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 SUPEME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Kenneth Eugene Smith was sentenced to death by an Alabama trial court despite a jury's determination by a vote of 11 to 1 that he be sentenced to life imprisonment without the possibility of parole. In 2017, Alabama abolished the authority of trial judges to override capital jury sentencing determinations. Currently, no State or the Federal Government permits trial judges to override capital jury sentencing determinations.

The questions presented are:

Does executing a condemned person contrary to a capital sentencing jury's determination that he should be sentenced to life imprisonment without the possibility of parole violate the prohibition against cruel and unusual punishments under the Eighth and Fourteenth Amendments to the United States Constitution given that no State or the Federal Government permits the practice any longer?

Should this Court overrule *Harris v. Alabama*, 513 U.S. 504 (1995)?

PARTIES TO THE PROCEEDING

Petitioner is Kenneth Eugene Smith. Respondent is the State of Alabama. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

State Proceedings

State v. Smith, No. CC-89-1149 (Colbert Cty. Cir. Ct. Nov. 14, 1989)

Smith v. State, No. CR-89-1290, 620 So.2d 732 (Ala. Crim. App. Sept. 18, 1992)

State v. Smith, No. CC-89-1149 (Colbert Cty. Cir. Ct. May 21, 1996), amended sentencing order (Sept. 25, 1997)

Smith v. State, No. CR-97-0069, 908 So.2d 273 (Ala. Crim. App. Dec. 22, 2000)

Ex parte Smith, No. 1000976, 908 So.2d 302 (Ala. Mar. 18, 2005)

Smith v. State, Jefferson County, No. CC1989-1149-60 (Jefferson Cty. Cir. Ct. July 13, 2011)

Smith v. State, No. CR 07-1412, 160 So.3d 40 (Ala. Crim. App. Feb. 7, 2014)

Smith v. State, No. 1130536 (Ala. Aug. 22, 2014)

Smith v. State, No. 1000976 (Ala. Nov. 10, 2022)

Federal Proceedings

Smith v. Alabama, No. 04-10643, 546 U.S. 928 (Oct. 3, 2005)

Smith v. Dunn, No. 2:15-cv-0384, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019)

Smith v. Comm'r, Ala. Dep't of Corrs., No. 19-14543-P, 850 F. App'x 726 (11th Cir. Apr. 6, 2021), *reh'g denied* (May 19, 2021)

Smith v. Hamm, No. 21-579, 142 S. Ct. 1108 (Feb. 22, 2022)

Smith v. Comm'r, Ala. Dep't of Corrs., No. 22-13781-P (11th Cir.) (pending)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Eugene Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS BELOW

The order of the Supreme Court of Alabama denying Mr. Smith's motion for a stay of execution and relief from his unconstitutional sentence is attached as Appendix A. The order of the Supreme Court of Alabama scheduling Mr. Smith's execution by lethal injection for November 17, 2022 at 6 pm CST is attached as Appendix B. The order of the Circuit Court of Colbert County sentencing Mr. Smith to death despite the jury's 11-1 verdict that he should be sentenced to life imprisonment without the possibility of parole is attached as Appendix C.

JURISDICTION

On June 24, 2022, Respondent moved in the Supreme Court of Alabama to set an execution date for Mr. Smith. On September 30, 2022, the Alabama Supreme Court scheduled Mr. Smith's execution for November 17, 2022 at 6 pm CT. Pet. App. 2a. On November 3, 2022, Mr. Smith moved in the Alabama Supreme Court to stay the execution and for relief from his unconstitutional sentence on the ground that his execution would violate his right under the Eighth and Fourteenth Amendments to the United States Constitution to be free from cruel and unusual punishments. The Court denied that motion on November 10, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

INTRODUCTION

Mr. Smith is facing execution because his trial judge overruled the jury's determination by a vote of 11 to 1 that he be sentenced to life imprisonment without the possibility of parole. "If [Mr.] Smith's trial had occurred today, he would not be eligible for execution because, in 2017, Alabama amended its capital-sentencing scheme prospectively to repeal trial judges' authority to override capital jury sentencing determinations." *Smith v. Comm'r, Ala. Dep't of Corrs.*, 850 F. App'x 726, 726 n.1 (11th Cir. 2021) (citing Ala. Code § 13A-5-47 (2017)). Nor would Mr. Smith be subject to execution in any other State or under a federal death sentence in that circumstance because since Mr. Smith was sentenced in 1996, every State that once permitted the practice of judicial override has abolished it.

That legislatures throughout the country have abolished or do not permit judicial override of capital jury sentencing determinations constitutes "the 'clearest and most reliable objective evidence of contemporary values'" that shows the practice is inconsistent with "'evolving standards of decency that mark the progress of a

maturing society'" and violates the Eighth Amendment to the United States Constitution as applied to the States through incorporation into the Fourteenth Amendment. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citations omitted). Executing Mr. Smith despite the determination of a jury of his peers that life imprisonment without the possibility of parole was the appropriate sentence would violate his Eighth Amendment right to be free from "cruel and unusual punishments." U.S. Const. amend. VIII.

The Alabama Supreme Court decision conflicts with the decisions of the highest Courts of other States that have considered prospective legislation rendering a class of individuals ineligible for the death penalty or abolishing the death penalty as evidence of contemporary values rendering those practices violations of the Eighth Amendment as applied to offenders sentenced both *before* and after the effective date of the legislation. *See State v. Santiago*, 318 Conn. 1 (2015); *Fleming v. Zant*, 259 Ga. 687 (1989); *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001). The Alabama Supreme Court's decision also is contrary to historical practice, which "has been to spare individuals from execution if they are under sentence of death at the time the capital punishment laws are repealed or invalidated." James R. Acker, Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated*, 54 Akron L. Rev. 267, 328 (2020).

The Court should grant certiorari to resolve this conflict on an important issue of constitutional law.

STATEMENT OF THE CASE

A. Mr. Smith's Impending Execution is Contrary to the Capital Jury's Determination that He Receive a Sentence of Life Without Parole

Mr. Smith was tried and convicted of capital murder in 1996. *See Smith v. State*, 908 So.2d 273, 278 (Ala. Crim. App. 2000).[1] After considering additional evidence presented during the penalty phase about Mr. Smith's character and life circumstances, the capital jury returned a general verdict by a vote of 11 to 1 that Mr. Smith be punished by life imprisonment without the possibility of parole. *See id.* at 278.

At the time of Mr. Smith's trial, since repealed Alabama law permitted the trial court to override the capital jury's sentencing verdict based on the trial court's findings of aggravating and mitigating circumstances and the trial court's weighing of them. *See* Ala. Code § 13A-5-47(d), (e) (1975). Exercising that authority and finding one aggravating circumstance and six mitigating circumstances, the trial court overrode the jury's sentencing determination. *See* Pet. App. 4a–12a. The trial court, thus, sentenced Mr. Smith to death contrary to the capital jury's determination that life imprisonment without the possibility of parole was an appropriate

[1] In 1988, Mr. Smith was indicted for the capital murder of Elizabeth Dorlene Sennett for a pecuniary or other valuable consideration in violation of Ala. Code § 13A-5-40(a)(7). Mr. Smith was convicted of capital murder and sentenced to death in November 1989. *See Smith,* 908 So.2d at 278 n.1. That conviction and death sentence were overturned because the State had exercised its peremptory challenges to prospective jurors based on their race. *See id.*

punishment based on the nature of the crime and evidence about Mr. Smith's character and life circumstances.

B. No State or the Federal Government Currently Permits Trial Judges to Override Capital Jury Sentencing Determinations

Judicial override was a controversial practice particularly in States like Alabama that select judges in partisan elections. As one former Alabama appellate judge put it:

> The reality is that the death penalty is so political in Alabama that as a practical matter, if you are against the death penalty, you cannot get elected as a judge or any other public official. Once elected, your rulings must reflect your bias for death. If your rulings show you reverse too many high profile death penalty cases, you will surely be beaten in your bid for re-election. There are very few judges who can withstand that type of pressure.

William M. Bowen, Jr., *A Former Appellate Judge's Perspective on the Mitigation Function in Capital Cases*, 36 Hofstra L. Rev. 805, 807 (2008) (footnotes omitted); *see also Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("What could explain Alabama judges' distinctive proclivity for imposing death sentences where a jury already has rejected that penalty? . . . The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.").

Given the controversy surrounding it, judicial override became increasingly rare after Mr. Smith's 1996 trial. In 1996, when the trial court overrode the jury's 11 to 1 recommendation that Mr. Smith be sentenced to life imprisonment without the

possibility of parole, only three States in addition to Alabama—Delaware, Florida, and Indiana—permitted judicial override in capital cases.

By 2000, in actual practice, judicial override was effectively non-existent outside Alabama. *See Woodward*, 134 S. Ct. at 407 ("Since 2000, . . . there have been only 27 life-to-death overrides, 26 of which were by Alabama judges."). The practice is now non-existent throughout the country because no State, including Alabama, or the Federal Government currently permits trial judges to override capital jury sentencing determinations.

Indiana abolished judicial override in 2002. *See* Ind. Code § 35-50-2-9(e). In 2016, this Court held that Florida's hybrid capital sentencing scheme, which was similar to Alabama's, was unconstitutional. *See Hurst v. Florida*, 577 U.S. 92 (2016). In *Hurst*'s wake, the Florida legislature amended its capital sentencing statute to abolish judicial override. *See* Fla. Stat. § 921.141(3)(a)(1). Later in 2016, the Delaware Supreme Court held that Delaware's capital sentencing statute was unconstitutional to the extent it permitted trial courts to override juries' capital sentencing determinations. *See Rauf v. State*, 135 A.3d 430 (Del. 2016).

In 2017, Alabama amended its capital sentencing scheme to repeal trial judges' authority to override capital juries' sentencing determinations, but only prospectively. *See* Ala. Code § 13A-5-47.1. According to a legislative sponsor of the repeal legislation, the Alabama legislature did so in acknowledgment that "override 'taints the process'" and to "'clean[] up a procedure detrimental to the jury system and that calls into question the integrity of jurisprudence in Alabama." Montgomery

Advertiser Feb. 23, 2017), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2017/02/23/senate-votes-end-judicial-override-capital-cases/98302650/. Other legislators expressed concern over the constitutionality of judicial override.[2]

Alabama has scheduled Mr. Smith's execution for November 17, 2022 even though his death sentence resulted from what its legislature has acknowledged was a tainted process. Pet. App. 2a. There are more than 30 condemned people on death row in Alabama due to judicial override.[3] Mr. Smith is the first person in that circumstance to face execution in Alabama since the State abolished judicial override. On November 10, 2022, the Alabama Supreme Court denied Mr. Smith's motion for a stay of execution and relief from his unconstitutional sentence. Pet. App. 1a.

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[2] *See* Kent Faulk, Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases, Birmingham Real-Time News (Apr. 11, 2017), https://www.al.com/news/birmingham/2017/04/post_317.html ("'I'm glad to be stripped of this power,' Jefferson County Bessemer Cutoff Circuit Judge David Carpenter told AL.com Tuesday. 'Also, this is long overdue. Our Capital Murder sentencing statute would eventually have been struck down by the U.S. Supreme Court.'"); Kent Faulk, 2 legislators file bills to halt judicial override in Alabama death penalty cases, Birmingham Real-Time News (Dec. 22, 2016), https://www.al.com/news/birmingham/2016/12/2_legislators_file_bills_to_ha.html ("'The Supreme Court of the United States has made it very clear they do not like this practice,' [Sen. Dick] Brewbaker [sponsor of the Senate legislation] said. 'There's just no reason to wait for the Supreme Court to force our hand,' he said. . . . 'I think it is inevitable that our sentencing scheme is going to be overturned,' [Rep. Chris] England [sponsor of the House legislation], who is a lawyer, said Thursday.").

[3] *See* O.H. Eaton, Jr., *Supreme Court Must Eradicate Judicial Override in Death Penalty Cases*, Bloomberg Law (Nov. 17, 2020), https://news.bloomberglaw.com/us-law-week/supreme-court-must-eradicate-judicial-override-in-death-penalty-cases#:~:text=In%20Alabama%20there%20are%20still%2032%20people%20on,former%20Florida%20Circuit%20Court%20Judge%20O.H.%20Eaton%20Jr..

REASONS FOR GRANTING THE PETITION

I THE ALABAMA SUPREME COURT'S DECISION RAISES AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW

This Court long ago held and consistently has reiterated that the Eighth Amendment "'must draw its meaning from evolving standards of decency that mark the progress of a maturing society.'" *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *see also Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) ("To enforce the Constitution's protections of human dignity, we loo[k] to the evolving standards of decency that mark the progress of a maturing society, recognizing that [t]he Eighth Amendment is not fastened to the obsolete." (alternations in original, citation and internal quotation marks omitted)). In making that assessment, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)); *see also Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988) ("Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is 'cruel and unusual.'").

The actions of the Alabama, Florida, and Indiana legislatures and the highest court in Delaware reflect a national consensus against executing people after capital juries have determined that the death penalty is not appropriate for them and they should serve a life sentence instead. Indeed, because no other State or the Federal Government permit judicial override of capital jury sentencing determinations, the

national consensus is even stronger than those this Court has found in other cases *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding that execution of juvenile offenders violates the Eighth Amendment where "30 states prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether, and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach"); *Atkins*, 536 U.S. at 314–15 (holding that execution of intellectually disabled offenders violates the Eighth Amendment and noting that 18 states and the Federal Government exempted intellectually disabled people from the death penalty). Without exception, a defendant convicted of capital murder in any State or by the Federal Government cannot be sentenced to death in the face of a contrary capital jury sentencing determination.

That national consensus derives from the critical role that juries play in establishing contemporary values when they exercise their judgment in capital sentencing. *See Thompson*, 487 U.S. at 821–22 (in assessing evolving standards of decency, among other things, "the Court . . . has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases"). "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). Indeed, "'one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would

hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 519 n.15 (quoting *Trop*, 356 U.S. at 101); *see also Coker v. Georgia*, 433 U.S. 584, 596 (1980) ("'The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved,' and . . . it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate punishment for the crime being tried." (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)).

In other words, a capital jury's sentencing determination is the barometer for what is consistent with "contemporary community values," which assures that the determination comports with "evolving standards of decency." Accordingly, executing Mr. Smith despite his capital jury's 11 to 1 determination that he should be sentenced to life imprisonment without the possibility of parole would violate the prohibition of cruel and unusual punishments in the Eighth Amendment to the U.S. Constitution.

II THE ALABAMA SUPREME COURT'S DECISION IS INCONSISTENT WITH DECISIONS OF OTHER STATE COURTS AND HISTORICAL PRACTICE

By its terms, the legislative repeal of judicial override in Alabama applies only prospectively. *See* Ala. Code § 13A-5-47.1. But that does not affect its strength as "'reliable objective evidence of *contemporary* values'" for purposes of Eighth Amendment analysis. *Atkins*, 536 U.S. at 312 (emphasis added, citation omitted). For example, in *Atkins*, this Court held that executing people with intellectual disability was inconsistent with contemporary standards of decency and thus violative of the Eighth Amendment based, in part, on evidence that 18 state

legislatures had prohibited executing people with intellectual disability even though most had done so only prospectively. *See Atkins*, 504 U.S. at 313–16, *see also id.* at 342 (Scalia, J., dissenting) (noting that 11 of the 18 state statutes barred execution of intellectually disabled people only if they were convicted after the effective date of the statute).

Consistent with *Atkins* and inconsistent with the Alabama Supreme Court, the highest courts of other States have found that legislation that applies only prospectively is evidence of contemporary values. in *State v. Santiago*, 318 Conn. 1 (2015), the Connecticut Supreme Court held that the death penalty violated Connecticut's analogue to the Eighth Amendment after the legislature abolished capital punishment even though it did so only prospectively. The court held that the "prospective abolition of the death penalty . . . provides strong support for the conclusion that capital punishment no longer comports with contemporary standards of decency and, therefore, constitutes cruel and unusual punishment." *Id.* at 61. In so holding, the Court relied on this Court's *Atkins* decision as having "considered and rejected [the] argument that a prospective only repeal does not indicate that the punishment no longer comports with society's evolving values." *Id.* at 63.

Similarly in *Fleming v. Zant*, 259 Ga. 687 (1989), the Georgia Supreme Court held that executing people with intellectual disability would violate Georgia's analogue to the Eighth Amendment based on the passage of a statute prohibiting the execution of such people on a prospective basis only. The Court held that passage of the statute "reflects a decision by the people of Georgia that the execution of mentally

retarded offenders makes no measurable contribution to acceptable goals of punishment" and violates Georgia's constitutional ban on cruel and unusual punishment even though the legislation applied only to offenders tried after its effective date. *Id.* at 690. In reaching that conclusion the Georgia Supreme Court relied on this Court's holdings that "whether a particular punishment is cruel and unusual is not a static concept, but instead changes in recognition of the evolving standards of decency that mark the progress of a maturing society" and that "legislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment." *Id.* at 689 (citations and internal quotation marks omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 805 (Tenn. 2001) (same).

Significantly, the foregoing authorities are consistent with historical practice. "Historically in this country . . . the apparent universal practice has been to spare individuals from execution if they are under sentence of death at the time capital punishment laws are repealed or invalidated." James R. Acker, Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated*, 54 Akron L. Rev. 267, 328 (2020). Additionally, "no juveniles who were sentenced to death in states that originally authorized capital punishment for 16- or 17-year-old offenders, but subsequently raised the minimum age for death eligibility to 18 prior to the Supreme Court's decision in *Roper v. Simmons*, [543 U.S. 551 (2005)] remained under sentence of death when *Roper* was decided, or were executed after relevant state laws raised

the minimum age." *Id.* at 326. There is no basis to make an exception to that historical practice here.

As in the foregoing authorities and consistent with historical practice, the prospective abolition of judicial override in Alabama capital cases and its abolition throughout the country provides strong support for the conclusion that executing people contrary to capital jury sentencing determinations no longer comports with contemporary standards of decency and, therefore, would constitute cruel and unusual punishment in violation of the Eighth Amendment. This Court should grant certiorari to clarify application of its Eighth Amendment jurisprudence to legislation that prohibits a capital punishment practice on a prospective basis only.

III THIS COURT SHOULD RECONSIDER *HARRIS*

In *Harris v. Alabama*, 513 U.S. 504 (1995), this Court upheld Alabama's practice of judicial override against an Eighth Amendment challenge. The Court decided *Harris* in 1995—27 years ago. It necessarily does not account for developments since then, including the fact that judicial override of capital jury sentencing determinations is no longer permitted anywhere in the country. Simply put, in the 27 years since *Harris* was decided, standards of decency have evolved. Executing someone like Mr. Smith based solely on a trial judge's determination contrary to a capital jury's determination that he should be sentenced to life imprisonment without the possibility of parole is inconsistent with contemporary values. *See Woodward*, 134 S. Ct. at 407 ("Eighteen years have passed since we decided *Harris*, and . . . the time has come for us to reconsider that decision.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2022