Alabama executes Willie B. Smith III, an intellectually disabled prisoner, after US Supreme Court fails to intervene

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Willie B. Smith III, 52, was executed Thursday night in Alabama, despite overwhelming evidence of his intellectual disability. The US Supreme Court declined to hear an 11th-hour appeal on Smith's behalf, clearing the way for his execution.

Smith was convicted and sentenced to death for the 1991 murder of Sharma Ruth Johnson, 22. Smith robbed Johnson, the sister of a police officer, then forced her into the trunk of her car, shot her and set her car on fire. Smith spent close to three decades on death row.

Smith's jury voted 10-2 to recommend the death penalty, and his trial judge sentenced him to death. Alabama is the only state that still allows a death sentence to be imposed without a unanimous recommendation from the jury.

His execution was delayed by several hours while the US Supreme Court considered a petition by his lawyers over the method of execution. Smith later died by lethal injection in the execution chamber of the Holman Correctional Facility in Atmore, Alabama. He was pronounced dead at 9:47 p.m., according to the Associated Press (AP).

On October 17, a federal district court denied for a second time Smith's claim that putting him to death by lethal injection violated his rights under the Americans with Disabilities Act (ADA). Smith was set to die by lethal injection, Alabama's default method of execution, after he failed to fill out a form from the Alabama Department of Corrections in which he could have designated the alternative method of execution, nitrogen hypoxia.

State death row inmates, including Smith, were given 30 days from June 1, 2018, to choose lethal injection or nitrogen hypoxia as their means of execution. They were required to sign, date and return the provided form. The *Montgomery Adviser* reports that several inmates received the notice "a few days before the deadline and described a scramble to contact attorneys and understand the offer to them."

Smith's legal team said he needed assistance to understand the form and what to do with it. They said their client's "significant cognitive deficiencies" qualified him for protection under the ADA and required Alabama to provide him reasonable accommodations to designate a method of execution. A successful appeal on this issue would have stayed Smith's execution, not prevented it outright.

Alabama is one of three states, the others being Oklahoma and Mississippi, that authorizes nitrogen hypoxia as an execution method. No state has used it. In a nitrogen hypoxia execution, the prisoner would breathe pure nitrogen, depriving the body of oxygen and causing asphyxiation.

Oklahoma, the only state other than Alabama to have publicly discussed plans to use nitrogen hypoxia executions, said in 2019 that at least seven companies declined to sell them a"gas delivery device" for executions. Pharmaceutical companies in the past have refused to sell drugs to states to be used for lethal injection, saying the use of their products for executions violates their terms of business.

"In a very real sense, execution by nitrogen hypoxia is experimental," Death Penalty Information Center Executive Director Robert Dunham told *Newsweek*. "It has never been done before and no one has any idea whether it is going to work the way its proponents say it will. And there is no way to test it because it is

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completely unethical to experimentally kill someone against their will."

Alabama says that its nitrogen hypoxia execution protocol and facilities are nearly complete, but the state has not indicated whether it plans to carry out nitrogen-gas executions by filling a specially designed chamber with the gas or by administering a lethal dose of the gas through a breathing apparatus strapped to the prisoner's face.

Arizona announced in June that it is ready to revive another method of execution, saying it has "refurbished" its gas chamber and is prepared to use cyanide gas, which was used by the Nazis to murder more than a million people during the Holocaust.

Willie Smith's final appeal, and its deadly outcome, was the latest in a series of legal developments in his case. The US Supreme Court ruled in 2002 in *Atkins v. Virginia* that the use of capital punishment against individuals with intellectual disabilities violates the Eighth Amendment's ban against cruel and unusual punishment. In July 2020, however, the high court declined to review Smith's appeal of Alabama state and federal courts' denial of his *Atkins* claim.

Alabama denied Smith's claim on the basis that he had not proved that his intellectual and adaptive functioning were sufficiently impaired to be diagnosed as intellectually disabled. The state courts ruled that Smith's IQ score was 72, unadjusted for measurement errors. This was just two points above the state's IQ cutoff of 70. Focusing on his adaptive skills, the courts claimed these skills outweighed his intellectual disability.

In 2014, the Supreme Court ruled in *Hall v. Florida* that the use of IQ cutoff scores is unconstitutional, and subsequently ruled in *Moore v. Texas* that the focus of a determination of adaptive functioning should be on the presence or absence of deficits, not on whether there are counterbalancing strengths.

The US Court of Appeals for the Eleventh Circuit agreed that Smith would have been ineligible for execution if Alabama had applied a constitutionally valid standard for determining intellectual disability. However, it ruled that his execution could proceed because *Hall* and *Moore* should be applied only to cases that had not yet been decided on appeal at the time of the Supreme Court decision. It was, they argued, simply "a matter of timing"—timing that arbitrarily condemned Smith to death.

On February 10, 2021, a three-judge panel of the Eleventh Circuit voted to enjoin Alabama from carrying out Smith's execution on the basis of the state's refusal to allow his spiritual adviser to attend to him in the execution chamber. The Supreme Court left the injunction in place unless the state would allow Smith's pastor to be present in the execution chamber, which they agreed to in June, removing that barrier to his execution.

Willie Smith was the eighth person to be executed in the US in 2021, including three federal prisoners. Since the Supreme Court reinstated the death penalty in 1976 after a brief hiatus, 1,537 condemned prisoners have met their deaths, including the intellectually disabled, those convicted of crimes committed as juveniles and foreign nationals denied their consular rights. Victims of capital punishment in the US are overwhelming poor and working class. Ethnic minorities are disproportionately represented among them.

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