No. 22-6049
CAPITAL CASE

In the
Supreme Court of the United States

KENNETH EUGENE SMITH,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED (RESTATED)

Kenneth Smith was convicted of capital murder in 1996. Following direct appeal, this Court denied his petition for a writ of certiorari in 2005. Smith then unsuccessfully sought state and federal habeas review. On October 18, 2021, he again sought a petition for a writ of certiorari from this Court arguing that his death sentence violated (1) the Sixth Amendment because the trial judge did not follow the jury's recommendation of life imprisonment and (2) the Eighth Amendment because he purportedly did not receive an individualized sentencing determination. The Court denied his petition on February 22, 2022. The State then requested that the Alabama Supreme Court schedule Smith's execution, and he filed with that court a "Motion For Stay Of Execution And Relief From Unconstitutional Sentence," arguing that the judge's failure to follow the jury's recommendation violated the Eighth Amendment. Under Alabama law, such collateral attacks on a sentence must be filed with the circuit court, not directly with the Alabama Supreme Court. *See* Ala. R. Crim. P. 32.1(a). The Alabama Supreme Court denied Smith's motion. Smith's execution is scheduled for November 17, 2022. The questions presented are:

1. Does the Alabama Supreme Court's denial of Smith's motion rest on an independent and adequate state law ground?
2. Should this Court grant certiorari review to consider a splitless claim that judicial sentencing violates the Eighth and Fourteenth Amendments, particularly where Smith has unduly delayed raising his latest claim?

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STATEMENT OF THE CASE

A. Proceedings and Disposition Below

On April 7, 1988, the appellant, Kenneth Eugene Smith, was indicted for capital murder by the Grand Jury of Colbert County, Alabama, for the murder of Elizabeth Dorlene Sennett. Specifically, he was charged with murder made capital because it was "done for a pecuniary or other valuable consideration or pursuant to a contract or for hire," Ala. Code § 13A-5-40(a)(7). *Smith v. State*, 908 So. 2d 273, 300 (Ala. Crim. App. 2000).

On February 28, 1989, venue was transferred from Colbert County to Jefferson County, where the case was originally tried. On November 3, 1989, Smith was convicted of capital murder. The jury recommended that Smith be sentenced to death, which recommendation the trial court accepted on November 14, 1989. In 1992, the case was twice remanded to the circuit court, which set aside Smith's conviction and a new trial was ordered, finding that the State's explanation of its challenges to black venire members did not meet its burden under *Batson v. Kentucky*, 476 U.S. 79 (1986). The Court of Criminal Appeals (ACCA) dismissed the State's appeal. *Smith v. State*, 620 So. 2d 732, 732-34 (Ala. Crim. App. 1992). The initial 1989 conviction is not at issue in this appeal.

Smith was retried and again convicted of capital murder and the jury recommended a sentence of life imprisonment without parole by a vote of 11 to 1. On May 21, 1996, the trial court held a sentencing hearing and, after carefully weighing the aggravating circumstances against mitigating circumstances, sentenced Smith to

death, pursuant to authority granted by Ala. Code § 13A-5-47(e). Vol. 1, Tab R-3; C. 31-37. [1]

Smith's conviction and sentence were affirmed by the Alabama Court of Criminal Appeals (hereinafter "ACCA") on December 22, 2000. *Smith v. State*, 908 So. 2d 273 (Ala. Crim. App. 2000); Vol. 27, Tab. R-40. Rehearing was denied on February 23, 2001. *Id.* The Alabama Supreme Court granted certiorari on June 4, 2003, but quashed the writ of certiorari as having been improvidently granted on March 18, 2005. *Ex parte Smith*, 908 So. 2d 302 (Ala. 2005); Vol 29, Tab. R-47. The certificate of judgment issued that same day. Review was denied by this Court on October 3, 2005. *Smith v. Alabama*, 546 S.Ct. 928 (2005). Vol. 29, Tab R-50.

On March 16, 2006, Smith filed a Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The procedural history of Smith's state postconviction action was complex and lengthy, involving multiple remands, but detailed description is not necessary to address Smith's current claim. The state circuit court ultimately denied relief on Smith's Rule 32 petition, and that decision was affirmed by the ACCA on March 22, 2013. Vol. 44, Tab R-100. On February 7, 2014, the ACCA overruled Smith's application for rehearing and issued a substituted memorandum affirming the circuit court's denial of relief. Vol. 45, Tab R-102. Among the claims rejected by the ACCA was an Eighth Amendment challenge to Alabama's system of judicial sentencing. In rejecting that claim, the ACCA cited the ASC's decision upholding judicial sentencing in *Ex parte Waldrop*, 859 So. 2d 1181

[1] Vol. # and Tab # citations are to the record in Smith's federal habeas action, in which Smith filed a petition for certiorari on October 18, 2021. *See Smith v. Hamm*, No. 21-579.

(2003), and held that "the jury in Smith's case unanimously determined [the existence of an aggravating circumstance] by its guilty verdict on the charge of murder for pecuniary or other valuable consideration[.]" *Smith v. State*, CR-07-1412 at 17-19 (Ala. Crim. App. Feb. 7, 2014) (mem. op.)

On February 21, 2014, Smith filed a petition for certiorari in the ASC, raising, among other things, the same Eighth Amendment challenge to his sentence. Vol. 45-46, Tab R-103. On August 22, 2014, the ASC denied Smith's petition without opinion. *Ex parte Smith*, No. 1130536 (Ala. Aug. 22, 2014); Vol. 46, Tab R-104.

On September 30, 2014, Smith filed his petition for writ of habeas corpus in the District Court for the Northern District of Alabama. After briefing by the parties, the District Court denied relief, including on a *different* Eighth Amendment challenge to judicial sentencing, in its final order issued on September 12, 2019. *Smith v. Dunn*, No. 2:15-CV-0384-AKK, 2019 WL 4338349 (N.D. Ala. Sept. 12, 2019). The Eleventh Circuit granted a certificate of appealability (hereinafter "COA") with respect to a single issue on January 9, 2020. The Eleventh Circuit denied COA on Smith's Sixth and Eighth Amendment challenges to judicial sentencing. On October 18, 2021, just over a year ago, after denial of relief in the Eleventh Circuit, Smith petitioned for certiorari review in this Court, where he argued, among other things, that judicial sentencing—characterized by Smith as "judicial override"—violates the Sixth Amendment and Eighth Amendments. This Court denied certiorari review on February 22, 2022.

On June 24, 2022, the State of Alabama filed a motion to set an execution date for Smith in the ASC. After Smith was given the opportunity to respond, the Alabama Supreme Court entered an order on September 30, 2022 which set Smith's execution date for November 17, 2022. Just over a month later, on November 3, 2022, Smith filed a motion to vacate his sentence in the Alabama Supreme Court, raising *yet another* claim that his sentence violated the Eighth Amendment, this time relying on its bar on cruel and unusual punishments, and arguing that this Court's decision in *Harris v. Alabama*, 513 U.S. 504 (1995) was not dispositive of the issue. Under Alabama law, a postconviction constitutional challenge to one's sentence must be filed in the trial "court of original conviction," Ala. R. Crim. P. 32.1, within one year of the sentence being made final, *id.* R. 32.2(c). Moreover, post-conviction relief is not available on any ground which was or could have been raised at trial, in a previous appeal, or previous collateral proceeding. *Id.* R. 32.2(a)(2)-(5). The Alabama Supreme Court denied Smith's procedurally barred motion on November 10, 2022. This petition followed.

B. Statement of the Facts

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. *Smith v. State*, 908 So. 2d 273, 279-281 (Ala. Crim. App. 2000). 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. *Id.* It was the coroner's opinion that Sennett died of

multiple stab wounds to the chest and neck. *Id.* The evidence established that Charles Sennett had recruited Billy Gray Williams, who in turn recruited Smith and John Forrest Parker, to kill his wife. *Id.* He was to pay them each $1,000 in cash for killing Mrs. Sennett. *Id.* 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. *Id.* Smith detailed the following in his statement to police:

> About one month prior to March 18, 1988, I was contacted by Billy Williams. Billy came over to my house and we talked out on the front porch. It was late afternoon. Billy said that he knew someone that wanted somebody hurt. Billy said that the person wanted to pay to have it done. Billy said the person would pay $1500 to do the job. I think I told Billy I would think about it and get back with him. Billy lives at the corner of Tuscaloosa Street and Cypress Street near the telephone company. Billy drives a red and white Thunderbird. Billy and I are good friends. Billy and I talked about this several times before I agreed to do it. I had already talked with John Parker about helping me. I think I first met Charles Sennett about two weeks prior to the murder. Billy arranged the meeting. At the time I met Mr. Sennett I did not know who he was. I did not ask his name and he did not ask what my name was. Mr. Sennett told me that he wanted somebody taken care of. Mr. Sennett said that the person would be at home, that they never had any visitors. Mr. Sennett said that the house was out in the country. At that time I just listened to his proposal and told him I would get back with him. When we talked we sat in Mr. Sennett's truck in front of Billy's apartment. I gave him my phone number. Mr. Sennett called me a couple of times to see if I had made a decision. Sometime between the Monday prior to the murder and the Thursday prior to the murder, Mr. Sennett learned that John and I would do what he wanted. I met with Mr. Sennett on Tuesday prior to the murder in the coffeehouse at ECM. At this meeting Mr. Sennett drew me a diagram of his house and told me that his wife and he would be out of town on Wednesday, to go down to the house and look around. By the time Sennett and I met at ECM I had learned through conversations with him that it was his wife that he wanted killed and the price agreed was $1,000 each—excuse me—$1,000

each for Billy Williams, John Parker and I. The next meeting was on Thursday prior to the murder in front of Billy's apartment again. Billy, Mr. Sennett and I sat in Mr. Sennett's silver car and talked. I don't recall what time it was exactly. I think it was in the morning. At this meeting Sennett gave me $200 and showed us the rest of the money. Two hundred dollars was for anything we needed to do the job. John Parker sat in my car while Billy and I talked with Mr. Sennett. The murder was supposed to look like a burglary that went bad. This was Mr. Sennett's idea. Sennett told me to take whatever I wanted from the house. It was agreed for John and I to do the murder and then come back to Billy's apartment—to Billy's house—excuse me—and get the rest of our money. This meeting only lasted a short while. Sennett told us that he would be gone from 8:30 until noon. Then on 3/18 of '88 ... Friday, John and I got together around 8:30. We were in John's car, a Pontiac Grand Prix, gold. John drove to Muscle Shoals, then I drove down to the Sennett house. John had brought a black handle survival knife and a black holster. At this time we still did not know how we were going to kill Mrs. Sennett. John and I got to the Sennett house around 9:30, I think. I parked at the back of the house near a little patio that led into the house. I went to a door to the left of the car. I think there was a white freezer nearby. I knocked on the door and Mrs. Sennett came to the door. I told Mrs. Sennett that her husband had told us that we could come down and look around the property to see about hunting on it. Mrs. Sennett asked my name. I told her I was Kenny Smith. She went to the phone and called her husband and came back and told us it was okay to look around. John and I looked around the property for a while then came back to the house. John and I went back to the door. We told Mrs. Sennett we needed to use the bathroom and she let us inside. I went to the bathroom nearest the kitchen and then John went to the bathroom. I stood at the edge of the kitchen talking with Mrs. Sennett. Mrs. Sennett was sitting at a chair in the den. Then I heard John coming through the house. John walked up behind Mrs. Sennett and started hitting her. John was hitting her with his fist. I started getting the VCR while John was beating Mrs. Sennett. John hit Mrs. Sennett with a large cane and anything else he could get his hands on. John went into a frenzy. Mrs. Sennett was yelling just stop, we could have anything we wanted. As John was beating up Mrs. Sennett, I messed up some things in the house to make it look like a burglary. I took the VCR out to the car. The last place I saw Mrs. Sennett she was lying near the fireplace covered with some kind of blanket. I had gone outside to look in the storage buildings when I saw John run out to the pond and throw some things in it. I also took a small stereo from the house—"also," is the last word. I don't know what brand it was or where in the house I got it. The VCR was a Samsung. I got it from under the TV set in the den. When John got back

> to the car we drove back to Billy's apartment to get our money. On the way back John told me that he had stabbed her once in the neck. I never stabbed Mrs. Sennett at all. When John and I got to Billy's, we were given $900 a piece. Billy gave us the money. At the time of the murder I never [knew] Charles Sennett's name or his wife's. It was only when it came out in the newspaper that I learned the name of the lady that was killed and Charles Sennett. I took the Samsung VCR home with me. The last time I saw the stereo it was in John's car. It was around noon when we got to Billy's apartment. Then on 3/31/88—in parenthesis, Thursday—my house was searched by investigators and they found the VCR. I was brought to the Colbert County Courthouse where I was advised of my rights. After being advised of my rights, I gave Investigator May this written statement.

Id. Smith's statement to police was corroborated at trial. *Id.* at 281. Smith's crime was not impulsive or spontaneous, but rather demonstrated planning and cold-blooded deception. For approximately a month before the murder, Smith had been talking about being hired to "beat somebody up." (R. 809-810.) During the planning stages, Smith attempted to recruit other friends to participate in the crime and, shortly before the crime, Smith was trying to find a gun. (R. 779-780, 784-785.) Donald Buckman, a friend of Smith's, testified that Smith approached him about one week before the murder and asked him if he would be interested in participating in beating someone up in exchange for money. *Id.* Another witness, Brent Barkley, testified that Smith told him that he had been hired to beat up someone. *Id.* Barkley also stated that he saw Smith on the evening of the murder and that Smith's hand was "bruised and wrapped." *Id.* There was also testimony that Smith had in his possession a large amount of money immediately after the murder. *Id.*

REASONS FOR DENYING THE PETITION

The first reason this Court should deny Smith's unusual, late-breaking petition is because the Court lacks jurisdiction to review the judgment of the Alabama Supreme Court. The State Supreme Court's decision to deny Smith's straight-to-the-top collateral attack on his sentence is readily explained by Smith's violation of multiple state rules related to state collateral relief. A postconviction constitutional challenge to one's sentence (1) must be filed in the trial "court of original conviction," Ala. R. Crim. P. 32.1, not the Alabama Supreme Court; (2) it must be filed within one year of the sentence being made final, *id.* R. 32.2(c), not decades later; and (3) post-conviction relief is not available on any ground which was or could have been raised at trial, in a previous appeal, or previous collateral proceeding, *id.* R. 32.2(a)(2)-(5), which obviously includes Smith's belated Eighth Amendment claim. Indeed, Smith *did* raise a different Eighth Amendment challenge in the Alabama Courts nearly a decade ago. But the Alabama Supreme Court did not address his barred claim in its denial of Smith's motion, nor did its order create any circuit split or conflict with this Court's rulings.

Second, and relatedly, Smith's petition (and related stay motion) should be denied because his delay in bringing this claim is unexplained and inexcusable. This approach represents gamesmanship of the first order. Smith did not properly bring this claim in the state courts, it is not properly brought here, and it is readily apparent that the primary motivation for bringing it *now* is in the hope that he can stave off execution, which is set for November 17, 2022.

Finally, Smith's Eighth Amendment claim does not withstand scrutiny. While it is styled as a claim that judicial sentencing amounts to "cruel and unusual punishment," his reasoning is utterly divorced from the rationale behind this Court's decisions in *Atkins*, *Roper*, and similar cases.

At bottom, Smith has not raised any cert-worthy issue. Smith has unreasonably delayed in bringing his challenge to the ASC. Moreover, the decision below does not implicate any genuine split, is inextricably intertwined with state law procedural issues, and presents no novel issue that should be settled by this Court. This Court should, therefore, deny Smith's petition for writ of certiorari. *See* Sup. Ct. R. 10.

I. Smith's Claims Below Were Barred Under Independent and Adequate State Law Grounds.

As this Court has often observed, "the presence of independent and adequate state-law grounds in the decision of a state supreme court means this Court has no jurisdiction over the case[.]" *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 982 (1986). Smith's petition is a particularly poor vehicle for this Court's consideration of Smith's Eighth Amendment claim because the State Supreme Court quite plainly declined to consider it based on numerous, obvious violations of state procedural rules governing collateral attacks on a sentence. Indeed, his belated collateral attack, raising claims he could have raised decades ago, in a filing that skipped over the state trial and intermediate appellate courts, was plainly rejected for its multiple procedural irregularities. It thus cannot be said that the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law,"

Michigan v. Long, 463 U.S. 1032, 1040 (1983), and thus this Court lacks jurisdiction over this petition.

As noted, Smith's motion to vacate in the Alabama Supreme Court failed to comply with Alabama law in critical ways. Alabama law provides inmates with the opportunity to bring constitutional challenges to their convictions and sentences. However, such challenges are governed by Rule 32.1(a) of the Alabama Rules of Criminal Procedure and must be brought "in the court of original jurisdiction" not later than "one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals." Rules 32.1, 32.2, Ala. R. Crim. P. The Certificate of Judgment in Smith's case was issued by the Court of Criminal Appeals on March 22, 2005, over seventeen years ago. Thus, Smith's Eighth Amendment claim was brought in the wrong court and was nearly two decades too late under Alabama law.

Additionally, pursuant to Alabama law, a petitioner is barred from obtaining "relief on a successive petition on the same or similar grounds on behalf of the same petitioner" unless the petitioner can show "why the new ground [] could not have been ascertained through reasonable diligence" earlier. Rule 32.2(b), Ala. R. Crim. P. Smith had previously challenged Alabama's system of judicial sentencing on both Sixth and Eighth Amendment grounds through his first postconviction petition, but Smith failed to make any argument as to why his second, successive, collateral attack on his sentence brought in his Motion to Vacate did not violated Rule 32.2. Indeed, Smith's motion didn't even *acknowledge* that he had previously brought a similar challenge to judicial sentencing. Moreover, Smith made no response when the State

pointed out these state law deficiencies in its response to his motion to vacate. As argued below, it appears that Smith was far more interested in building a Trojan horse to get him into this Court than he was in raising a legitimate constitutional challenge in state court.

II. Smith's Attempt to Seek Certiorari Review from the Denial of a Motion to Vacate Filed Originally in the Alabama Supreme Court Represents Extraordinary Gamesmanship.

Considering the state law deficiencies discussed above, the timing of Smith's petition, coming days before his scheduled execution, can only be explained by gamesmanship. This Court has set forth rules governing petitions for seeking certiorari review that include a requirement that, to be timely, a petition must be "filed with the Clerk of this Court within 90 days after entry of the judgment." Sup. Ct. R. 13. Smith certainly could have argued his present "cruel and unusual punishment" claim along with his other Eighth Amendment challenge to Alabama's system of judicial sentencing in his original state postconviction proceedings, but he did not. Moreover, had he properly raised this present challenge after that state postconviction proceeding, his present claims would have been equally meritless 90 days after the entry of judgment in that case, but at least they would have been timely. But instead, Smith has attempted to evade this Court's rules by bringing a second, successive, and untimely, Eighth Amendment challenge to his sentence in the ASC and asking this Court to intervene when the ASC predictably denied his motion.

Smith also could have brought the present claim in his federal habeas proceedings. Indeed, under this Court's precedent he was *required* to do so, because

a direct challenge to the constitutionality of his sentence is one of those "clear-cut" claims that *must* be brought in habeas. *Nance v. Ward*, 213 L. Ed. 2d 499, 142 S. Ct. 2214, 2221–22 (2022). Smith's habeas proceedings weren't resolved in the federal court until late 2019, and to the extent that his claim relies on the Alabama Legislature's decision to eliminate judicial sentencing in capital cases in favor of jury sentencing, that decision was made in 2017. And Smith offers no rationale for why he has waited almost five years to bring this challenge. Similarly, Smith's argument cites no authority more recent than 2016. But Smith did not raise his Eighth Amendment theory in his habeas petition, nor did he ever attempt to amend the petition to include it. Instead, it appears that he planned to keep his powder dry and to reserve the present claim for a sort of last-minute "hail Mary" with the hope of throwing sand in the gears of Alabama's effort to carry out a lawful sentence.

Indeed, beyond gamesmanship, it is hard to divine any reason why Smith could not have brought his claim far earlier—and he certainly offers none. By waiting until November 3, 2022 to improperly seek relief in the Alabama Supreme Court, Smith "leaves little doubt that the real purpose behind his claim [was] to seek a delay of his execution…." *Jones v. Allen*, 485 F.3d 635, 640 (11th Cir. 2007). This Court should not reward Smith's gamesmanship by granting certiorari review or a stay of execution because to do so would simply invite a wave of similar tactics by other inmates. If Smith is allowed to go forward on his claims, others whose time for seeking certiorari review has long passed will be encouraged to "take another bite at the apple" by filing

procedurally improper and time-barred motions in state supreme courts and asking this Court to intervene when they inevitably lose.

III. Smith's Eight Amendment Challenge is Meritless.

Because of the uniquely flawed manner in which Smith presented his Eighth Amendment claim to the Alabama Supreme Court, it is unsurprising that there is no substantive opinion to review. But not even Smith can point to any genuine split or unsettled issue that would warrant certiorari review. Indeed, within the tattered and misaddressed envelope that brings Smith's petition to this Court is simply another invitation to overturn *Harris v. Alabama*, 513 U.S. 504 (1995). This Court should decline accept it.

The jury in Smith's trial convicted him of capital murder for pecuniary gain, thus finding the existence of an aggravating circumstance under Alabama law. As the ACCA explained:

> The record shows that the trial court found that only one aggravating factor had been proven—that the murder was done for a pecuniary gain. The fact that this aggravating factor is also an element of the capital offense does not make this finding unlawful.

Pet. App'x F at 276a. This was all the Constitution required to expose Smith to the death penalty. *Ring v. Arizona* 536 U.S. 584 at 612–13 (2002) ("What today's decision says is that the jury must find the existence of the **fact** that an aggravating factor existed.") (Scalia, J., concurring); *cf. Hurst v. Fla.*, 577 U.S. 92, 103, 136 S. Ct. 616, 624, 193 L. Ed. 2d 504 (2016) ("Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.") While the jury returned a recommendation that Smith be

sentenced to life imprisonment without the possibility of parole, at the time, Alabama's capital sentencing process vested ultimate sentencing authority in the trial judge. §13A-5-47 (e), Ala. Code (1975).

Smith now claims that his sentence violates the Eighth Amendment because the judge was allowed to determine whether to sentence him to either death or life-without parole based upon the aggravating circumstance found by the jury because "executing Mr. Smith despite his jury's 11-1 determination that he should be sentenced to life imprisonment [] would violate the prohibition on cruel and unusual punishments in the Eight Amendment." Pet. at 10. This is the critical question at the center of Smith's petition: does a procedural issue, like Alabama's former judicial sentencing procedure, implicate the Eight Amendment's bar to cruel and unusual punishments? Yet, Smith does not, *cannot*, cite to *any case* from *any court* holding that judicial sentencing amounts to amounts to cruel and unusual punishment. Thus he fails to identify any conflict at all, much less one that would warrant this Court's intervention. Sup. Ct. R. 10.

At best, Smith's petition amounts to a policy argument in which he attempts to bootstrap cases where death was found to be a cruel and unusual *punishment* for individuals with certain characteristics, *e.g.* age and intellectual capacity, into an argument that a particular sentencing *procedure* that applied regardless of any particular individual's characteristics. Pet. at 8, 10-11, 12-13. But, unlike Smith's argument, *Atkins* did not have anything to do with the process by which Atkins was sentenced or *who* sentenced him. Indeed, "[t]he *jury* sentenced Atkins to death."

Atkins v. Virginia, 536 U.S. 304, 309, 122 S. Ct. 2242, 2245, 153 L. Ed. 2d 335 (2002) (emphasis added). Instead, *Atkins* focused on the "characteristics of mental retardation[.]" *Id.* at317. The same was true of *Roper*. *Roper v. Simmons*, 543 U.S. 551, 558 (2005) ("[t]he jury recommended the death penalty".) Thus, unlike in either *Atkins* or *Roper*, Smith's claim is not, at its core, about who he *is*, but, instead, about *who sentenced him*. *Cf. Roper*, 543 U.S. at 568 ("The death penalty may not be imposed on certain *classes* of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."). Indeed, by Smith's logic, *Atkins* and *Roper* should be overturned because juries decided that the defendants in those cases deserved death.

Further, that questions about judicial sentencing and jury recommendations have little to do with an individual's immutable characteristics (such as age or intellectual ability) can be no more clearly demonstrated than by the fact that at Smith's *first* trial, the jury returned "an advisory sentence of death." *Smith v. State*, 588 So. 2d 561, 565 (Ala. Crim. App. 1991). Smith's claim is indubitably not about some immutable characteristic he has, it's simply about who weighed the aggravating and mitigating circumstances of his crime. Consequently, Smith's arguments about "evolving standards of decency" and "cruel and unusual punishment" are just a rehash of Smith's oft-rejected collateral attacks on Alabama's former sentencing *process* of judicial sentencing.

But that argument is squarely foreclosed by *Harris*. This Court explained in *Harris* that the weight a judge gives to a jury's advisory verdict is constitutionally

irrelevant. Because "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," it is "not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight." *Harris*, 513 U.S. at 515, 115 S. Ct. at 1037. This Court has steadfastly refused to revisit that decision. *See, e.g.*, *Bohannon v. Alabama*, 197 L. Ed. 2d 72, 137 S. Ct. 831 (2017). That is because, as this Court said in *Harris*, "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence[.]" *Harris*, 513 U.S. at 515. None of the authority that Smith relies on questions the durability of this Court's holding in *Harris*. Nor has Smith pointed to any intervening decision of this Court casts any doubt on that holding. Consequently, this Court should decline to revisit it and certiorari should be denied.

Smith grounds his "evolving standards of decency" argument on the fact that Indiana, Florida, Delaware, and Alabama no longer use advisory juries in capital sentencing. *See* Pet. at 8. But when this Court last considered "Alabama's capital sentencing statute," that statute was "unique." *Harris*, 513 U.S. at 516 (Stevens, J., dissenting). Even so, the Court recognized "that the 'Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws.'" *Id.* at 510 (quoting *Spaziano v. Florida*, 468 U.S. 447, 464 (1984)). For while "'the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for [the Court] ultimately to judge whether the Eighth Amendment' is violated by a challenged practice." *Spaziano*, 468 U.S. at 464 (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982)). And "[i]n light of

the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional," even if the practice is rare. *Id.*

Moreover, the legal changes in Indiana, Florida, Delaware, and Alabama hardly evince societal "standards of decency" or a national consensus that would benefit Smith. Rather, these changes were largely driven not by evolution in "society's standards," *Graham v. Florida*, 560 U.S. 48, 61 (2010), but by this Court's Sixth Amendment decisions over the past two decades. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and then *Ring v. Arizona*, 536 U.S. 584 (2002), marked major shifts in the Court's Sixth Amendment jurisprudence. During that time, the United States and several States were forced to examine and, in some instances, amend their sentencing regimes in an effort to read the Sixth Amendment tea leaves. Thus, in 2002, as this Court was considering *Ring*, the Indiana Legislature amended its capital sentencing so that defendants sentenced after June 30, 2002, would be sentenced according to the jury's recommendation of life or death. *See* 2002 Ind. Legis. Serv. P.L. 117-2002 (S.E.A. 426), codified at Ind. Code § 35-50-2-9(e).

Florida's move away from advisory juries in 2016 was no more driven by natural "evolution" of societal values. Rather, Florida's sentencing procedure changed because this Court commanded that result when it overruled *Spaziano*. *See Hurst*, 136 S. Ct. at 623-24. This change was judicial, not societal.

The same goes for Delaware, where that State's supreme court acknowledged that it invalidated Delaware's capital sentencing statute because of "the majority's collective view that Delaware's current death penalty statute violates the Sixth Amendment role of the jury as set forth in *Hurst*." *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016). This language leaves no doubt that the changes in Delaware, on which Smith relies, were a direct result of this Court's decision in *Hurst*.

And it is no accident that Alabama's sentencing amendments occurred the year following *Hurst*. The law did not limit or restrict the death penalty, but merely protected the State's criminal justice system from being upended in the event this Court decided to extend *Hurst* to Alabama's sentencing regime.

Further undercutting the notion that these legal changes show a new consensus against advisory juries is the fact that three of the four States have refused to apply the changes to their sentencing regimes retroactively. If the Alabama Legislature's 2017 amendments reflected a societal shift against advisory juries, presumably the legislation would not have exempted Smith and others from its scope. And, as mentioned above, Indiana did away with advisory juries for capital sentencing only on a prospective basis. *See* Ind. Code § 35-50-2-9(e). Similarly, the Florida Supreme Court has determined that *Hurst* applies only to cases that were not final when *Ring* was announced. *See Reynolds v. Florida*, 139 S. Ct. 27 (2018) (Breyer, J., statement respecting denial of certiorari).

Thus, even if recent procedural changes in Alabama, Florida, and Indiana were indicative of society's views, they reflect a society that values finality over the

retroactive application of those changes. Thus, Smith's claim fails even on its own terms and is not worthy of review.

CONCLUSION

For the foregoing reasons, this Court should deny Smith's petition for writ of certiorari.

Respectfully submitted,

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