

No. 22-6049

IN THE
Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

V.

STATE OF ALABAMA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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It is undisputed that Mr. Smith is scheduled to die on November 17, 2022. Without intervention from this Court, the State of Alabama will execute him, even though his jury voted 11 to 1 for life imprisonment without the possibility of parole, because of judicial override, a practice that has not been permitted anywhere in the U.S. since 2017. Indeed, Mr. Smith is one of 30 individuals currently on Alabama's death row as a result of judicial override. He is the first to be scheduled for execution since 2017.¹

I Mr. Smith's Petition is Procedurally Proper.

Despite the State's repeated assertion that the Alabama Supreme Court's decision "plainly" rejected Mr. Smith's motion below on state law grounds, the Alabama Supreme Court's unreasoned order reflects no such disposition—plain or otherwise. To the contrary, the order states, "the Motion is DENIED." App. 1a. If, as the State asserts, the Alabama Supreme Court had concluded that the motion was procedurally improper and filed in the wrong court, it stands to reason that it would have dismissed the motion and articulated a state law ground. *See, e.g., Lauterbach v. Gordon, Dana, Still, Knight & Gilmore, LLC*, 56 So. 3d 613, 615 (Ala. 2010).

There is a good reason why the Alabama Supreme Court did not dismiss Mr. Smith's stay motion for lack of jurisdiction or other procedural failings. Only the Alabama Supreme Court is authorized to set execution dates. The Alabama Supreme

¹ See Equal Justice Initiative, *Alabama Abolished Judicial Override, But Still Seeks to Execute People Who Received Life Verdicts*, <https://eji.org/news/alabama-abolished-judge-override-but-still-seeks-to-execute-people-who-received-life-verdicts/> (Nov. 4, 2022).

Court has adopted a rule of practice and procedure governing execution warrants.

Alabama Rule of Appellate Procedure 8(d)(1) provides:

When pronouncing a sentence of death, the trial court shall not set an execution date, but it may make such orders concerning the transfer of the inmate to the prison system as are necessary and proper. The supreme court shall at the appropriate time enter an order fixing a date of execution, not less than 30 days from the date of the order, and it may make other appropriate orders upon disposition of the appeal or other review. The supreme court order fixing the execution date shall constitute the execution warrant.

Ala. R. App. P. 8(d)(1). As the comments to that rule explain, it supersedes Ala. Code § 15-18-80 (regarding authority of trial courts to set execution dates), and is “based on the recognition that appeal is automatic in death penalty cases, and that *the supreme court is in the best position to set an execution date and enter any necessary stays.*” *see* Ala. R. App. P. 8 committee comments to 1985 amendment (emphasis added). Accordingly, under Alabama law, the Alabama Supreme Court—not the court of “original jurisdiction”—has the authority to set and stay execution dates. *See James v. Att’y Gen.*, No. 22-12345, 2022 WL 2952492, at *9–10 (11th Cir. July 26, 2022).

Because the Alabama Supreme Court is the only court authorized to set execution dates for condemned individuals, it was only authorized court to hear Mr. Smith’s motion. In *Madison v. Alabama*, 139 S. Ct. 718 (2019), this Court granted a petition for certiorari following an Alabama state trial court’s denial of the petitioner’s claim that his mental condition precluded his execution. Alabama law provided that a challenge to competency to be executed must be brought in an Alabama trial court, with no right to appeal the denial of the claims. *See Weeks v.*

State, 663 So. 2d 1045, 1046 (Ala. Crim. App. 1995). Thus, certiorari was granted after the petitioner had sought relief in the only available venue. Here, Mr. Smith likewise sought relief in the only Alabama state court authorized to set and stay execution dates. Certiorari jurisdiction is proper, and review is warranted.

II The Alabama Supreme Court’s Decision Raises an Important Issue of Federal Constitutional Law and is Inconsistent with Decisions of other State Courts and Historical Practice.

The State’s assertions of “gamesmanship” and arguments regarding the merits of Mr. Smith’s petition are all grounded in a misstatement of his argument—which is that the complete abolition of judicial override, which occurred in 2017 when Alabama finally outlawed the practice, reflects a national consensus against executing people after capital juries have determined that the death penalty is not appropriate. Alabama’s decision to move forward with executing individuals despite jury verdicts for life imprisonment more than 5 years after it became the last state to outlaw it violates the Eighth Amendment’s prohibition on cruel and unusual punishments.

CONCLUSION

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

Respectfully submitted,

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