**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 SUPREME COURT OF ALABAMA

## PETITION FOR A WRIT OF CERTIORARI


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**CAPITAL CASE**

## QUESTION PRESENTED

In November 2022, the Alabama Department of Corrections (ADOC) attempted, but failed, to execute Petitioner Kenneth Eugene Smith by lethal injection because it was unable to establish intravenous access to administer the lethal drugs. It is uncontroverted that ADOC inflicted actual physical and psychological pain on Mr. Smith by repeatedly trying (and failing) to establish IV access through his arms, hands, and by a central line as he was strapped to a gurney for hours. Mr. Smith's was the third consecutive execution that ADOC botched or aborted for that same reason. ADOC's failed attempt to execute Mr. Smith caused him severe physical pain and psychological torment, including post-traumatic stress disorder. ADOC later agreed, on the eve of a discovery deadline in a separate method-of-execution case in federal district court, not to attempt a further lethal-injection. But ADOC now intends to make a second attempt to execute Mr. Smith on January 25, 2024—this time by nitrogen hypoxia, which has "never been used to carry out an execution and ha[s] no track record of success[]." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019) (quotation marks and citation omitted).

The question presented is:

Does a second attempt to execute a condemned person following a single, cruelly willful attempt to execute that same person violate the prohibition against cruel and unusual punishments under the Eighth and Fourteenth Amendments to the United States Constitution?

## PARTIES TO THE PROCEEDING

Petitioner is Kenneth Eugene Smith. Respondent is the State of Alabama. Because the petitioner is not 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)

*Smith v. State*, Jefferson County, No. CC-1989-001149.61 (Jefferson Cty, Cir. Ct. Aug. 11, 2023)

*Smith v. State*, No. 1000976 (Ala. Nov. 1, 2023)

*Smith v. State*, No. CR-2023-0594 (Ala. Crim. App. Dec. 15, 2023)

*Ex parte Smith*, No. SC 2023-0934 (Ala. Jan. 12, 2024)

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 Corr.*, No. 22-13781-P, 2022 WL 17069492 (11th Cir. Nov. 17, 2022)

*Smith v. Comm'r, Ala. Dep't of Corr.*, No. 22-13846-P, 2022 WL 19831029 (11th Cir. Nov. 17, 2022)

*Smith v. Alabama*, No. 22-6049 (22A423), 143 S. Ct. 440 ( Nov. 16, 2022)

*Hamm v. Smith*, No. 22A441, 143 S. Ct. 440 (Nov. 17, 2022)

*Hamm v. Smith*, No. 22-580, 143 S. Ct. 1188 (May 15, 2023)

*Smith v. Hamm,* No. 2:22-cv-497, 2023 WL 4353143 (M.D. Ala. July 5, 2023)

*Smith v. Comm'r, Ala. Dep't of Corr.*, No. 24-10095 (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 petition for a writ of certiorari (Pet. App. 1a-13a) is not yet reported but is available at 2024 WL 133084. The order of the Alabama Court of Criminal Appeals affirming the judgment of the Circuit Court of Jefferson County, Alabama (Pet. App. 14a-27a) is not yet reported but is available at 2023 WL 8506490. The order of the Circuit Court of Jefferson County dismissing Mr. Smith's Second Petition for Relief from Death Sentence Under Alabama Rule of Criminal Procedure 32 (Pet. App. 28a-30a) is unreported. The order of the Alabama Supreme Court authorizing the Commissioner of ADOC to carry out Mr. Smith's sentence of death within a time frame set by the Governor of Alabama (Pet. App. 31a-32a) is unreported.

## JURISDICTION

On May 12, 2023, Mr. Smith filed a Second Petition for Relief from Death Sentence under Alabama Rule of Criminal Procedure 32 in the Circuit Court of Jefferson County, Alabama, seeking injunctive relief to prohibit ADOC from making a second attempt to execute him ("Postconviction Petition"). Pet. App. 34a-45a. On August 11, , the circuit court dismissed the Petition. Pet. App. 28a-30a. On December 8, 2023 the Alabama Court of Criminal Appeals affirmed the judgment. Pet. App. 14a-27a. On December 15, 2023, the Alabama Court of Criminal Appeals denied Mr. Smith's petition for rehearing. On January

12, 2024, the Supreme Court of Alabama denied Mr. Smith's petition for a writ of certiorari. Pet. App. 1a-13a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## 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, § 1.

## STATEMENT OF THE CASE

On January 25, 2024, the State of Alabama intends to make a second attempt to execute Mr. Smith. Its first attempt in November 2022 failed because it was unable to set IV lines despite trying for nearly two hours, much as Mr. Smith had alleged would happen in his federal complaint to enjoin that execution.[1] During that failed attempt, ADOC representatives jabbed Mr. Smith repeatedly in his arms and hands, ignoring his complaints that they were penetrating his muscles and causing severe pain, before then attempting to perform a central line procedure on him. For its second attempt, the State obtained permission from the Alabama Supreme Court to employ nitrogen hypoxia—a novel method

[1] *See Barber v. Ivey*, 143 S. Ct. 2545, 2549 (2023) (Sotomayor, J., dissenting from denial of application for a stay) ("Both [Alan] Miller and Smith argued that Alabama would likely botch their execution just as it had botched preceding executions. They were both right.").

of execution that has never been attempted by any state or the federal government—using a recently-released and untested protocol. *See* Pet. App. 31a-32a.

States have failed at executions before. But upon information and belief, if Alabama proceeds with its planned execution attempt, it will be only the second time in U.S. history that a state follows through with a second execution attempt after a previous, failed attempt.[2]

The only other such attempt of which Mr. Smith is aware was addressed by this Court in *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). Even then, the constitutionality of a second execution attempt—after the first attempt at electrocution failed because of an unforeseeable mechanical failure—sharply divided this Court. Four justices concluded that a second attempt did not violate the Eighth Amendment. *Id.* at 463-64 (plurality op.). Four justices would have remanded for further factfinding about the failed execution. *Id.* at 472 (Burton, J., dissenting). Justice Frankfurter cast the deciding vote, reasoning that the Eighth Amendment did not apply to the states at all. *Id.* at 470-71 (Frankfurter, J., concurring).

The outcome in *Resweber* thus turned on a theory that has since been squarely rejected by this Court. *See Robinson v. California*, 370 U.S. 660 (1962). Justice Frankfurter also made clear that his conclusion "[did] not mean that a hypothetical situation, which assumes

[2] Mr. Smith is aware of four other individuals in recent history whose executions were aborted because of an inability to set IV lines. Three of those individuals—Romell Broom (Ohio), Alva Campbell (Ohio), and Doyle Lee Hamm (Alabama)—later died from medical conditions. The fourth, Alan Miller, remains on Alabama's death row. *See Botched Executions*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/executions/botched-executions (last updated Dec. 6, 2022).

a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions." *Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring).

In his Postconviction Petition, Mr. Smith alleged facts—which are unrefuted and therefore must be taken as true at this stage—showing that his case presents the precise hypothetical situation anticipated by Justice Frankfurter: a second execution attempt following "a single, cruelly willful attempt." As the fractured decision in *Resweber* illustrates, this scenario raises questions of tremendous importance that implicate the Constitution's foundational protections of human dignity. And unless this Court intervenes to settle the distinction first recognized by Justice Frankfurter between unforeseeable mishaps and cruelly willful previous attempts, states will be free to engage in serial execution attempts regardless of the reasons or circumstances of the previous failed attempt—and regardless whether that failed attempt caused (and continues to cause) physical and emotional pain. With respect, that is the very definition of torture.[3] And, sadly, this is a question that is likely to recur, even with Mr. Smith: ADOC's chosen nitrogen-hypoxia method for its second execution attempt has never been tried (by any state or the federal government) before.[4]

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[3] *See, e.g.*, *Pizzuto v. Tewalt*, 1:23-cv-00081, 2023 WL 4901992, at *3 (D. Idaho Aug. 1, 2023) (holding that a condemned person stated a plausible Eighth Amendment claim where he alleged that the state "repeatedly reschedul[ed] his execution despite knowing that they cannot carry it out," which "series of abortive attempts at execution amounts to psychological torture," resulting in "intense psychological symptoms" and "mental anguish and torment" (quotation marks and citation omitted)).

[4] Mr. Smith has filed a separate method of execution action under 42 U.S.C. § 1983 to enjoin imminent constitutional violations if Alabama is permitted to employ its novel nitrogen hypoxia protocol. At the time of filing this Petition, an appeal from the district court's denial of Mr. Smith's preliminary injunction motion is pending before the Eleventh Circuit. *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 24-10095 (11th Cir.).

### A. Factual Background

Mr. Smith was tried and convicted of capital murder in 1996. *See Smith v. State*, 908 So.2d 273, 278 (Ala. Crim. App. 2000).[5] 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. The trial court overrode the jury's recommendation and sentenced Mr. Smith to death. In September 2022, the Alabama Supreme Court scheduled Mr. Smith's execution by lethal injection for November 17, 2022, but the State, through ADOC, failed to execute him on the scheduled date because it was unable to set IV lines. Pet. App. 36a ¶ 6.

On May 12, 2023, Mr. Smith filed the Postconviction Petition in the Circuit Court of Jefferson County, Alabama. Pet. App. 34a-45a. In it, he alleged that ADOC's failed attempt to execute him in November 2022 caused him severe physical and psychological pain, including post-traumatic stress disorder, and that ADOC personnel knew or should have known that the IV team would have great difficulty establishing IV access based on difficulties that had occurred in attempting to execute two other inmates just months earlier. *Id.* Mr. Smith asserted that a second attempt to execute him following those botched executions, including the cruelly willful attempt to execute him, would violate his

[5] 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.*

right to be free from cruel and unusual punishment under the Eighth Amendment. *Id.* A summary of Mr. Smith's unrefuted allegations, which, under Alabama law "'must be accepted as true'" at the pleading stage "'in a postconviction petition,'" follows. *McBurnett v. State*, 266 So.3d 122, 126 (Ala. Crim. App. 2018) (citation omitted).

On November 17, 2022, "[t]he State unsuccessfully attempted to execute Mr. Smith" and instead "aborted the attempt because ADOC was unable to set intravenous ('IV') lines through which it could inject Mr. Smith with the lethal drugs." Pet App. 36a ¶ 12. ADOC failed to establish IV access using the only two methods authorized by its Lethal Injection Protocol—the "standard procedure" and a "central line procedure." Pet. App. 39a ¶ 23. "Mr. Smith's was the third consecutive execution that the State has botched or aborted all for the same reason—the inability of ADOC personnel to place IV lines in condemned people." Pet. App. 39a ¶ 22.

"It should be a straightforward process to establish IV access by the procedures allowed by the [ADOC's] Protocol or to determine that neither is achievable," taking on average "'2.5 to 16 minutes, with difficult IV access requiring as much as 30 minutes.'" Pet. App. 39a ¶ 24 (citation omitted). "And '[p]atients experience increased and potentially significant pain in association with multiple IV attempts.'" Pet. App. 39a-40a ¶ 24 (citation omitted). But "[i]n attempting to establish IV access, ADOC botched the execution of Joe Nathan James on July 28, 2022, taking three hours to accomplish it[,] and failed to establish IV access after nearly two hours of unsuccessful attempts during the aborted executions of Alan Eugene Miller on September 22, 2022 and Mr. Smith on November 17, 2022." Pet. App. 40a ¶ 25.

"ADOC did nothing after its botched execution of Mr. James and its failed execution of Mr. Miller to investigate what happened and why to prevent a recurrence" before it subsequently attempted to execute Mr. Smith. Pet. App. 40a ¶ 26. Instead, "the State and ADOC simply moved forward with Mr. Smith's planned execution on November 17, 2022," Pet. App. 40a ¶ 27, even though they "knew or should have known based on the difficulties that occurred during Mr. James's execution and Mr. Miller's attempted execution that the IV Team would have great difficulty establishing IV access, resulting in severe physical and psychological pain to Mr. Smith." Pet. App. 40a ¶ 28.

The State and ADOC "further knew or should have known that what they allegedly had done to Mr. Miller—as described in a pleading he filed in federal court—stated a claim for violation of the right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment to the U.S. Constitution." Pet. App. 40a-41a ¶ 29 (citing *Miller v. Hamm*, No. 2:22-cv-506, 2022 WL 16721093, at *13–15 (M.D. Ala. Nov. 4, 2022)). "Despite all that, they recklessly and knowingly charged ahead with deliberate indifference to Mr. Smith's rights and with the same results." Pet. App. 41a ¶ 30.

"The State's failed attempt to execute Mr. Smith caused him severe physical and psychological pain that has had ongoing effects." Pet. App. 36a ¶ 13; *see also* Pet. App. 39a ¶ 22. "Mr. Smith continues to be in a great deal of physical and emotional pain from the attempted execution in November [2022]." Pet. App. 41a ¶ 34. Among other things, "ADOC's failed attempt to execute Mr. Smith has had chronically severe psychological consequences, including severe post-traumatic stress disorder. In addition to difficulty sleeping, Mr. Smith's symptoms include nightmares, hypervigilance, hyperarousal, and

disassociation (a defense mechanism to suppress threatening thoughts)." Pet. App. 41a ¶ 35. "ADOC's threat to make a second attempt to execute Mr. Smith exacerbates his symptoms and further destabilizes him." Pet. App. 41a ¶ 36.

A federal district court construing Mr. Smith's parallel factual allegations found that they "support a plausible claim of cruel superadded pain as part of the execution, as multiple needle insertions over the course of one-to-two hours into muscle and into the collarbone in a manner emulating being stabbed in the chest, in combination with being strapped to the gurney for up to four hours and at one point being placed in a stress position for an extended period of time, goes 'so far beyond what [is] needed to carry out a death sentence that [it] could only be explained as reflecting the infliction of pain for pain's sake.'" *Smith v. Hamm*, No. 2:22-cv-497, 2023 WL 4353143, at *7 (M.D. Ala. Jul. 5, 2023) (citation omitted) (alterations in original). On the eve of being required to respond to discovery into its failed execution attempt in that federal case, the State suddenly changed its position about the availability of lethal injection for Mr. Smith, stating for the first time that lethal injection was not available as to Mr. Smith and that it would be seeking authority to make Mr. Smith the first-ever nitrogen-hypoxia execution instead. *Smith v. Hamm*, No. 2:22-cv-497, DE 102, 104, 106 (M.D. Ala.). Based on the State's representations, the district court entered an order permanently enjoining the State from executing Mr. Smith by lethal injection. *Id.*, DE 112. Accordingly, his allegations about what occurred on November 17, 2022, when ADOC tried and failed to execute him, remain unrebutted.

### B. Legal Background

After Mr. Smith filed his Postconviction Petition in the Circuit Court of Jefferson County, the State moved to dismiss the petition. About five hours after Mr. Smith submitted his opposition, the circuit court denied Mr. Smith's claim and dismissed the petition without an evidentiary hearing. Pet. App. 28a-30a. The totality of the court's analysis supporting the denial of relief is as follows:

> In reviewing the petitioner's claim, the Court is of the opinion that the petition is insufficiently pleaded as it amounts to bare allegations that the petitioner's constitutional rights have been violated. The petitioner has failed to plead sufficient facts to show that he is entitled to relief or that a manifest injustice would result if relief were denied. His citing of the U.S. Constitution, Article I, § 15 of the Constitution of Alabama, and the [bare] allegations listed in his petition amount to mere conclusions of law and warrant no further proceedings. Rule 32. (b), Ala. R. Crim P. [sic].

Pet. App. 30a (alteration in original).

The court then "determined that there are no material issues of law or facts that would entitle the Petitioner to relief under Rule 32 and that no purpose would be served by any further proceedings." *Id.*

The Alabama Court of Criminal Appeals affirmed the summary dismissal of the Postconviction Petition. 14a-27a. The court relied heavily on the plurality opinion in *Resweber* to reason that "[i]f it is not cruel and unusual punishment to execute an inmate who has been subjected to a current of electricity in a previous failed execution attempt, then it is certainly not cruel and unusual punishment to execute an inmate after the failure to insert an IV line in a previous failed execution attempt." Pet. App. 23a-24a. The Court of Criminal Appeals never acknowledged or addressed that the decisive vote from Justice

Frankfurter did not rest on any conclusion about whether being "subjected to a current of electricity in a previous failed execution attempt" rises to the level of cruel and unusual punishment. It instead rested on his conclusion that the Eighth Amendment did not apply to states at all.[6] Nor did the Court of Criminal Appeals acknowledge that Mr. Smith had alleged facts showing that the previous execution was a "single, cruelly willful attempt," which Justice Frankfurter made clear would "raise different questions." *See Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring). The Court of Criminal Appeals also cited a decision of the Ohio Supreme Court (*State v. Broom*, 51 N.E.3d 620 (Ohio 2016)) in reasoning that a second execution attempt would not violate the Eighth Amendment because, in the court's view, "Smith's life was never at risk because the drugs were never administered." Pet. App. 25a.

The Alabama Supreme Court denied Mr. Smith's petition for a writ of certiorari. Pet. App. 1a-13a.

## REASONS FOR GRANTING THE PETITION

### I. This Case Presents an Exceptionally Important Question Regarding Whether the Constitution Limits a Second Execution Attempt Following a Previous, Cruelly Willful Attempt.

Only once in its history has this Court decided whether the Eighth Amendment prohibits a state from attempting to execute a condemned person after having tried, but failed, in a previous attempt. *Resweber*, 329 U.S. 459.

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[6] *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (quotation marks and citation omitted)).

*Resweber* involved "a unique situation" in which the petitioner, Willie Francis, was "placed in the official electric chair of the State of Louisiana" but "presumably because of some mechanical difficulty, death did not result" when the switch was thrown. *Id.* at 460. The Louisiana Supreme Court denied the petitioner's applications to prevent a second execution attempt. *Id.* at 461. This Court granted certiorari to "consider the alleged violations of rights under the Federal Constitution," including the Eighth Amendment, "in the unusual circumstances" of that case. *Id.* The result was a fractured decision in which a four-justice plurality concluded that a second execution attempt under the unique circumstances of that case did not violate the Eighth Amendment; four dissenting justices would have vacated and remanded for further factfinding about the failed execution attempt; and Justice Frankfurter, the deciding vote, concluded that the Eighth Amendment was not applicable to the states, and therefore did not preclude a second execution attempt.[7]

As the plurality, concurring, and dissenting opinions in *Resweber* establish, failed execution attempts present important and divisive questions about whether a second attempt creates a "lingering death" in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 463-64 & n.4.

Justice Reed, writing for a plurality of four justices, began with the assumption that "the state officials carried out their duties under the death warrant in a careful and humane manner," as the aborted attempt had been "an unforeseeable accident" and "nothing [had] been brought to [the Court's] attention to suggest the contrary." *Id.* at 462, 464. Under

[7] This Court has since held that the Eighth Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *See, e.g.*, *Robinson*, 370 U.S. 660.

those circumstances, the plurality opinion rejected the petitioner's argument that a second execution attempt would "subject[] him to a lingering or cruel and unusual punishment." *Id.* at 464. The plurality opinion observed that "[t]he fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution." *Id.*

The four dissenting justices "believe[d] that the unusual facts before [the Court] require that the judgment of the Supreme Court of Louisiana be vacated" and the case be remanded for "the determination of certain material facts not previously determined, including the extent, if any, to which electric current was applied to [the petitioner] during his attempted electrocution." *Id.* at 472 (Burton, J., dissenting). The dissent explained that "[i]n determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution," and "[t]he contrast is that between instantaneous death" and an impermissible "death by installments." *Id.* at 474.

In his concurring opinion, Justice Frankfurter opined that the Eighth Amendment did not apply to the states at all; only the Fourteenth Amendment did. *Id.* at 470 (Frankfurter, J., concurring). He further reasoned that because the Fourteenth Amendment demanded only that the state not "offend[] a principle of justice [r]ooted in the traditions and conscience of our people," and because the state's initial failure was simply "an innocent misadventure," and therefore not in violation of any deeply-rooted "principle of justice," the Constitution did not prohibit a second execution attempt. *Id.* (quotation marks and citation omitted). In other words, according to Justice Frankfurter, the Court "must abstain from interference with State action no matter how strong one's personal feeling of revulsion

against a State's insistence on its pound of flesh." *Id.* at 471. But Justice Frankfurter also explained that his conclusion "***does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions***." *Id.* (emphasis added).

Seventy-seven years after *Resweber* was decided, this case now presents the precise hypothetical situation envisioned by Justice Frankfurter: A state insisting on another execution attempt—this time by a novel method never before used by any state or the federal government—after having already subjected Mr. Smith to cruelty and superadded pain during a previous, failed attempt at lethal injection. Indeed, it is unrebutted that ADOC inflicted actual physical and psychological pain on Mr. Smith by repeatedly trying (and failing) to establish an IV line after he was strapped to a gurney for hours, causing him (lingering) pain the whole time. Those are different, more egregious facts than were before the Court in *Resweber*, and the hypothetical question posed by Justice Frankfurter is just as important now as it was seventy-seven years ago, when this Court granted certiorari to hear the "unique situation" presented there. The Court should do the same here.

## II. This Case Presents a Rare Opportunity to Settle the Meaning of a "Lingering Death" In the Context of Aborted Executions.

This Court has long recognized that "[p]unishments are cruel when they involve torture or a lingering death." *In re Kemmler*, 136 U.S. 436, 447 (1890). But in the 134 years since *In re Kemmler*, the Court has provided limited guidance on what constitutes a "lingering death" in violation of the Eighth Amendment in the context of execution attempts.

In addition to *Resweber*, this Court's 2008 decision in *Baze v. Rees* is one of the few decisions addressing this question. 553 U.S. 35 (2008). In concluding that Kentucky's lethal injection protocol did not violate the Eighth Amendment, Chief Justice Roberts, in an opinion joined by Justice Kennedy and Justice Alito, discussed the critical distinction that Justice Frankfurter had drawn in *Resweber*. *Id.* at 50. Specifically, the Chief Justice Roberts observed that while an accidental mechanical malfunction "did not give rise to an Eighth Amendment violation," "a hypothetical situation involving a series of abortive attempts at electrocution would present a different case." *Id.* (quotation marks and citation omitted). The opinion further explained that "[i]n terms of [the Court's] present Eighth Amendment analysis, such a situation—unlike an innocent misadventure—would demonstrate an objectively intolerable risk of harm that officials may not ignore." *Id.* (quotation marks and citations omitted). *See also Wilson v. Seiter*, 501 U.S. 294, 297 (1991) ("Because the first attempt [in *Resweber*] had been thwarted by an unforeseeable accident, the officials lacked the culpable state of mind necessary for the punishment to be regarded as cruel, regardless of the actual suffering inflicted." (quotation marks omitted)).

Accordingly, while this Court's more recent jurisprudence has acknowledged the important distinction between the "innocent misadventure" in *Resweber* and failed attempts that cause actual pain and demonstrate an objectively intolerable risk of harm, it has never squarely addressed the latter situation. And although survivors of execution attempts are unquestionably the exception, Mr. Smith's situation is far from singular.

In 2009, for example, the State of Ohio tried and failed to execute Romell Broom because it could not maintain viable IV connections. *See Broom v. Shoop*, 963 F.3d 500, 503

(6th Cir. 2020). The various opinions resulting from eleven years of litigation following that incident demonstrate that failed execution attempts raise legal and moral issues of "national importance" on which reasonable jurists sharply disagree. *See, e.g.*, *State v. Broom*, No. 96747, 2012 WL 504504, at *4 (Ohio Ct. App. Feb. 16, 2012) ("We recognize this is a case of first impression and potentially of national importance . . . and given the magnitude of the issues presented, we understand Broom's insistence on getting his day in court.").

After the failed execution attempt, Mr. Broom filed a petition for postconviction relief in Ohio state court, arguing that any future attempt to execute him would be unconstitutional. *See State v. Broom*, 51 N.E.3d 620, 625 (Ohio 2016). The state trial court rejected that argument, the Ohio Court of Appeals affirmed, and the Ohio Supreme Court, in a 4-3 decision, held that the Eighth Amendment did not bar a second execution attempt. *See id.* Two dissenting justices argued that because there was "an unresolved dispute of fact at the heart of the case, namely, the reason for the state's inability to establish IV access at the start of Broom's attempted execution," he was entitled at least to an evidentiary hearing. *Id.* at 634 (French, J., dissenting). Another dissenting justice contended that a second execution attempt would violate the Eighth Amendment primarily because, in his view, standards of decency have "evolved substantially" since *Resweber*. *Id.* at 639-40 (O'Neill, J., dissenting). This Court denied certiorari. *But see Sireci v. Florida*, 137 S. Ct. 470, 471 (2016) (Breyer, J., dissenting from denial of certiorari) ("I would have heard Broom's claim."). In a subsequent federal habeas proceeding, a panel of the Sixth Circuit Court of Appeals recognized that "Broom makes a compelling case on the merits, one that

some members of the panel might be tempted to accept were this case before [the court] on direct review." *Broom*, 936 F.3d at 511.[8]

Alabama's recent history of botched or failed executions further demonstrates the need for clarity on the question of what constitutes a lingering death. Just two months before attempting to execute Mr. Smith, Alabama failed in its attempt to execute Alan Miller after two hours of unsuccessful attempts to establish IV access. Pet. App. 40a-41a ¶ 25-29.[9] And just months before that, Alabama took three hours to establish IV access in executing Joe Nathan James. Pet. App. 40a ¶ 25. That string of failures—resulting in needless physical and emotional suffering—demonstrates the need for guidance on the meaning of a "lingering death;" without it, there is no outer limit on a state's ability to engage in protracted executions or even, as is the case here, an execution by installments over the course of more than one year.

**III. This Case Is a Strong Vehicle For Addressing the Eighth Amendment Issue.**

This case is an ideal vehicle for addressing the Eighth Amendment issue presented by aborted execution attempts because Mr. Smith's factual allegations are unrebutted and thus were required to be accepted as true in the state court. *See McBurnett,* 266 So.3d at 126. Those unrefuted factual allegations include the following:

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[8] Ultimately, Ohio never executed Romell Broom; he died of COVID-19 in December 2020. *See Rommel Broom, Who Survived Botched Execution, Dies of COVID-19 on Ohio Death Row*, DEATH PENALTY INFORMATION CENTER (Dec. 30, 2020), https://deathpenaltyinfo.org/news/romell-broom-who-survived-botched-execution-dies-of-covid-19-on-ohio-death-row.

[9] Although Alan Miller's failed execution attempt occurred before Mr. Smith's, Alabama has not presently sought authority to attempt again to execute Mr. Miller.

- Mr. Smith's was the third consecutive execution that ADOC botched all for the same reason: its incompetence and inability to set IV lines. Pet. App. 39a-40a ¶ 22, 25-27.
- ADOC did no investigation after the first two botched executions and before it attempted to execute Mr. Smith. Pet. App. 39a-40a ¶ 22, 27.
- Given the previous two botched executions and ADOC's failure to investigate and remedy their cause, State officials responsible for Mr. Smith's execution "knew or should have known . . . that the IV team would have great difficulty establishing IV access, resulting in severe physical and psychological pain to Mr. Smith." Pet. App. 40a ¶ 28.
- State officials "further knew or should have known" that the same alleged consequences that befell Mr. Miller during and after his failed execution only two months earlier "stated a claim for violation of the right to be free from cruel and unusual punishment guaranteed by the Eighth Amendment to the U.S. Constitution." Pet. App. 40a-41a ¶ 29.
- ADOC nevertheless "recklessly and knowingly charged ahead with deliberate indifference to Mr. Smith's rights and with the same results." Pet. App. 41a ¶ 30. ADOC repeatedly jabbed Mr. Smith with needs while attempt—unsuccessfully—to establish IV access through his arms, hands, and by attempting to insert a central line. Pet. App. 41a ¶ 31-32.
- As Mr. Smith foresaw, ADOC's actions "caused him severe physical and psychological pain that has had ongoing effects," including "severe post-

traumatic stress disorder." Pet. App. 36a ¶ 13; Pet. App. 41a ¶ 35. Indeed, ADOC officials ignored Mr. Smith's complaints that they were penetrating his muscles and causing severe pain. Pet. App. 41a ¶ 31.

- And "ADOC's threat to make a second attempt to execute Mr. Smith exacerbates his symptoms and further destabilizes him." Pet. App. 41a ¶ 36.

Those unrefuted allegations plainly demonstrate a series of botched and aborted executions that ADOC failed to investigate before its single, cruelly willful attempt to execute Mr. Smith, which caused him actual, severe, and ongoing physical and psychological pain that is exacerbated by ADOC's continuing threat to make a second attempt by a new, experimental method. Those facts, in turn, support the inference that ADOC's conduct to date and any further attempt to execute Mr. Smith following that series of botched and failed executions, including the single, cruelly willful attempt to execute Mr. Smith, suggests "cruelty," *i.e.*, that State officials' actions are "destitute of pity, compassion or kindness," *Bucklew*, 139 S. Ct. at 1123 (citations omitted), and would pose an "objectively intolerable risk of [further] harm that officials may not ignore," *Baze*, 553 U.S. at 50 (quotation marks and citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

*/s Robert M. Grass*

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