No. 24-7487

In the Supreme Court of the United States

NICHOLAS NOELANI D. SMITH,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the state trial court violate Petitioner Nicholas Smith's Fourteenth Amendment right to due process by not *sua sponte* instructing the jury on voluntary intoxication and lesser-included noncapital offenses when the evidence was insufficient under state law to warrant those instructions?

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INTRODUCTION

On April 21, 2011, Petitioner Nicholas Smith kidnapped Kevin Thompson, robbed him, slit his throat, and shoved him down an embankment where he died alone. A jury found Smith guilty of two counts of capital murder and recommended that he be sentenced to death, which the trial court did. For the first time on appeal, Smith argued that the trial court erred by failing to instruct the jury *sua sponte* on voluntary intoxication and two lesser-included offenses that, unlike Smith's convictions, did not require specific intent to kill. Reviewing the forfeited claim for plain error, the Alabama Court of Criminal Appeals held that the evidence presented at Smith's trial was insufficient as a matter of state law to permit the instructions. *See Smith v. State*, 246 So. 3d 1086, 1097-1100 (Ala. Crim. App. 2017).

Smith argues that this state-law decision warrants this Court's review because it somehow "violates the principles espoused in *Beck v. Alabama*." Pet. 8. It does not. In *Beck*, this Court reviewed Alabama's since-revised statutory scheme that gave all non-capital defendants a right to lesser-included-offense instructions "under appropriate circumstances" but denied those same instructions to capital defendants. 447 U.S. 625, 636-37 (1980). Because it was undisputed that the defendant in *Beck* would have been entitled to lesser-included-offense instructions had he been charged with a non-capital crime, the Court held that imposing the death penalty under such circumstances risked arbitrary enforcement in violation of the Due Process Clause. *Id.* at 640-41.

Beck thus stands for the general proposition "that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction" under state law. *Hopper v. Evans*, 456 U.S. 605, 611 (1982). Following *Beck*, it is undisputed that Alabama applies the same rule to capital and non-capital offenses: "a lesser included offense instruction [is] given if 'there is any reasonable theory from the evidence which would support the position." *Id.* at 611 (quotation omitted). "The Alabama rule clearly does not offend federal constitutional standards." *Id.* at 612.

The Alabama Court of Criminal Appeals applied that rule here. *See Smith*, 246 So. 3d at 1098 ("It is clear that a defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position." (quotations and alterations omitted)). And Smith does not challenge that rule. *See* Pet. 9-11. Instead, his claim boils down to a disagreement with Alabama state courts over their application of Alabama state law to the facts of his case. Because this Court "ha[s] no occasion to pass on this issue," *Beck*, 447 U.S. at 630 n.5, it should deny the petition.

STATEMENT OF THE CASE

1. Kevin Thompson's murder was set in motion when Tyrone Thompson invited Nicholas Smith and Jovon Gaston to join him on the evening of April 20, 2011. *Smith*, 246 So. 3d 1093. (Given the same surname, "Thompson" will refer to the victim, Kevin Thompson, while his assailant Tyrone Thompson will be referred to by his full name.) Tyrone Thompson picked up Smith and Gaston and drove them to Thompson's apartment. There they smashed Thompson's phone and forced him into his own car. *Id.* at

1093-94. Smith drove the car to a bank, where he withdrew money from Thompson's account while Gaston held the victim at gunpoint. *Id.* at 1094. The three men then bound Thompson and forced him into the trunk of the car. *Id.* While Thompson screamed and thrashed, Smith and company discussed over beers which one of them would kill Thompson. *Id.*

Their plan thus considered, the three men purchased duct tape and re-bound Thompson, drove to an isolated stretch of Highway 278, and escorted Thompson off the side of the road. *Id.* "Tyrone Thompson handed Smith a knife and held Thompson's hands while Smith slit Thompson's throat." *Id.* "Thompson, who was crying and pleading for help at this point, was held down as a vehicle passed." *Id.* "Then Gaston took the knife from Smith and stabbed Thompson several times in the chest." *Id.* "Thompson was held down as another vehicle passed, and then was held up and again stabbed by Gaston." *Id.* "After pushing Thompson to the bottom of the embankment, Smith, Tyrone Thompson, and Gaston left the scene." *Id.*

After leaving Thompson to die, Smith phoned a friend around 3:00 a.m. asking for a place to park the victim's car overnight. *Id.* at 1091. Later that morning, Smith roped additional friends into helping him "chop" the car for scrap. *Id.* When that proved impossible, Smith planned to burn the car, then abandoned the car entirely when he saw police in the area. *Id.* at 1092. Smith and his friends fled to Georgia, where Smith described Thompson's murder in detail and told his friends where Thompson's body was located. *Id.* One of his friends playfully punched Smith's arm,

prompting Smith to tell her: "[D]on't you know you don't punch a killer." *Id.* (alteration in original).

Police officers finally apprehended Smith on his way to the Atlanta airport. *Id.* Six days later, Smith was extradited to Alabama, where he waived his *Miranda* rights and made a detailed statement describing Thompson's murder. *Id.* at 1093.

2. At trial, the judge instructed the jury on two counts of capital murder: one for intentionally killing Thompson during a kidnapping, *see* Ala. Code § 13A-5-40(a)(1), and one for intentionally killing Thompson during a robbery, *see* Ala. Code § 13A-5-40(a)(2). *See Smith*, 246 So. 3d at 1090. Smith did not request additional instructions on voluntary intoxication or any lesser-included offenses, nor did he object to the instructions given. *Id.* at 1098. The judge instructed the jury that to convict Smith of capital murder, it must find that he intended to kill Thompson. Tr. 1967, 1971. Thus instructed, the jury found Smith guilty of both counts of capital murder. Tr. 1985. In accordance with the jury's recommendation, the court sentenced Smith to death. *Smith*, 246 So. 3d at 1090.

3. On appeal to the Alabama Court of Criminal Appeals, Smith for the first time "argue[d] that the circuit court erred in failing to charge the jury on the lesser-included offenses of felony murder and manslaughter and in failing to charge the jury on intoxication." *Id.* at 1097. "Because Smith neither requested that the jury be instructed on lesser-included offenses or intoxication nor objected to the circuit court's jury instructions," the appellate court reviewed the unpreserved claim "for plain error only." *Smith*, 246 So. 3d at 1098.

As he does here (Pet. 9-11), Smith argued that he was entitled to intoxication and lesser-included-offense instructions because "there was 'substantial, uncontested evidence' of his intoxication during the abduction, robbery, and murder of Thompson," and "the jury could have reasonably believed that Smith became intoxicated after kidnapping and robbing Thompson but before Thompson's murder, thereby negating the specific intent to murder." *Id.* at 1098-99 (quoting Smith's brief). Smith pointed to witness testimony stating that Smith purchased beer "around 10:00 a.m. or 11:00 a.m." on April 20 and that he "purchased and consumed morphine pills" later that day. *Id.* at 1098. The witness "also testified that Smith telephoned her at 3:00 a.m. on April 21 and stated that 'he had gotten drunk' and asked if he could park his friend's vehicle"—the car he had stolen from Thompson—"at the house of [a friend's] mother." *Id.* (quoting R. 834-35.) Smith also argued that he had told law enforcement "that he was already 'high' when Tyrone Thompson telephoned him on the evening of April 20 and that he had been 'riding around smoking and drinking all day.'" *Id.* (quoting State's Exhibit 60.) He "also told law enforcement that following the abduction of Thompson, but before Thompson was murdered, he, Tyrone Thompson and Gaston purchased and consumed an 18-pack of beer." *Id.*; *see* Pet. 10-11 (discussing same evidence).

In rejecting Smith's claim, the Alabama Court of Criminal Appeals recognized that under Alabama law, "[w]here the defendant is charged with a crime requiring specific intent *and* there is evidence of intoxication, drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered

by the jury in deciding the question of intent." *Id.* at 1098 (quotation marks and citation omitted). "Consequently," the court noted, "when the crime charged is intentional murder and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter," and "a defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position." *Id.* (quotation marks, citations, and alterations omitted).

The court also explained that under Alabama law mere evidence of "the consumption of intoxicating liquors or drugs" does not justify "an instruction on intoxication and the relevant lesser-included offenses." *Id.* at 1099. "Instead, there must be evidence of 'a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.'" *Id.* (quoting Ala. Code § 13A-3-2(e)(1)). Under Alabama law, "[t]he degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill." *Id.* (quotation marks and citation omitted). "Stated differently, the level of intoxication needed to negate intent must rise to the level of statutory insanity." *Id.* (quotation marks and citations omitted).

The appellate court held that the evidence at Smith's trial was insufficient to meet this standard. *Id.* It explained that "much of the evidence cited by Smith involved the consumption of alcohol and drugs hours before the kidnapping and murder of Thompson occurred." *Id.* That evidence was "rarely specific as to the quantities consumed," the court noted, and when it *was* specific, "it cut against a level of

intoxication that would merit instructions to the jury on intoxication and lesser-included offenses." *Id.* For example, while Smith pointed in his appeal to the "18-pack of beer" he consumed with Tyrone Thompson and Gaston, the court noted that he "told law enforcement officers during his statement … that he drank 'maybe, like, two beers'" between the kidnapping and the murder and that "Tyrone Thompson and Gaston drank 'the majority of the beer.'" *Id.* (quoting State's Exhibit 60, 17:30).

Likewise, while "Smith relie[d] heavily on his statement to law-enforcement officers as evidence of his intoxication," the Court of Criminal Appeals noted that "it is the statement that gives the clearest indication that there was no reasonable theory from the evidence that Smith was intoxicated." *Id.* The court reasoned that "Smith's ability to recall in detail the kidnapping, robbery, and murder of Thompson," and his "attempt to hide his involvement in the crime by having Thompson's vehicle 'chopped' and fleeing Alabama" were "wholly inconsistent with being intoxicated to the point of insanity." *Id.* at 1099-1100.

Having determined that the evidence did not warrant any intoxication-related jury instructions, the court held that the trial court "did not commit error, plain or otherwise, in failing to instruct the jury on intoxication or lesser-included offenses." *Id.* at 1100.

4. The Court of Criminal Appeals affirmed Smith's convictions but reversed his sentence on other grounds and remanded for a new penalty proceeding. *Id.* at 1116. On remand, the jury found additional aggravating factors, and the trial court, following the jury's recommendation, again sentenced Smith to death. *See Smith v. State*, -

- So. 3d --, No. CR-2022-0504, 2024 WL 3212264, at *4 (Ala. Crim. App. June 28, 2024). On his second appeal, the Court of Criminal Appeals affirmed Smith's death sentence. *Id.* at *22. Smith's petition followed.

REASONS FOR DENYING THE PETITION

Smith asks this Court to vacate his conviction of capital murder and remand his case to be tried in front of a new jury instructed on lesser-included noncapital offenses. Pet. 12. The Court should deny the petition.

This Court has recognized, and Smith does not contest, that "[t]he Alabama rule" on charging lesser-included offenses "clearly does not offend federal constitutional standards" when it is applied to capital and non-capital defendants equally. *Hopper*, 456 U.S. at 612. And Smith does not argue that Alabama applied a different rule to him. Instead, he simply argues that there was sufficient evidence of intoxication at trial to warrant instructing the jury on lesser-included offenses that do not require the specific intent to kill. Pet. 11. But the Alabama Court of Criminal Appeals considered this argument and properly rejected it as a matter of state law. *Smith*, 246 So. 3d at 1098-1100. Because Smith raises no other ground to contest his intent to kill, the jury could not have acquitted him of capital murder and convicted him of a lesser-included offense.

It follows that Smith's petition is not cert-worthy. This Court does not sit in review of state-court judgments on matters of state law, which is all that is really at issue here. And though Smith tries to find a federal hook by couching his claim in terms of due process, even then his "asserted error consists of erroneous factual findings [and] the misapplication of a properly stated rule of law"—claims that are "rarely

granted" under this Court's rules. *See* Sup. Ct. R. 10. There is no split of authority or even a meaningful dispute about the meaning of *Beck*—only Smith's claim that the Alabama Court of Criminal Appeals erred when it applied Alabama law to the facts of his case. The Court should deny the petition.

I. The Decision Below Comports With *Beck v. Alabama*.

1. In *Beck v. Alabama*, this Court confronted Alabama's death penalty statute that at the time categorically barred lesser-included-offense instructions in capital cases. 447 U.S. at 628-29. Beck was tried "for the capital offense of robbery or attempts thereof when the victim is intentionally killed by the defendant." *Id.* at 627 (alterations and quotation marks omitted). He admitted that he robbed the victim, but "consistently denied … that he killed the man or that he intended his death," claiming instead that "his accomplice unexpectedly struck and killed" the victim. *Id.* at 629. "[A]bsent the statutory prohibition on such instructions," it was undisputed that "this testimony would have entitled [Beck] to a lesser included offense instruction on felony murder as a matter of state law." *Id.* at 630 (footnote omitted).

This Court held that Alabama's statutory prohibition on lesser-included-offense instructions in capital cases violated Beck's right to due process because it increased the chance "of an unwarranted conviction" and an arbitrarily imposed death sentence. *Id.* at 638. Beck's jury, for instance, was instructed that if it acquitted Beck of the capital offense, he would be "discharged" and could "never be tried for anything that he ever did" to the victim. *Id.* at 630 (quotation marks and citation omitted). The Court explained that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an

element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction." *Id.* at 637. *Beck* thus stands for the proposition that a capital defendant is "entitled to a lesser included offense instruction where the evidence warrants it" under state law for non-capital defendants. *Id.* at 636-37.

The corollary rule to *Beck* is that a defendant is entitled to a lesser-included-offense instruction *only if* "the jury could rationally have convicted him of [that lesser offense] if that option had been presented." *Id.* at 634 (quoting *Keeble v. United States*, 412 U.S. 205, 213 (1973)). A statutory scheme that *always* instructs juries in capital cases on lesser-included offenses is just as problematic as one that *never* does so. *See Hopper*, 456 U.S. at 611 (discussing *Roberts v. Louisiana*, 428 U.S. 325 (1976)). When there is insufficient evidence to warrant a lesser-included-offense instruction under state law, providing one anyway risks "invit[ing] the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of [the charged offense], inevitably leading to arbitrary results." *Id.* at 611.

In sum, "*Beck*'*s* rule [is] that a State may not erect a capital-specific, artificial barrier to the provision of instructions on offenses that actually are lesser included offenses under state law." *Hopkins v. Reeves*, 524 U.S. 88, 97-98 (1998). This Court has "never suggested that the Constitution requires" States to offer a lesser-included-offense instruction in a capital case when such an instruction would not be warranted under state law for a non-capital offense. *Id.* at 97.

2. Following *Beck*, Alabama law has minded these limits scrupulously. Two years after deciding *Beck*, this Court examined the State's rule of lesser-included offenses and held that "[t]he Alabama rule clearly does not offend federal constitutional standards" when applied to capital and non-capital defendants in the same way. *Hopper*, 456 U.S. at 611-12.

As explained above (pp. 4-7), the Alabama Court of Criminal Appeals applied this same rule to Smith's case. *See Smith*, 246 So. 3d at 1098-1100. Indeed, that rule is derived from a statute that has not been amended since this Court approved the rule. *See* Ala. Code § 13A-1-9(b); *Ex parte Oliver*, 518 So. 2d 705, 706 (Ala. 1987). Section 13A-1-9(b) of the Code of Alabama provides that "[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." As the Court of Criminal Appeals explained, under Alabama law, "a defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position." *Smith*, 246 So. 3d at 1098 (alteration omitted) (quoting *Ex parte Oliver*, 518 So. 2d at 706).

Smith does not take issue with this rule. Instead, he argues that the Court of Criminal Appeals misapplied it and thereby "violate[d] the principles espoused in *Beck v. Alabama*" by not requiring jury instructions on intoxication and related lesser-included offenses when state law required them. Pet. 8. But the Alabama Court of Criminal Appeals directly rejected this argument and held that the evidence Smith

pointed to—and now points to here—was insufficient as a matter of state law to warrant those instructions.

As the Court of Criminal Appeals explained, to warrant an instruction on voluntary intoxication under Alabama law, the evidence must show intoxication "so extreme as to render it impossible for the defendant to form the intent to kill." *Smith*, 246 So. 3d at 1099 (quotation omitted); *see also Ex parte Bankhead*, 585 So. 2d 112, 120 (Ala. 1991) (explaining that "intoxication must be of such character and extent as to render the accused incapable of consciousness that he is committing a crime," and noting that "mere drunkenness, voluntarily produced, is never a defense against a criminal charge, and can never palliate or reduce the grade of an offense, unless it is so extreme as to render impossible some mental condition which is an essential element of the criminal act" (quotations and citations omitted)).

Following that state law, the Court of Criminal Appeals held that Smith was not entitled to an instruction on voluntary intoxication. According to the court, while the evidence showed that Smith consumed *some* intoxicating substances on the day of the murder, most of that consumption occurred hours before he kidnapped Thompson—and many hours before he murdered him. *Smith*, 246 So. 3d at 1099. Between the kidnapping and the murder, the court noted, Smith consumed only "two beers," and in his statements to police he "consistently minimized his consumption of alcohol on the evening Thompson was murdered." *Id.* In addition, the court reasoned, "Smith's ability to recall in detail the kidnapping, robbery, and murder of Thompson" and his "attempt to hide his involvement in the crime by having Thompson's vehicle

'chopped' and fleeing Alabama" were "wholly inconsistent with being intoxicated to the point of insanity." *Id.* at 1099-1100.

Based on these findings, the Alabama Court of Criminal Appeals correctly held that the evidence at Smith's trial was insufficient as a matter of state law to warrant instruction on voluntary intoxication or lesser-included noncapital offenses. *Id.* at 1100. That determination does not conflict with *Beck* or the Due Process Clause.

II. The Petition Alleges No More Than A Misapplication Of Settled Law.

Given that Smith's petition is fundamentally an attack on the state court's application of state law to the facts of his case, it is unsurprising that Smith fails to invoke any of the "compelling reasons" listed in Rule 10 governing this Court's review of cert petitions. While he invokes *Beck* as a federal hook, that decision is settled law. There is no relevant split in authority about its application, nor any "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Nor does Smith contend that the Alabama Court of Criminal Appeals incorrectly stated the law. *See* Pet. 7-12. He simply argues that the state court erred when it held as a matter of state law that the evidence at trial did not permit instruction on voluntary intoxication or lesser-included offenses. *Id.* at 11-12. This Court "ha[s] no occasion to pass on this issue" of state law. *Beck*, 447 U.S. at 630 n.5. And to the extent the state court's decision has due process implications, *at most* Smith's "asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. "A petition for a writ of certiorari is rarely granted" in such situations. *Id.* It should not be granted here.

CONCLUSION

For these reasons, this Court should deny the petition.

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