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October 13, 2021

The Honorable Kay Ivey, Governor
State of Alabama
State Capitol Building
600 Dexter Avenue
Montgomery, Alabama 36130

Re: *Clemency Request for Willie B. Smith*

Dear Governor Ivey:

We urge you to grant clemency to Willie B. Smith, an Alabama death row prisoner, who is scheduled to be executed on October 21, 2021. Mr. Smith was convicted and sentenced to death despite strong evidence in post-conviction proceedings that he suffers from an intellectual disability. The United States Supreme Court has concluded that the U.S. Constitution does not permit the execution of people who are intellectually disabled,¹ but due to a technicality, Mr. Smith is unable to have his death sentence overturned by the courts. Granting Mr. Smith clemency and commuting his sentence to life in prison without parole would both protect the citizens of Alabama and allow Alabama to maintain strict compliance with the U.S. Constitution and international and domestic standards for human rights.

Ultimately, we are not asking you to make a legal determination; we are asking you to show mercy on Mr. Smith. Both of the experts who examined Mr. Smith concluded, based on valid IQ testing, that he has a low IQ. Mr. Smith is also sincerely remorseful for his crime and has developed a deep faith in God. In light of these facts, he is worthy of clemency. As the attached letters explain, Mr. Smith has inspired other inmates through his faith. Given a chance to live, he will continue to try to help bring others to God.

The Standard Used to Deny Mr. Smith's Intellectual Disability Claim is Now Unconstitutional

According to the U.S. Court of Appeals for the Eleventh Circuit, Mr. Smith's failed appeal of his death sentence was simply a "matter of timing."² The state court that adjudicated Mr. Smith's intellectual disability claim used a standard that was subsequently found to be unconstitutional by the United States Supreme Court.³ As the Eleventh Circuit found, the state

¹ *Atkins v. Virginia*, 536 U.S. 304, 304-05 (2002).

² *Smith v. Commissioner, Ala. Dep't of Corr.*, 924 F.3d 1330, 1343 (11th Cir. 2019).

³ *Id.*

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court's "approach was acceptable at the time. But after *Moore*, it no longer is."⁴ The United States Supreme Court's decision in *Moore v. Texas*,⁵ however, was not "retroactive" and the Eleventh Circuit was forced to deny Mr. Smith's appeal.⁶ Because the courts are powerless to address the injustice caused by the application of this unconstitutional standard in Mr. Smith's case, clemency is warranted.

In its 2002 decision in *Atkins v. Virginia*, the United States Supreme Court proscribed the practice of executing prisoners who suffer from an intellectual disability. The Court found that the judicial pursuits of retribution and deterrence were not sufficiently supported by the act of executing prisoners suffering from an intellectual disability. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution."⁷ Further, the Court stated that "the same cognitive and behavioral impairments that make [intellectually disabled] defendants less morally culpable ... also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."⁸

However, in *Atkins* the United States Supreme Court did not provide many governing principles on how the lower courts and states were to determine what constituted an intellectual disability or even how to evaluate a claim of intellectual disability. Mr. Smith's evidentiary hearing occurred in November 2008. At that time, Alabama law required Mr. Smith to prove by a preponderance of evidence that he suffered from (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior", and (3) that both prongs 1 and 2 manifested before the age of eighteen.⁹

Since Mr. Smith's evidentiary hearing, the United States Supreme Court has provided additional guidance about what the U.S. Constitution requires with respect to intellectual disability claims. In 2014, the Court decided in *Hall* that the states are required to consider the standard error of measurement in assessing IQ scores.¹⁰ And in 2017, the Court decided in *Moore* that, when making a determination of intellectual disability, lower courts and the states must use the current clinical standards of the medical community.¹¹ The Court specifically found that when considering adaptive functioning, courts must follow the medical community and focus on adaptive *deficits* rather than adaptive strengths.¹²

⁴ *Id.*

⁵ 137 S. Ct. 1039 (2017).

⁶ *Smith v. Commissioner*, 924 F.3d at 1340 (*Moore v. Texas* "cannot be applied retroactively.").

⁷ 536 U.S. at 319.

⁸ *Id.* at 320.

⁹ *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

¹⁰ *Hall v. Florida*, 572 U.S. 701, 723-24 (2014).

¹¹ 137 S. Ct. at 1053.

¹² *Id.* at 1050.

Because Mr. Smith’s evidentiary hearing predated these decisions of the United States Supreme Court, the Alabama courts did not apply these constitutional requirements to Mr. Smith’s case. As described below, Mr. Smith’s test results showed full scale IQ scores of 64 and 72. The Alabama courts, however, consistent with state law at the time, applied a strict cutoff of 70 to determine intellectual disability and did not consider the standard error of measurement. The United States Supreme Court subsequently made clear that courts must consider the standard error of measurement in determining intellectual disability. That requirement, if adhered to by the state court, would indisputably have brought both of Mr. Smith’s IQ scores below Alabama’s 70-point cutoff. As the Eleventh Circuit noted, however, “[t]hat requirement did not emerge until *Hall v. Florida*, ... well after the Alabama courts considered Smith’s case.”¹³

Likewise, as the Eleventh Circuit noted, the state court found that Mr. Smith did not have deficits in adaptive functioning after weighing his adaptive strengths and deficits.¹⁴ This type of weighing is precisely what the United States Supreme Court found to be unconstitutional in *Moore*. As the Eleventh Circuit put it: “Smith’s success on this claim is a matter of timing. After *Moore v. Texas*, it is abundantly clear that states may not weigh a defendant’s adaptive strengths against his adaptive deficits.”¹⁵

The standards applied by the Alabama courts in Mr. Smith’s state court proceedings are now unconstitutional. However, because the Eleventh Circuit has determined that *Hall* and *Moore* cannot be applied retroactively (because the court considered them to be “procedural rules”), these new rules of constitutional law did not help Mr. Smith. Simply stated, Mr. Smith is scheduled to be executed because the state used a standard that is currently unconstitutional to adjudicate his intellectual disability claim.

If the court were to evaluate Mr. Smith today under the current standard, it would find that he suffers from an intellectual disability. It is fundamentally unfair that Mr. Smith will be executed because the defendants in *Hall* and *Moore* did not have their cases heard by the United States Supreme Court prior to Mr. Smith’s evidentiary hearing in Alabama.

Mr. Smith Suffers From an Intellectual Disability

Because an evaluation of the evidence under the current standard demonstrates that Mr. Smith is intellectually disabled, clemency is warranted. Both of Mr. Smith’s IQ scores fell within a range that extended below an IQ score of 70 (Alabama’s cutoff for intellectual disability) when accounting for the standard error of measurement. During a post-conviction

¹³ *Smith v. Commissioner*, 924 F.3d at 1342 (citation omitted).

¹⁴ *Id.* at 1343 (“Alabama argues that the state court did not weigh Smith’s adaptive strengths against his adaptive deficits. We firmly disagree.”).

¹⁵ *Id.*

hearing for Mr. Smith, both Mr. Smith's expert and the State's expert testified after administering a full IQ test to Mr. Smith. Mr. Smith's expert gauged Mr. Smith's IQ to be 64 and noted that Mr. Smith exhibited adaptive deficits in several areas. The State's expert testified that Mr. Smith had "low intelligence" and gauged Mr. Smith's IQ to be 72. He testified that, due to standard errors in measurement, Mr. Smith's true IQ could be as low as 67.

The parties also introduced ample evidence that Smith has "significant adaptive deficits" under Alabama's definition of intellectual disability.¹⁶ For example, Mr. Smith's expert concluded that Smith has the functional independence of an 11-year-old, based on testing of his skills in social interaction and communication, personal living, and community living, as well as his motor skills. Evidence further showed that Smith is particularly limited in his ability to engage in tasks involving "social interaction with other people," "deriving information from spoken and written language," "eating and meal preparation," "dressing," "determining the value of items and using money," and "work habits and prevocational skills." He has the reading skills of an eighth grader and the math skills of a sixth grader. The State's expert independently tested Smith's adaptive functioning and similarly concluded that "Smith has some difficulties with community use, health and safety, self-direction, social skills, and leisure skill areas."

Although the Attorney General disputes that Mr. Smith is intellectually disabled on both the facts and the law, this was a close case. The finality of the punishment associated with capital cases requires that the state reach near certainty that the condemned is both guilty of the crime for which they are accused and is legally eligible to be sentenced to death.¹⁷ Even if he does not meet the legal standard, Mr. Smith's IQ scores, as demonstrated by valid tests from both experts, place him well within the range of individuals with significant subaverage intellectual functioning and he has significant adaptive deficits. Thus, for all the reasons explained by the United States Supreme Court in *Atkins*, executing Mr. Smith is not warranted. Mr. Smith deserves mercy, and this is a case that warrants clemency.

Mr. Smith Experienced a Traumatic Upbringing And is Remorseful for His Crime

Mr. Smith's childhood was punctuated with two main features: abject poverty and an abusive father. It was common for the household in which Mr. Smith and his siblings lived to lose gas and electricity because his mother struggled to pay the bills. As a child, Mr. Smith regularly witnessed his father abusing his mother and, as a result, Mr. Smith pledged to protect and care for his mother when he was able to do so. As described in the attached letters, Mr. Smith's mother tried to raise her children to be people of faith, but Mr. Smith's faith in God did

¹⁶ See *Perkins*, 851 So. 2d at 456.

¹⁷ *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact finding.").

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not flourish until he was removed from the traumatic environment in which he was raised. Mr. Smith is a changed person who is helping to bring about positive changes in others through his mentoring and his prayers.

Mr. Smith displays clear remorse for his actions. He does not deny that his actions were wrong and that he brought extreme sorrow to Ms. Johnson's family. At his Rule 32 hearing, Mr. Smith asked Ms. Johnson's family for forgiveness while at the same time recognizing that he was not deserving of such grace. Even the judge at the hearing acknowledged Mr. Smith's heartfelt remorse but stated such remorse could not factor into his ruling. By contrast, nothing prevents the executive from taking Mr. Smith's remorse into account.

Granting Mr. Smith clemency would recognize the significant disadvantages of his childhood and the commitment to God that he has made during his incarceration. Mr. Smith is clearly remorseful for his actions and he should carry the burden of that remorse beyond October 2021.

Conclusion

Our court system is required to strictly apply the legal standards of the law without prejudice. At times, these legal standards devolve into a determination of whether a case like *Hall* or *Moore* is procedural rather than substantive, and the outcome of such minutia determines whether a person lives or dies. This makes the court system ill-equipped to avoid the fundamental unfairness that is present in Mr. Smith's death sentence. Unless the executive intervenes, Mr. Smith will be executed based on a technicality. The ability to grant clemency and commute Mr. Smith's sentence to life without parole gives the executive the option to avoid the unfairness that the court system cannot. Mr. Smith, his family, and the people represented by the attached letters are respectfully requesting that you exercise that option.

Sincerely,



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