustice.

In support of his petition, Mr. Smith states the following:

PROCEDURAL HISTORY

1. On April 7, 1988, Mr. Smith was indicted in Colbert County for capital murder in violation of Ala. Code § 13A-5-40(a)(7). Vol. 1 at 65–66.

2. By order dated February 28, 1989, the trial court transferred venue of Mr. Smith's trial to Jefferson County due to prejudicial pretrial publicity. Vol. 7 at 1294–95.

3. In May 1996, Mr. Smith was convicted of capital murder. Vol. 1 at 113. After a separate penalty phase hearing, the jury recommended by a vote of 11–1 that Mr. Smith be sentenced to life imprisonment without the possibility of parole (Vol. 1 at 114), but the trial court overrode the jury's decision and sentenced Mr. Smith to death (Vol. 1 at 31–37).

4. Following his direct appeal proceedings, on March 16, 2006, Mr. Smith filed a timely petition for relief from judgment pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in the Circuit Court of Jefferson County. Vol. 31 at 245. On June 1, 2007, Mr. Smith amended his petition. Vol. 32 at 428.

5. On December 19, 2012, the circuit court entered its final order denying Mr. Smith's Rule 32 petition. Vol. 43 at 117–24.

6. On March 22, 2013, the Court of Criminal Appeals affirmed that decision.

7. On August 22, 2014, the Alabama Supreme Court denied Mr. Smith's petition for a writ of certiorari. Vol. 46 at 126.

8. On March 3, 2015, Mr. Smith timely petitioned for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. *See* Petition, *Smith v. Dunn*, No. 2:15-cv-0384, DE 1 (N.D. Ala.).

9. On September 12, 2019, the district court denied each of the claims Mr. Smith asserted in his habeas petition. *Smith v. Dunn*, No. 2:15-cv-0384, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019). The Eleventh Circuit affirmed, *see Smith v. Comm'r, Ala. Dep't of Corrs.*, 850 F. App'x 726 (11th Cir. 2021), and the United States Supreme Court denied a petition for a writ of certiorari on February 22, 2022, *see Smith v. Hamm*, 142 S. Ct. 1108 (2022).

10. On June 24, 2022, the State moved in the Alabama Supreme Court to set a date for Mr. Smith's execution by lethal injection.

11. By order dated September 30, 2022, the Alabama Supreme Court set Mr. Smith's execution for November 17, 2022.

12. The State unsuccessfully attempted to execute Mr. Smith by lethal injection on November 17, 2022, but aborted the attempt because ADOC was unable to set intravenous ("IV") lines through which it could inject Mr. Smith with the lethal drugs.

13. The State's failed attempt to execute Mr. Smith caused him severe physical and psychological pain that has had ongoing effects.

14. Mr. Smith is pursuing a federal action under 42 U.S.C. § 1983 alleging that making a second attempt to execute him by lethal injection would violate his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and seeking to prohibit the State from doing so.

That action remains pending in the United States District Court for the Middle District of Alabama. *See Smith v. Hamm*, Docket No. 2:22-cv-497 (M.D. Ala.).

15. However, a claim that "challenges the validity of [Mr. Smith's] conviction or sentence"—as opposed to a claim that challenges the method of his execution—is not available to him in a federal action brought under 42 U.S.C. § 1983. *See Nance v. Ward*, 142 S. Ct. 2214, 2222 (2022).

16. This petition asserts just one claim—*i.e.*, the claim that is not available to Mr. Smith in his federal action under *Nance*.

17. In this petition, Mr. Smith alleges that making a second attempt to execute him by any method would violate his rights under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article, I, Section 15 of the Alabama Constitution and Mr. Smith seeks to prohibit the State from doing so. Mr. Smith could not have asserted this claim at trial, on appeal, or while his first Rule 32 petition was pending. The ground for Mr. Smith's claim was not and could not have been known to Mr. Smith until he experienced the consequences of ADOC's aborted attempt to execute him on November 17, 2022.

GROUND FOR GRANTING THE PETITION

A SECOND ATTEMPT TO EXECUTE MR. SMITH WOULD VIOLATE HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 15 OF THE ALABAMA CONSTITUTION

18. The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. Likewise Article I, § 15 of the Alabama Constitution prohibits "cruel or unusual punishment." Ala. Const. art. I, § 15.

19. The U.S. Supreme Court has explained that "[p]unishments are cruel when they involve torture or a lingering death." *Baze v. Rees*, 553 U.S. 35, 49 (2008) (citation and internal quotation marks omitted). The U.S. Supreme Court has further elaborated that "cruel" as "the people who ratified the Eighth Amendment would have understood it" means:

> "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting," or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness."

Bucklew v. Precythe, 139 S. Ct. 1112, 1123 (2019) (quoting 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773) and 1 N. Webster, An American Dictionary of the English Language (1828)); *see also Baze*, 553 U.S. at 49 (a cruel punishment "implies there is something inhuman and barbarous, something more than the mere extinguishment of life").

20. A "method of execution [that] cruelly superadds pain to the death sentence" violates the Eighth Amendment. *Bucklew*, 139 S. Ct. at 1125. In addition to physical pain, "[t]he modern definition of *torture* makes clear that torture can be either physical or psychological in nature." John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U. L. REV. 1, 3 (2019) (emphasis in original). For example, "a threat . . . can rise to the level of cruel and unusual punishment." *Dobbey v. Ill. Dep't of Corrs.*, 574 F.3d 443, 445 (7th Cir. 2009); *see also id.* ("Mental torture is not an oxymoron, and has been held or assumed in a number of prisoner cases to be actionable as cruel and unusual punishment . . .—imagine falsely informing a prisoner that he has been sentenced to death." (citation and internal quotation marks omitted)); *Shanklin v. State*, 187 So.3d 734, 808 (Ala. Crim. App. 2014) ("Psychological torture can be inflicted where the victim *is in intense fear and is aware of, but helpless to prevent, impending death.*" (emphasis in original, citation and internal quotation marks omitted)).

21. Applying these principles, "'a series of abortive attempts at [execution]' . . . — unlike an 'innocent misadventure'—would demonstrate an 'objectively intolerable risk of harm'" in violation of the Eighth Amendment "that officials may not ignore." *Baze*, 553 U.S. at 50 (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470–71 (1947) (Frankfurter, J., concurring); *Farmer v. Brennan*, 511 U.S. 825, 846 & n.9 (1994)).

22. Mr. Smith's was the third consecutive execution that the State has botched or aborted all for the same reason—the inability of ADOC personnel to place IV lines in condemned people. Before ADOC's aborted attempt to execute Mr. Smith in November 2022, it did nothing to determine what happened and why during the previous two botched executions to reduce the risk of a recurrence. Consequently, ADOC's failed attempt to execute Mr. Smith caused him severe physical pain and psychological distress, which he continues to experience. Attempting to execute Mr. Smith for a second time would pose an objectively intolerable risk of triggering the same harm to Mr. Smith in violation of his right to be free from cruel and unusual punishments under the United States and Alabama Constitutions.

23. ADOC's protocol for executing condemned people by lethal injection (the "Protocol") authorizes only two methods for establishing IV access: the "standard procedure" or, if that is unsuccessful, "a central line procedure."

24. It should be a straightforward process to establish IV access by the procedures allowed by the Protocol or to determine that neither is achievable. According to the Emergency Nurses Association Clinical Practice Guideline for Difficult Intravenous Access, "[t]he average time requirement for peripheral IV cannulation is reported at 2.5 to 16 minutes, with difficult IV access requiring as much as 30 minutes." ENA Clinical Practice Guideline: Difficult Intravenous Access (Revised Oct. 2015). And "[p]atients experience increased and potentially significant pain

in association with multiple IV attempts." J. Fields, *et al.*, *Association between multiple IV attempts and perceived pain levels in the emergency department*, 15 J. Vasc. Access 514, 518 (2014); A. Bahl, *et al.*, *Defining difficult intravenous access (DIVA): A systematic review*, J. Vasc. Access 1, 1 (Nov. 2021) ("multiple venipuncture attempts sometimes required for successful [IV] insertion . . . can cause pain and anxiety for the patient").

25. In attempting to establish IV access, ADOC botched the execution of Joe Nathan James on July 28, 2022, taking three hours to accomplish it and failed to establish IV access after nearly two hours of unsuccessful attempts during the aborted executions of Alan Eugene Miller on September 22, 2022 and Mr. Smith on November 17, 2022.

26. ADOC did nothing after its botched execution of Mr. James and its failed execution of Mr. Miller to investigate what happened and why to prevent a recurrence.

27. Despite Mr. James's botched execution and Mr. Miller's failed execution and having done nothing to investigate what happened and why during those executions, the State and ADOC simply moved forward with Mr. Smith's planned execution on November 17, 2022.

28. The IV Team, other personnel in the execution chamber, and the officials outside the execution chamber, including Holman Warden Terry Raybon ADOC Commissioner, and John Q. Hamm, knew or should have known based on the difficulties that occurred during Mr. James's execution and Mr. Miller's attempted execution that the IV Team would have great difficulty establishing IV access, resulting in severe physical and psychological pain to Mr. Smith.

29. They further knew or should have known that what they allegedly had done to Mr. Miller—as described in a pleading he filed in federal court—stated a claim for violation of the right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment to the

U.S. Constitution. *See Miller v. Hamm*, No. 2:22-cv-506, 2022 WL 16721093, at *13–15 (M.D. Ala. Nov. 4, 2022).

30. Despite all that, they recklessly and knowingly charged ahead with deliberate indifference to Mr. Smith's rights and with the same results.

31. In an unsuccessful attempt to establish two IV lines by the standard procedure, the IV Team jabbed Mr. Smith repeatedly, sliding the catheter needle continuously in and out his arms and hands, while ignoring Mr. Smith's complaints that they were penetrating his muscles and causing severe pain.

32. Having failed to establish IV access by the standard procedure, the IV Team next tried to do so using a central line procedure.

33. Sometime before midnight, the IV Team returned to the execution chamber and Mr. Smith was informed that the execution had been aborted.

34. Mr. Smith continues to be in a great deal of physical and emotional pain from the attempted execution in November.

35. ADOC's failed attempt to execute Mr. Smith has had chronically severe psychological consequences, including severe post-traumatic stress disorder. In addition to difficulty sleeping, Mr. Smith's symptoms include nightmares, hypervigilance, hyperarousal, and disassociation (a defense mechanism to suppress threatening thoughts).

36. ADOC's threat to make a second attempt to execute Mr. Smith exacerbates his symptoms and further destabilizes him.

PRAYER FOR RELIEF

For the foregoing reasons and other such reasons as may be made upon amendment of this petition and a full evidentiary hearing, petitioner Kenneth Eugene Smith respectfully requests that the Court grant him the following relief:

(a) conduct a full evidentiary hearing at which proof may be offered concerning the allegations in this petition;

(b) provide petitioner, who is indigent, with funds sufficient to present witnesses, experts, and other evidence in support of the allegations contained in this petition;

(c) issue an order relieving petitioner of his unconstitutional death sentence following a full and complete hearing; and

(d) grant petitioner any such additional relief as just, equitable, and proper under federal and state law.

Respectfully submitted,

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Attorneys for Petitioner Kenneth Eugene Smith

**pro hac vice* motion forthcoming

ATTORNEY'S VERIFICATION

I swear under penalty of perjury that, upon information and belief, the foregoing is true and correct. Executed on May 12 2023.

Respectfully submitted,

Andrew B. Johnson
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Birmingham, Alabama 35103-2104
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Attorneys for Petitioner Kenneth Eugene Smith

SWORN TO AND SUBSCRIBED before me on this 12th day of May, 2023.

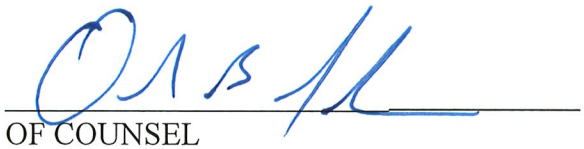
Notary Public

STATE OF ALABAMA NOTARY PUBLIC
CARLA BATCHELOR
My Commission Expires
June 19, 2026

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 12, 2023, the foregoing was served by Electronic and U.S. Mail on the following:

Richard D. Anderson
Office of Attorney General
501 Washington Avenue
Montgomery, AL 36130
Richard.Anderson@AlabamaAG.gov



OF COUNSEL