No. 24-1153
CAPITAL CASE

Supreme Court of the United States

COREY SCHIROD SMITH,
Petitioner,
v.
JOHN Q. HAMM, Commissioner,
Alabama Department of Corrections,
Respondent.

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

BRIEF IN OPPOSITION

STEVE MARSHALL
Attorney General

Edmund G. LaCour Jr.
Solicitor General

Henry M. Johnson*
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Henry.Johnson@AlabamaAG.gov
*Counsel of Record

CAPITAL CASE
QUESTION PRESENTED
(Restated)

Should this Court decline to review Smith's question presented, that the Eleventh Circuit misapplied the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), where the court properly applied AEDPA deference in holding that the state court's denial of his ineffectiveness claim was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statues

INTRODUCTION

Thirty years ago, Corey Schirod Smith was convicted and sentenced to death for murdering Kimberly Brooks. Following his unsuccessful direct appeal, Smith sought postconviction relief in state court, arguing that counsel were ineffective for failing to present evidence of his mental health problems in mitigation. The state circuit court held two evidentiary hearings and denied his claim on the merits. The Alabama Court of Criminal Appeals ("ACCA") affirmed. Smith then filed a 28 U.S.C. § 2254 petition. Applying AEDPA's highly deferential standard of review, the district court denied habeas relief, and the Eleventh Circuit affirmed in an unpublished opinion.

Smith seeks certiorari review of the Eleventh Circuit's decision, but strangely, he argues as though his case were on appeal from the state circuit court. Recasting himself as the state postconviction petitioner in *Sears v. Upton*, 561 U.S. 945 (2010), Smith says the Eleventh Circuit conducted a truncated prejudice inquiry. Pet. 25-26. He chides the court for "failing to consider" evidence, as if it were the factfinder at his state-court evidentiary hearings. Pet. ii, 13-20.

What's missing in all this? AEDPA. Smith fails to grapple with the Eleventh Circuit's application of AEDPA to the state court's denial of his ineffectiveness claim. He doesn't even mention it. Indeed, his petition contains only one citation to § 2254. Pet. 12.

At bottom, Smith asks this Court to engage in a factbound review of his particular case. He presents no "compelling reasons" for granting certiorari. S. CT. R. 10. His petition should be denied.

STATEMENT OF THE CASE

A. Facts of the crime

On the evening of February 22, 1995, Smith forced Kimberly Brooks into a van at gunpoint in Tallassee, Alabama. DE15-15:184; DE15-16:125.[1] Smith and Kimberly were dating, and she was the mother of his child. DE15-16:5. Smith had threatened to kill her if she ever left him. DE15-15:155. Testimony at trial showed that Smith had recently learned that she was seeing another man. DE15-19:117-18.

Smith and his two cousins, Sanjay and Shontai, drove Kimberly to a secluded area, known to locals as Bibb Town. DE15-16:125-26. They stopped on a dirt road leading to a trash dump, and Smith made Kimberly get out. DE15-16:75-76. They argued about their relationship, and she told him that she no longer felt the same way. DE15-18:154-56. Smith pulled out a .380 pistol and said "if [he] couldn't have her, no one could." *Id.* As she begged for her life, Smith shot her. DE15-16:126. She clutched her chest and fell to the ground. DE15-16:77. Smith walked over and shot her again, this time in the head. *Id.* He tried to shoot her a third time, but he was out of bullets. *Id.*

Smith told Shontai to help him move Kimberly off the road. DE15-16:137. Grabbing her by the legs, they dragged Kimberly under some bushes. *Id.* Smith decided to burn her body, so they drove into town for supplies. *Id.* There, they changed vehicles, switching out the van, which was maroon in color, for a 1972 Grand Prix with a flag on its hood. DE15-16:47, 68.

---

[1] Docket numbers refer to the district court proceedings. Page citations are to those generated by the CM/ECF filing system.

They pumped gasoline into a large jug and went back to Bibb Town. DE15-16:141-42.

As they were driving down the dirt road, they saw Kimberly standing on the side of the road, bent over in pain. DE15-16:145. They stopped the car, and she got in. DE15-16:119. She said that she had been shot and needed a hospital. DE15-16:87. Smith asked her what she would tell the doctors; she replied, "I'm going to say Corey shot me." DE15-18:155.

Smith and his cousins did not take Kimberly to a hospital. Instead, they rode around for miles, debating where to kill her and burn her body. DE15-16:88-91. Kimberly was conscious and at one point asked if she could lie down. DE15-16:146. Smith decided that they should return to Bibb Town, so they drove back and stopped on the same dirt road, not far from where Smith shot her. DE15-16:90-91.

Smith ordered Kimberly out of the car, but she refused. *Id.* Smith and Shontai took her by the arm and pulled her out. *Id.* After forcing her to walk some distance to the dump site, Smith put a plastic trash bag over her head to suffocate her. DE15-16:154-58. Kimberly struggled and tried to remove the bag, so Smith told Shontai to hold her hands. *Id.* Eventually, her body went limp, and she collapsed. *Id.* Smith poured gasoline over her, and they set her on fire. *Id.* When the fire got out of control, they threw dirt on her to extinguish it. *Id.* They wrapped her body in an old piece of carpet and left. *Id.*

The next day, Smith called Kimberly's mother, Mattie Brooks, and asked if she had seen Kimberly. DE15-16:198-200. Smith told Mattie that Kimberly brought their child to his house earlier that morning

and then left with somebody he didn't recognize in a red or maroon car. *Id.* Worried and suspicious, Mattie telephoned the police and went to Smith's house. *Id.* Smith repeated his story when Mattie arrived, insisting the last time he saw Kimberly was when she got in the car. *Id.* He told one of Kimberly's friends a similar story. DE15-16:187. He had instructed his cousins to say, "if anybody asked, … that the lady in the red Beretta came and picked Kim up." DE15-16:97.

Smith was arrested and charged with capital murder. DE15-1:7-8. He confessed and gave a detailed written statement. DE15-18:154-55. Smith's cousins pleaded guilty to murder and kidnapping and were given life sentences in exchange for testifying against him at trial. Pet.App.313a. Their testimony corroborated his statement. *Id.*

The medical examiner testified that Kimberly had gunshot wounds to her chest and head. DE15-18:46. There was considerable fluid accumulation and hemorrhage in her lungs, and her airway was lined with soot, from her nose and mouth to her trachea and lungs. DE15-18:65-73. The presence of the soot proved that she was alive during the burning. *Id.* Kimberly's cause of death was "homicidal violence, which included the shots to the head, the chest, and [partial] asphyxiation and burning." DE15-18:67, 72.

B. Facts elicited at the penalty phase

Smith's counsel called sixteen witnesses at the penalty phase: (1) Reginald Smith (brother), (2) Annie Butler (aunt), (3) Merrell Hayes (cousin), (4) Larry Butler, Sr. (uncle), (5) Herbert Woodruff (Wal-Mart manager), (6) Arlene Hooks (friend), (7) Katrine Smith (half-sister), (8) Chowon Smith (half-brother),

(9) Latrice Smith (half-sister), (10) Jelma Smith (stepmother), (11) Gene Coan (baseball coach), (12) Rebecca Taunton (teacher), (13) Latasha Butler (cousin), (14) Jerry Lewis Terrill (uncle), (15) Casbie Forte (stepfather), and (16) Emma Forte (mother). DE15-19:105-202; DE15-20:3-66. They called twelve family members, a close family friend, a teacher, his baseball coach, and a potential employer. And they introduced numerous records.

The jury learned that Smith and his two full brothers were "born into a not-so-desirable situation." DE15-19:162. Their biological mother is Emma Forte, and their biological father is Robert Charles Smith. DE15-19:162-64; DE15-20:50-52. Emma and Robert weren't married. DE15-20:52. Robert was married to a different woman, Jelma, and he and Jelma had six children. DE15-20:8. Robert and Jelma lived in the same neighborhood as Emma and her sons, and their houses were blocks apart. DE15-19:162. This unusual family arrangement had "some adverse effects" on Smith. *Id.* For one thing, Smith and his full brothers had a different social status in the community; they were "outside child[ren]." *Id.*

The jury heard that Smith was raised in a "very violent domestic situation" and that he witnessed violence in his home. DE15-19:164; DE15-20:61-62. Several witnesses testified that Robert physically abused Emma. *E.g.*, DE15-19:152-57, 162-65; DE15-20:61-63. In 1981, Robert assaulted Emma and threatened her with a gun at a baseball game. DE15:163. On another occasion, Robert barged into her home; he was brandishing a gun and threatened to kill her. DE15-20:62-63. Emma hurried Corey and his brothers out of the room. DE15-20:62-63. On yet another occasion, Robert

attacked her with a knife. DE15-19:157. When Emma raised her hand to protect herself, he cut her on the wrist. *Id.* Emma has multiple scars on her body from wounds inflicted by Robert. *Id.* The jury heard that Robert physically abused Jelma, too. DE15-20:11. In fact, Robert shot Jelma. *Id.*

Counsel presented evidence that Robert neglected Smith. The jury learned that Emma had to go to court or seek help from the Department of Pensions and Welfare because Robert refused to pay child support. DE15-20:60. At the most, Robert gave Emma $10 a month for their three sons. *Id.* Robert never held, fed, or cared for Smith. DE15-20:58-60. Robert did not admit that Smith was his biological son until years after he was born. *Id.* Emma and Reginald, Smith's brother, have never heard Smith call Robert his dad or refer to him as his father. DE15-19:115; DE15-20:58.

The jury heard that Smith adored his daughter, Labresha. Eleven witnesses testified that Smith held her, fed her, bathed and dressed her, and played with her. *E.g.*, DE15-19:109, 170, 182, 191; DE15-20:30-31. Smith was proud of Labresha and enjoyed showing her to family and friends. DE15-19:134. Several witnesses said that being a father was important to him and told the jury about his affection for Labresha and her affection for him. DE15-20:25, 38-40.

Smith worked hard to better himself so that he could provide for his daughter. He took classes and studied for the GED exam. DE15-20:56. He tried to find a job so that he could earn money to support her. DE15-19:110-11. The jury heard that Smith did not want another man to raise her and feared that Kimberly would take her away from him. DE15-20:31.

Witnesses testified that Smith had a childhood speech impediment that made it hard for him to be understood, and the jury learned that other children mocked him because of his speech problem. DE15-19:131-32, 200. His family members spoke about their love for him and asked the jury not to sentence him to death. *E.g.*, DE15-19:161; DE15-20:12, 50, 65.

C. Evidence presented at the postconviction hearings

The state circuit court held evidentiary hearings on Smith's ineffectiveness claims in July 2005, and December 2007. Smith called (1) Palmer Singleton (trial counsel), (2) Lee Sims (trial counsel), (3) Marjorie Hammock (social worker), (4) Reginald Smith (brother), (5) Dr. Michael Maher (psychiatrist), and (6) Dr. Charles Golden (psychologist). The State called two of Smith's teachers and Dr. Glen King, a psychologist.

Palmer Singleton graduated from New York University School of Law and was admitted to the bar in 1981. DE15-28:121-28. He joined the Southern Center for Human Rights, where he specialized in capital defense and helped found capital-representation projects. *Id.* By the time he was appointed to represent Smith, Singleton had tried eight capital cases to verdict and represented more than ten capital defendants whose cases did not go to trial. *Id.* He taught criminal law and procedure and a seminar on postconviction rights and remedies at the State University of New York and courses on criminal law and capital punishment at the Emory University School of Law and the Georgia State College of Law. *Id.*

Counsel obtained a wealth of records, including Smith's medical, mental health, academic, juvenile, legal, and social services records. DE15-38:155. They spoke with Smith about the crime, the police interrogation, and his use of alcohol and drugs. DE15-38:139-42. They interviewed Smith and his family members to learn about his childhood and background. *Id.* Their mitigation investigation revealed that Smith was the product of an impoverished and broken family, came from "parallel families," and suffered abuse. *Id.*

Singleton made a strategic decision not to present mental health evidence at the penalty phase:

> Smith had another active pending felony case in an adjacent jurisdiction. The case terrified me. Why? Because the facts all too closely paralleled what the charged case was in Tallapoosa County.
>
> It was a very violent abduction of a woman. She was taken to a remote area. As I recall, again, it was a refuse dump. The only significant difference that I could see between the charged offense and this unadjudicated other criminal offense was that, in that case, that person had survived. Unfortunately, Ms. Brooks hadn't. I was so terrified, as bad as the charged case was, how do you make it worse? And any death case can get worse. You bring another one that is just like it. My goal, number one, was to do nothing that would open the door to that other crime evidence coming in.

DE15-38:115-16. Having "investigated the other criminal acts," they made a tactical decision not to put his "mental state at issue." DE15-38:116, 135.

Lee Sims was admitted to practice law in 1971 and was an experienced criminal defense attorney, having tried ten murder cases, including two capital cases. DE15-39:26-27. Due to the passage of time, he had difficulty recalling details about the mitigation investigation. DE15-39:28-30. He remembered meeting with Smith's mother and obtaining information from her. DE15-39:36. He recalled that Smith abused drugs and alcohol. DE15-39:43.

Marjorie Hammock is a social worker. DE15-48:7. Postconviction counsel retained her to conduct a biopsychosocial assessment, which involves gathering information about "the biological or physical, the psychological or behavioral, and social history of a client." DE15-48:13-16. To that end, she interviewed twenty-seven people and reviewed Smith's school, medical, and legal records. DE15-48:17-18.

Hammock took notes during her interviews, which she labeled interview summaries. DE15-43:23-49. Hammock's interview summaries were admitted into evidence.[2] DE15-48:18. Importantly, she "made it

---

[2] Smith claims that he "presented … numerous lay witnesses via statements admitted into evidence" at his postconviction hearings. Pet. 5 n.1; Pet. 14 ("At the postconviction [R]ule 32 hearings, Mr. Smith presented mitigation evidence … from numerous family members and friends, one via live testimony and the rest based on interview statements admitted into evidence."). That is misleading. He did not introduce any affidavits or otherwise present "statements" from family and friends in postconviction. He's referring here to Hammock's interview summaries, which are her unorganized and often unintelligible notes from her witness interviews. *E.g.*, DE15-43:54 ("Ferante Smith, Met at restaurant

clear" to everyone she interviewed that she worked for Smith's attorneys and wanted information that could be used to overturn his death sentence:

> [I] told them that I was working on the case for the defense. That I was looking to have the opportunity to speak to them about their knowledge of the defendant and his family. If the information was relevant to that issue and that in this instance, we were attempting, really, to challenge his death penalty ruling.

DE15-48:40.

Hammock concluded from her assessment that there's a "history of considerable violence" in Smith's family, along with "considerable poverty, lack of resources for the family to survive, and a generational pattern of difficulties in meeting basic needs." DE15-48:19. However, she agreed on cross-examination that Smith's medical records reflect that he frequently was treated for ear aches and infections, including with shunts and tubes, and that his family sought medical treatment when he was ill. DE15-48:63.

Dr. Michael Maher is a psychiatrist. DE15-37:203. Postconviction counsel hired him to conduct a mental health evaluation. DE15-37:205. He reviewed records and saw Smith for about two and a half hours on June 17, 2002. *Id.* He performed a mental status and brief neurological examination and interviewed Smith. DE15-38:3.

… Shamus Brooks was a star football player. Is the one who killed Kim's brother Michael. Charles Smith's mom is a Brooks. Upset Corey. Corey would get involve in fights with other often trying to take for someone.").

Dr. Maher diagnosed Smith with chronic post-traumatic stress disorder ("PTSD") and polysubstance abuse. *Id.* He testified that Smith was "functioning at the level of a child of preadolescent or early adolescent age, twelve to fourteen years of age." DE15-38:44. Based on his review of the testing done by Drs. Golden and King, he opined that Smith "was suffering from brain impairments" which affected his judgment, impulse control, and ability to conform his behavior to the requirements of the law at the time of the offense. DE15-47:181-83.

Dr. Maher based his diagnoses in large part on information provided to him by Smith. DE15-47:189. For example, Smith told him that he was "brought up in a household where domestic violence was a chronic and continuing way of life." DE15-38:16-17. Crediting Smith's account, Dr. Maher opined that his childhood "trauma" laid "the foundation" for his PTSD. *Id.*

Reginald Smith is Smith's eldest brother. DE15-38:159-66. Reginald testified that he and his brothers saw their biological father hit their mother. *Id.* Their mother could be violent when she punished them, and she called him and his brothers names. *Id.* Reginald claimed that he occasionally hit Smith. *Id.*

Dr. Charles Golden is a psychologist with a specialty in neuropsychology and assessment. DE15-47:88. Smith's postconviction counsel retained him to conduct "a psychological and neuropsychological evaluation to see if there's any information … that would have affected the issue of mitigating circumstances" at trial. DE15-47:169-70.

Dr. Golden evaluated Smith in October 2002. *Id.* He administered a series of psychological and

neuropsychological tests. DE15-47:98-99. He found that Smith's "brain is functioning at a borderline level with particular deficits in terms of academic reading skills and arithmetic skills and in terms of executive functioning." DE15-47:101-03. This, he said, means that Smith has below average intelligence but is not intellectually disabled. *Id.* Dr. Golden further opined that Smith's executive functioning deficits existed at the time of the crime and would have affected his impulse control, judgment, and ability to recognize the consequences of his actions. *Id.*

Karen White was Smith's seventh and eighth grade English teacher. DE15-39:52-58. Smith had a good attendance record. *Id.* White testified that Smith "was not a troublemaker in class. He was relatively quiet. I didn't have any trouble with Corey." *Id.* "I remember Corey in the classroom. I remember him doing his work. Just a typical student." *Id.* White never saw any signs of physical abuse and had no reason to be concerned about his home life. *Id.*

John Wilcox was Smith's ninth grade history teacher. DE15-39:64-66. Smith regularly attended his class. *Id.* Smith conformed his conduct to the rules of the classroom and was not a troublemaker. *Id.* Wilcox never had any reason to suspect that Smith was being abused at home. *Id.*

Dr. Glen King, the State's expert witness, is a clinical and forensic psychologist; he was accepted as an expert in the fields of psychology and neuropsychological assessment. DE15-46:141-56. Dr. King evaluated Smith on May 10 and 11, 2005, for four and a half to five hours each day. DE15-46:168. He conducted a clinical interview and mental status examination, and he administered a test of academic achievement and

a battery of neuropsychological tests. DE15-46:156-68. He reviewed a number of documents, including Smith's medical, school, social services, and legal records and Smith's records from Mt. Meigs and the Lee County Youth Development Center. *Id.*

Dr. King found no evidence in any of the records to substantiate Smith's claim that he was abused by his mother. DE15-47:7-8. To the contrary, some of the records "refer to a good relationship between him and his mother." *Id.* Dr. King explained that the absence of such records "can be significant in the sense it can indicate that there was not significant physical or verbal abuse." *Id.*

Dr. King compared Smith's records with Hammock's interview summaries and found "a number of inconsistencies," testifying:

> Well, these kind of summary statements from Ms. Hammock that Mr. Smith was the product of poverty and chaos, and his home life was bad, had no access to resources for mental health, medical treatment, things of that nature. And then, in the actual body, she indicated that she had taken information, for example, that Mr. Smith took Advil three times a day for days on end to treat his headaches. There are notes in the records about, of course, that he had his own bedroom in his own house, and he also had difficulty learning how to ride a dirt bike and a four wheeler, which doesn't sound like poverty to me. And then he also had—he had frequent fevers, ear aches, things of that nature requiring visits to doctors

> numerous times late at night, which also sounds like he certainly had access to parental support for getting medical treatment. So those overall statements that occur in terms of her summary and the actual records just do not fit together.

DE15-47:18-19.

Dr. King determined that Smith does not have "frontal or temporal damage or any kind of brain damage." DE15-46:203-04. Dr. King found that Smith has "pretty good literacy skills. He can get by in reading. He has a problem with that, but he has got pretty good writing skills and also arithmetic skills." *Id.* Dr. King summarized his conclusions this way: "I find him to be functioning in the low-average to high-borderline range of intellectual ability. That he has probably a learning disorder involving reading. And that otherwise he is normal." *Id.*

Dr. King found no evidence to substantiate the claim that Smith has PTSD. DE15-47:21-25. He disagreed with Dr. Maher that Smith was functioning like a twelve or fourteen year old at the time of the offense, explaining that "any individual who has low-average or high-borderline intellectual function is not going to develop at the same rate as someone who has average or higher function." DE15-47:25-26.

D. The proceedings below

On September 1, 1995, a Tallapoosa County, Alabama jury found Smith guilty of the capital offense of murdering Kimberly Brooks during the course of a kidnapping in the first degree, in violation of section 13A-5-40(a)(1) of the Code of Alabama. Pet.App.56a. The jury unanimously recommended that Smith be

sentenced to death. Pet.App.57a. The trial court followed the jury's recommendation and sentenced him to death. *Id.*

Smith's conviction and death sentence were affirmed on direct appeal. *Smith v. State*, 797 So. 2d 503 (Ala. Crim. App. 2000), *cert. denied*, 797 So. 2d 549 (Ala. 2001) (mem.), *cert. denied*, 534 U.S. 962 (2001) (mem.).

In June 2002, Smith filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure and amended it twice. Pet.App.58a-59a. The circuit court struck his second amended petition and held an evidentiary hearing on his ineffectiveness claims as they were pleaded in his first amended petition. Pet.App.59a. The circuit court denied his petition. *Id.*

The ACCA reversed and remanded for further proceedings, holding that the circuit court erred in striking Smith's second amended petition. *Id.* The circuit court held an evidentiary hearing on that petition and denied relief. Pet.App.60a. The ACCA affirmed, and the Alabama Supreme Court denied certiorari. *Id.*

Having exhausted his state-court remedies, Smith filed a 28 U.S.C. § 2254 petition in the Middle District of Alabama. DE1. Respondent answered, filed the state-court record and habeas checklist, and briefed the merits. DE14-16, 26. On January 12, 2023, the district court denied and dismissed his petition and denied a certificate of appealability. Pet.App.D.

Smith moved the Eleventh Circuit for a certificate of appealability. The court of appeals granted a COA, limited to the claim that the ACCA unreasonably applied *Strickland v. Washington*, 466 U.S. 668

(1984), in determining that he suffered no prejudice from his trial counsel's failure to investigate his mental health problems. Pet.App.B. After briefing and argument, the court affirmed the district court's judgment in an unpublished opinion. Pet.App.A. The court denied his petition for panel rehearing. Pet.App.M

REASONS FOR DENYING THE PETITION

Smith presents no "compelling reasons" for granting certiorari. S. CT. R. 10. He has not shown that the Eleventh Circuit misapplied *Strickland* or that the decision below conflicts with the decisions of other courts of appeals. Nor has he shown that his case presents an important question of federal law. His petition should be denied.

I. Smith misunderstands the decision below.

Smith contends that the Eleventh Circuit failed "to review the totality of the evidence" in conducting its prejudice analysis, thereby misapplying *Strickland* and creating a "new, diminished standard" for prejudice. Pet. ii, 5-6, 25-26. He says the court of appeals "engaged in exactly" the kind of truncated inquiry rejected in *Sears v. Upton*, 561 U.S. 945 (2010). Pet. 5, 13, 25. He misunderstands the decision below.

In *Sears*, a Georgia postconviction court heard evidence on the petitioner's penalty-phase ineffectiveness claims. 561 U.S. at 945-46. The court found that counsel were deficient for failing to present evidence of the petitioner's brain damage, but it refused to apply *Strickland's* test for assessing prejudice, deeming it an "impossible" task because counsel had presented some mitigation evidence. *Id.* at 952. Concluding that "it could not speculate as to what the effect of additional evidence would have been," the postconviction

court denied relief. *Id.* at 946. The Georgia Supreme Court summarily denied review. *Id.*

This Court granted certiorari and vacated the judgment, holding that the state court "failed to apply the proper prejudice inquiry." *Id.* at 954. To determine whether a petitioner has shown *Strickland* prejudice, courts must consider the totality of the mitigation evidence, the old and the new, in reweighing it against the evidence in aggravation. *Id.* at 955. That requires a "probing and fact-specific analysis." *Id.* This Court made clear that "counsel's effort to present some mitigation evidence" does not foreclose an inquiry into *Strickland* prejudice. *Id.* And the "same standard applies … regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 956.

Smith is not Sears. Smith is a federal habeas petitioner whose ineffectiveness claim is governed by AEDPA. *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1252 (11th Cir. 2017) ("In *Sears*, the Supreme Court was sitting in direct review of the decision of the Georgia postconviction court. Accordingly, it was not required to give AEDPA deference to the state court decision and could demand a more fulsome analysis."); *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1330 (11th Cir. 2013) (en banc) ("[U]nlike the state court decision in this appeal, the decision in *Sears* was not subject to deferential review under section 2254(d) because the defendant had directly appealed the decision of the state court on state collateral review.").

Smith's reliance on *Sears* and *Andrus v. Texas*, 590 U.S. 806 (2020), thus is misplaced. Pet. 13-14, 19-20, 25-26. The Court did not apply AEDPA deference to *Strickland's* prejudice prong in those cases. *Cullen*

v. Pinholster, 563 U.S. 170, 202 (2011). Because they "lack the important 'doubly deferential' standard of *Strickland* and AEDPA," *Sears* and *Andrus* "offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking." *Id.* His petition should be denied.

II. The decision below is correct.

The Eleventh Circuit correctly held that Smith failed to show that the ACCA's determination that he was not prejudiced by counsel's failure to present mitigation evidence of his mental health problems was an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. Pet.App.32a-41a. For that additional reason, his petition should be denied.

Petitions for a writ of habeas corpus on behalf of persons in custody pursuant to the judgment of a state court are governed by the provisions of § 2254, as amended by AEDPA. *Harrington v. Richter*, 562 U.S. 86, 97-98 (2011). AEDPA prohibits federal habeas relief unless the state court's decision was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §§ 2254(d)(1)-(2).

To satisfy the unreasonable-application standard, a federal habeas petitioner "must show far more than that the state court's decision was 'merely wrong' or 'even clear error.' *Shinn v. Kayer*, 592 U.S. 111, 118 (2020). Instead, the petitioner must demonstrate that "the state court's decision is so obviously wrong that its error lies beyond any possibility for fairminded

disagreement." *Id.* (quoting *Richter*, 562 U.S. at 103). The petitioner "must persuade a federal court that no 'fairminded jurist' could reach the state court's conclusion under this Court's precedents." *Brown v. Davenport*, 596 U.S. 118, 135 (2022).

"[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). "AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'" *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007) (citing § 2254(e)(1)).

To meet *Strickland's* prejudice prong, a petitioner must do more than "show that the errors had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693. "The question is whether there is a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "That requires a substantial, not just conceivable, likelihood of a different result." *Thornell v. Jones*, 602 U.S. 154, 163 (2024).

The ACCA properly reweighed the totality of the mitigation evidence, the old and the new, against the evidence in aggravation and found that there is no reasonable probability that the outcome of Smith's sentencing would have been different.[3] Pet.App.117a-

[3] Smith asserts that, "[t]hroughout the postconviction proceedings, deficient performance has been assumed." Pet. 7. That is untrue. The state circuit court held that Smith failed to prove deficient performance. Pet.App.250a-52a. The circuit court found that "counsel had a strategic and tactical reason for not calling a

47a. The ACCA was correct and, in the very least, not objectively unreasonable in finding that "evidence of Smith's mental health, which was in large part disputed by the State's expert, and even more evidence of his upbringing, would have had no impact on the results." Pet.App.147a.

The ACCA's decision is all the more reasonable in light of the trial court's findings and conclusions in its sentencing order. The trial court found the existence of two aggravating circumstances: (1) the capital offense was committed while the defendant was engaged in the act of kidnapping in the first degree, and (2) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Pet.App.420a-24a. The trial court made these findings of fact as to the latter:

> If Kimberly Brooks had died when Corey Schirod Smith shot her, and he had simply returned and burned her dead body, this would not have constituted the aggravating circumstance of heinous, atrocious, or cruel as compared to the capital offenses. Suffice it to say that that is not the way it happened.
>
> Corey Schirod Smith found the victim alive when he returned to burn her body. Indeed, according to the undisputed medical evidence from the medical examiner, with proper treatment,

---

mental health expert" and, further, that they made a "reasonable and strategic" decision to humanize him by "presenting evidence *through* sixteen witnesses" about his "childhood, the violence that he experienced and witnessed during his life, and his relationship with his daughter and other family members." *Id.*

> Kimberly Brooks might very well have survived the initial shooting. She asked to be carried to a hospital. Instead, the defendant drove her around, looking for the appropriate place to finish her off. She was conscious, and there was no reason why she could not hear the discussions among the defendants that would have clearly evidenced their intent to kill her. After the long ride, she was pulled from the car and required to walk to the place of her doom. There is nothing to suggest that she did not know where she was going and why she was being taken there. Asphyxiation was the chosen method for finishing the job. The victim struggled for life and breath. Corey Schirod Smith enlisted the help of his accomplice to hold her hands, while he placed the plastic bag over her head. The victim slowly lost strength and consciousness, deprived of air. The Court has no way of knowing whether, in that terrible moment, she regained consciousness amidst the flames.

Pet.App.421a-22a.

The trial court found the existence of three statutory mitigating circumstances: (1) the defendant has no significant history of prior criminal activity, (2) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, and (3) the age of the defendant at the time of the crime. Pet.App.430a-34a.

The trial court found several non-statutory mitigating circumstances. Smith's "environment had a role in making [him] what he is," in that he was born to unwed parents and "never" had "an appropriate male figure in his household during his early and most formative years." Pet.App.424a-25a. He suffered from a speech impediment as a young child for which he was "teased and mocked by other children," "caus[ing] him to become withdrawn, quiet, and not talkative." Pet.App.426a. He gave "helpful information to authorities" within twenty-four hours of the crime, admitting his guilt and providing the location of Kimberly's remains. Pet.App.428a. And his family and members of the community love him. Pet.App.429a.

The trial court weighed the aggravating and mitigating circumstances and found that the aggravating circumstances "far outweigh all the mitigators that can be compiled," reasoning:

> The aggravating circumstances speak for themselves and carry great weight in the mind of any reasonable and rational person. It is clear that the murder that was committed … was deliberately and intentionally planned and carried out.
>
> When Corey Schirod Smith found the victim standing beside the road after he had shot her, he was given the opportunity to display his humanity. Instead, he unequivocally displayed a savage intention to kill. He ignored pleas for help, and the murder was carried out in a torturous fashion. First, he led her to the place of her death, and she no doubt had full knowledge of the fact that she was

> about to be killed. Then he deprived her of the very breath of life. Even though the fire was lit to dispose of her remains, its real effect was to complete the execution by use of gasoline and fire. There is no mistake about the tremendously evil intent of this defendant.
>
> When the court weighs the aggravating circumstances against the mitigating circumstances in the manner the law requires, there is absolutely no question and can be no question in the mind of any reasonable human being that the aggravating circumstances far outweigh the mitigating circumstances.

Pet.App.435a-36a.

Given the highly aggravated nature of Smith's crime and the overwhelming evidence of his guilt, there is no reasonable probability that the presentation of evidence about his mental health problems would have altered the jury's unanimous death recommendation or the trial court's finding that the aggravating circumstances far outweigh the mitigating circumstances.

The ACCA's decision is a straightforward application of *Strickland* to the facts of Smith's case. As the Eleventh Circuit correctly found, the ACCA's determination that Smith was not prejudiced by counsel's failure to present mental health evidence was not an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. His petition should be denied.

CONCLUSION

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

STEVE MARSHALL
Attorney General

Edmund G. LaCour Jr.
Solicitor General

/s/ Henry M. Johnson
Henry M. Johnson*
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Henry.Johnson@AlabamaAG.gov
*Counsel of Record

Counsel for Respondent