No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

JERRY SMITH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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October 23, 2023

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CAPITAL CASE

QUESTIONS PRESENTED

Whether *Ake v. Oklahoma*, 470 U.S. 68 (1985), and the Fourteenth Amendment's due process guarantee of fundamental fairness require courts to provide funds for prison mitigation experts to indigent defendants in capital trials?

Whether a prima facie case of racial discrimination is established under *Batson v. Kentucky*, 476 U.S. 79 (1986), where a District Attorney targets African-American jurors with questions during jury selection and treats African-American and white jurors differently in its use of peremptory strikes?

RELATED PROCEEDINGS

State v. Smith, Houston County Circuit Court, No. 1997-270. Judgment entered on February 24, 1998. Sentencing order entered on April 7, 1998.

Ex parte Smith, Alabama Supreme Court, No. 1010267. Conviction affirmed but remanded to trial court for new sentencing proceeding on March 14, 2003.

Smith v. State, Alabama Court of Criminal Appeals, CR-17-1014. Sentence affirmed on September 2, 2022. Application for rehearing overruled on December 9, 2022.

Ex parte Smith, Alabama Supreme Court, No. 2022-1033. Petition for writ of certiorari denied on June 23, 2023.

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OPINIONS BELOW

The opinion of the Alabama Supreme Court affirming Mr. Smith's conviction but remanding the case to the trial court for a new sentencing proceeding, *Ex parte Smith*, 213 So. 3d 214 (Ala. 2003), is attached as Appendix A. The opinion of the Alabama Court of Criminal Appeals, *Smith v. State*, CR-17-1014, 2022 WL 4007496 (Ala. Crim. App. Sept. 2, 2022), affirming Mr. Smith's sentence of death is not reported and is attached as Appendix B. The order of the Alabama Supreme Court denying Mr. Smith's petition for a writ of certiorari on June 23, 2023, *Ex parte Smith*, No. 2022-1033 (Ala. June 23, 2023), is unreported and attached as Appendix C. The certificate of judgment entered by the Alabama Court of Criminal Appeals on June 23, 2023 is attached as Appendix D.

STATEMENT OF JURISDICTION

The Alabama Supreme Court affirmed Mr. Smith's capital murder conviction on March 14, 2003, but remanded the case to the trial court for a new sentencing proceeding. *Ex parte Smith*, 213 So. 3d 214 (Ala. 2003). After Mr. Smith's sentence was reversed six times,[1] the Alabama Court of Criminal

[1] *See Smith v. State*, 213 So. 3d 108 (Ala. Crim. App. 2000) (remanding with instructions to correct sentencing order); *Smith v. State*, 213 So. 3d 108 (Ala.

Appeals ultimately affirmed his sentence of death on September 2, 2022. *Smith v. State*, CR-17-1014, 2022 WL 4007496 (Ala. Crim. App. Sept. 2, 2022). The Court of Criminal Appeals overruled his application for rehearing on December 9, 2022. *Smith v. State*, CR-17-1014, 2022 WL 4007496 (Ala. Crim. App. Sept. 2, 2022). On June 23, 2023, the Alabama Supreme Court denied Mr. Smith's petition for a writ of certiorari, Order, *Ex parte Smith*, No. 2022-1033 (Ala. June 23, 2023), and the Alabama Court of Criminal Appeals entered a certificate of judgment. *Smith v. State*, CR-17-1014, 2022 WL 4007496 (Ala. Crim. App. Sept. 2, 2022). This Court granted Mr. Smith's application to extend the time to file a petition for writ of certiorari on September 12, 2023, extending the time to file to October 23, 2023. *Smith v. Alabama,* No. 23A233 (Sep. 12, 2022). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

Crim. App. 2000) (on return to second remand) (remanding with instructions to correct sentencing order again); *Ex parte Smith*, 213 So. 3d 214 (Ala. 2003) (reversing and remanding for second penalty phase because Mr. Smith was precluded from presenting evidence about his family in mitigation); *Ex parte Smith*, 213 So. 3d 239 (Ala. 2007) (reversing and remanding to conduct *Atkins* hearing); *Ex parte Smith*, 213 So. 3d 313 (Ala. 2010) (reversing and remanding for third penalty phase because of improper contact between victim's family and jury venire); *Smith v. State*, 213 So. 3d 327 (Ala. Crim. App. 2011) (reversing and remanding for fourth penalty phase because trial court improperly instructed on inapplicable aggravating circumstance); *Smith v. State*, 213 So. 3d 327 (Ala. Crim. App. 2011) (reversing and remanding for fifth penalty phase because the trial court improperly closed courtroom during voir dire). When the fifth penalty phase proceeding resulted in a mistrial after an 8-4 vote in favor of sentencing Mr. Smith to death, the trial court conducted a sixth penalty phase proceeding in 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Evidence at trial indicated that under pressure to collect a drug debt from Willie Flournoy, Mr. Smith shot and killed Mr. Flournoy, Theresa Helms, and David Bennett, and attempted to shoot Derrick Gross. (R18. 275–82, 289, 314–16; C18. 733–46.)[2] The evidence indicated that Mr. Smith smoked crack with the victims prior to the shooting. (R18. 268.) Following Mr. Smith's arrest, he cooperated with the investigation, providing a confession within hours of the

[2]"R18." refers to the reporter's transcript from the 2018 penalty phase proceeding, "C18." refers to the clerk's record from the 2018 penalty phase proceeding, "R98." refers to the reporter's transcript from the first trial in 1998, "C98." refers to the clerk's record from the first trial in 1998, "MH1." refers to the reporter's transcript of the motions hearing held on May 9, 2018, and "SH1." refers to the sentencing hearing held on June 7, 2018.

shootings. (R18. 418, 430, 432–37; C18. 733–46.) At trial, the State removed two of the three African-American jurors with for cause or peremptory strikes, leaving one African-American to serve on Mr. Smith's jury. (R98. 465).

During the penalty phase hearing, Mr. Smith presented extensive evidence to establish, as a mitigating circumstance, that he is mildly intellectually disabled, including testimony from experts who have reached this conclusion. (R18. 503, 601–05, 726, 731, 743, 889; C18. 1621–46, 1668–76.) Mr. Smith also presented testimony from lay witnesses who testified to Mr. Smith's reputation as being intellectually disabled. (*See e.g.* R18. 449–56, 521–23, 631, 643–45, 696, 703, 873.)

Mr. Smith also presented evidence that he grew up in extreme poverty as a child and that his childhood home was dilapidated with no indoor plumbing or running water. (R18. 463–65, 518, 550, 784, 893.) His childhood home had holes in the floor and ceiling, farm animals were permitted to come in and out of the house, and human feces was deposited in buckets inside the house. (R18. 555, 783, 799, 804.) Mr. Smith's mother, who he lived with, was prone to violence, including violence against her children, and had shot at a family member. (R18. 465, 493, 518, 527–28, 557, 683, 691–92, 779; C18. 815.) Also, Mr. Smith's mother and father were both alcoholics and Mr. Smith's mother drank during her pregnancies. (R18. 471, 497, 513, 572, 648, 788; C18. 818) In addition,

several of Mr. Smith's family members are intellectually disabled or have other psychological difficulties. (R18. 465–66, 497, 529, 567, 572, 626–27, 629–31, 646–50, 805, 837, 860.) Mr. Smith also presented evidence that he was exposed to drugs at a very young age and was permitted to huff gasoline when he was less than 10 years old, and then later other drugs such as alcohol, marijuana, and crack. (R18. 435, 628–29, 876, 889–90; C18. 818–819, 1034.)

The trial court denied defense counsel's repeated requests for funds to hire a prison expert that could have contextualized Mr. Smith's behavior during his two decades in prison. (MH1. 5–6; C18. 557–70, 610–17.) The jury unanimously found that Mr. Smith had previously been convicted of a violent felony (C18. 412), but did not unanimously conclude that he caused a great risk of death to many persons (C18. 413). By a vote of 10-2, the jury recommended that Mr. Smith be sentenced to death. (R18. 1138–41; C18. 411.) After holding a hearing where no additional evidence was presented, on June 5, 2018, the trial court issued its sentencing order sentencing Mr. Smith to death. (SH. 15; C18. 423–32.)

REASONS FOR GRANTING THE WRIT

In this capital case, the trial court denied Mr. Smith the expert assistance necessary to effectively present over twenty years of his life to the jury. The lower court's opinion affirming the trial court's denial of Mr. Smith's detailed *ex*

parte application for funds for a prison mitigation expert conflicts with this Court's opinion in *Ake v. Oklahoma*, 470 U.S. 68 (1985). Further, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial court erred in refusing to find a prima facie case where the District Attorney targeted African-American jurors during jury selection and treated African-American veniremembers differently in its use of peremptory strikes. *See* Sup. Ct. R. 10(b).

I. UNDER *AKE V. OKLAHOMA*, MR. SMITH, WHO IS INDIGENT, WAS ENTITLED TO EXPERT ASSISTANCE TO EFFECTIVELY PRESENT OVER 20 YEARS OF HIS LIFE SPENT INCARCERATED AS MITIGATING EVIDENCE TO THE JURY.

In *Ake v. Oklahoma*, this Court held that it has "long recognized . . . [the] elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness . . . that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. at 76; *see also California v. Trombetta*, 467 U.S. 479, 485 (1984) ("[C]riminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense."); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the

right to a fair opportunity to defend against the State's accusations."); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality opinion) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"); *McWilliams v. Dunn*, 582 U.S. 183, 186 (2017) ("'Meaningful access to justice,' the [*Ake*] Court added, "has been the consistent theme of these cases.")

This Court's holding in *Ake* is not limited to expert psychiatric assistance where an indigent defendant has made a preliminary showing that his sanity will be a significant factor at trial but instead "can be understood as . . . holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'" *Medina v. California*, 505 U.S. 437, 444–45 (1992).

Mr. Smith is indigent. (C98. 252.) At the time of his sixth penalty phase proceeding in 2018, Mr. Smith had been incarcerated for over two decades. (MH1. 4–6.) This Court has held that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Skipper v. South Carolina*, 476 U.S. 1, 7 (1986). To effectively present the

voluminous institutional records from Mr. Smith's time spent incarcerated as mitigating evidence, Mr. Smith sought the assistance of James Aiken, a qualified prison mitigation expert and former prison warden with over 40 years of experience managing correctional facilities and systems and experience testifying as a prison mitigation expert in numerous cases across 20 states, including Alabama. (C18. 564–65.)

Before the penalty phase proceeding, Mr. Smith filed a detailed *ex parte* application for expenses for Mr. Aiken's services as a qualified prison expert and included his resume and a budget estimate. (C18. 610–16.) In the motion, defense counsel argued, citing this Court's opinion in *Skipper,* that Mr. Smith's time in prison "is important mitigation evidence that Mr. Smith has the right to fully and effectively investigate, develop and present with the assistance of an expert." (C18. 611.) Defense counsel stated that, given Mr. Aiken's experience "conduct[ing] thousands of inmate classification evaluations relative to their adjustment to prison," Mr. Aiken would "render an expert opinion, in an operational context" "from a prison regimen perspective" in "institutional specific terms" regarding Mr. Smith's adjustment to prison. (C18. 610–11.) The motion argued that Mr. Aiken was "necessary to place the testimony about the Defendant's correctional history in context and to explain why it should be viewed as a mitigating factor." (C18. 612.)

Later, at a pre-trial hearing, defense counsel argued that Mr. Smith has been incarcerated since his arrest in 1996, a period of over 20 years, and has spent "15 or so years" on death row at Holman Prison. (MH1. 4–6.) Defense counsel argued that Mr. Aiken would be necessary to "give a full picture of his life to the jury" and without his assistance, they "have no real mechanism to portray, paint, present, show what 20 years, and specifically, the fifteen or so that he has been in Holman prison." (MH1. 5.) Mr. Aiken would "interpret the hundreds, if not thousands, of pages of jail and prison records and adequately describe to the jury what that means . . . for mitigation purposes." (MH1. 5.) The trial court denied Mr. Smith's request for funding. (C18. 617.)

The Court of Criminal Appeals affirmed the trial court's ruling and held that "given the fact that the trial court[] granted Smith funds to hire an investigator and mitigation expert and granted him access to Smith's records from the Alabama Department of Corrections," Mr. Smith failed to show how a prison mitigation expert was necessary because "the stated scope of the work for the 'prison expert'. . . [were] all things that a qualified investigator and mitigation expert could assist Smith's trial counsel in doing." *Smith*, 2022 WL 4007496, at *15. This holding violates *Ake's* "elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness" that Mr. Smith, despite his indigent status, was entitled

to *expert* assistance on this subject. As defense counsel argued in their motion, "an investigator [is] not a prison expert" that could aid defense counsel in the crucial task of "determining what information is helpful for mitigation and developing strategy to present that mitigation evidence." (R18. 611.) Mr. Aiken's testimony and status as an expert undoubtedly would have had a much greater mitigating impact on the jury's deliberations than lay testimony from a general investigator or mitigation investigator. *See McWilliams*, 582 U.S. at 187–88 (2017) ("Unless a defendant is 'assure[d]' the assistance of someone who can effectively perform these functions, he has not received the 'minimum' to which *Ake* entitles him.")

This Court should grant certiorari to affirm the principle articulated in *Ake* that fundamental fairness requires that indigent defendants not be denied the opportunity to a present complete defense simply because they are indigent. 470 U.S. at 76. Testimony from a qualified prison expert with over forty years of experience managing correctional facilities was necessary to equip the jury with an adequate understanding of Mr. Smith's 20 years in prison before deciding whether to sentence him to death. In violation of *Ake* and longstanding precedent from this Court embodying fundamental fairness, it was only Mr. Smith's status as indigent that barred him from introducing testimony from a qualified prison expert that translated 20 years of institutional records into

mitigating evidence for a jury to consider when deciding whether to sentence Mr. Smith to life without the possibility of parole or to death. This Court should grant certiorari in this case and reaffirm the equal protection and due process principles articulated in *Ake*.

II. MR. SMITH ESTABLISHED A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER *BATSON V. KENTUCKY*.

To establish a prima facie case of racial discrimination in jury selection under *Batson v. Kentucky*, defendants must only show a mere *inference* of discrimination, a burden lower than a preponderance of the evidence. 476 U.S., at 96; *Johnson v. California*, 545 U.S. 162, 170 (2005) ("'[M]ore likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case."). In fact, this Court "*assumed* in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated [] [and] [] did not intend the first step to be so onerous" on defendants. *Johnson*, 545 U.S. at 170 (emphasis added). In this case, the trial court refused to find a prima facie case, overruling defense counsel's objection (R98. 465), even though the Houston County District Attorney, who has a documented history of *Batson* reversals near in time to Mr.

Smith's trial,[3] targeted African-American jurors with private voir dire and for cause strikes before using two of his thirteen peremptory strikes to remove two of the three remaining qualified African-American jurors. (C98. 190).[4] This was error.

This Court has repeatedly held that a prosecutor's conduct during voir dire is relevant to the *Batson* analysis. *Batson*, 476 U.S. at 97 ("[P]rosecutor's questions and statements during voir dire examination . . . may support . . . an inference of discriminatory purpose"); *see also Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 265 (2005) ("[S]trikes . . . occurred in a selection process replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race")*; Foster v. Chatman*, 578 U.S. 488, 512–13 (2016) ("Considering all of the circumstantial evidence that 'bear[s] upon the issue of racial animosity,'" in finding that strikes were "motivated in substantial part by discriminatory intent" (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008))); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2247 (2019) ("The State spent far more time questioning the black prospective jurors than the accepted white jurors");

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[3]*See e.g.*, *McCray v. State*, 738 So. 2d 911 (Ala. Crim. App. 1998); *Morris v. City of Dothan*, 659 So. 2d 979 (Ala. Crim. App. 1994); *Ashley v. State*, 651 So. 2d 1096 (Ala. Crim. App. 1993); *Andrews v. State*, 624 So. 2d 1095 (Ala. Crim. App. 1993); *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992); *Rogers v. State*, 593 So. 2d 141 (Ala. Crim. App. 1991).

[4]The striking of the jury did not occur on the record. (R98. 463.)

Miller-El v. Cockrell (Miller-El I), 537 U.S. 322, 344 (2003) ("It follows that, if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual.").

During jury selection in this case, the trial court allowed the parties to privately voir dire veniremembers of their choice. The District Attorney took this opportunity to intensely question five of the seven remaining qualified African-American jurors (as well as the African-American juror that the defense called but then did not question), about whether they knew the victims, had heard anything about the case, or had prior convictions. (R98. 379, 383–86, 406, 420, 450.) He then struck four of these African-American jurors for cause over objection by defense counsel (R98. 396, 409, 428, 452), who pointed out that the District Attorney's reason for striking these four jurors — that they allegedly lied — was both tenuous and an inappropriate basis for a for cause challenge.[5] (*E.g.*, R98. 391).

The District Attorney only privately questioned African-American jurors;

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[5]The Alabama Court of Criminal Appeals agreed with Mr. Smith that the trial court erred in granting for cause challenges to African-American jurors Myra McClendon, Lizzie Wright, and Linda Young. *Smith v. State*, 213 So. 3d 108, 129 (Ala. Crim. App. 2000). The court also found the District Attorney's assertion on the record that he relied on information from the victim's family in calling the African-American jurors for private questioning to be inadmissible hearsay. *Id.* at 127.

he did not seek to privately question any white jurors and, as a result, did not ask a question (or strike) a single white juror on any of these grounds. However, as this Court has recognized, and as defense counsel argued, "this Court's cases explain that disparate questioning and investigation of prospective jurors on the basis of race can arm a prosecutor with seemingly race-neutral reasons to strike" African-American jurors while allowing prosecutors to "decline to seek what they do not want to find about white prospective jurors." *Flowers*, 139 S. Ct. at 2247–48. (R98. 455 ("The State has targeted the blacks since we have begun this Voir Dire, and they have gotten information on them.").) "In other words, by asking a lot of questions of the black prospective jurors or conducting additional inquiry into their backgrounds, a prosecutor can try to find some pretextual reason — any reason — that the prosecutor can later articulate to justify what is in reality a racially motivated strike." *Flowers*, 139 S. Ct. at 2248.

In addition, the District Attorney used his strikes to remove 66 percent of the African-American jurors. (R98. 467; C98. 190); *id.* ("[S]tatistical evidence about the prosecutor's use of peremptory strikes"); *see also Batson*, 476 U.S. at 97 ("[A] 'pattern' of strikes against black jurors . . . might give rise to an inference of discrimination."). Further, the District Attorney used a peremptory strike to remove African-American juror Lillie Stewart, who voted and put a campaign sign in her yard in support of him (R98. 432–33), but did not challenge

white juror Clarence Slaughter, a personal friend that he has known all of his life and campaign supporter. (R98. 181, 190–91, 194); *Miller-El II,* 545 U.S. at 244 (State "did not respond to [white juror] the way it did to [similarly situated black juror]" during voir dire examination and then only struck African-American juror).

At trial, over defense objection (R98. 465), the judge ruled that there was no prima facie case of discrimination. (R98. 470). On appeal, the Court of Criminal Appeals affirmed that decision, finding that Mr. Smith "offers nothing to support his argument other than defense counsel's assertion that he found nothing in his notes that would indicate a race-neutral reason for the strikes. However, the record shows that the prosecutor examined the two veniremembers extensively in regard to matters of legitimate concern to the prosecution; those matters were unrelated to their race." *Smith v. State*, 213 So. 3d 108, 131 (Ala. Crim. App. 2000). The Alabama Supreme Court affirmed without addressing the *Batson* claim specifically. *Ex parte Smith*, 213 So. 3d 214, 217 (Ala. 2003).

This Court should grant certiorari in this case and determine that under *Batson*, Mr. Smith was required only to "proffer enough evidence to support an 'inference' of discrimination," *Johnson*, 545 U.S. at 166, and that given this low standard, the lower courts erred in refusing to require the District Attorney to explain his peremptory strikes.

For the foregoing reasons, Petitioner Jerry Smith prays that this Court grant a writ of certiorari in this case.

Respectfully Submitted,

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