No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

KIM T. THOMAS,
ACTING COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW,
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com
Counsel for Petitioner

Blank Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITY

Blank Page

SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner hereby submits this supplemental brief in response to the intervening supplemental brief filed by respondent.

ARGUMENT

The State's supplemental brief misconceives the significance of this Court's decision in *Walker v. Martin*, No. 09-996, slip op. (Feb. 23, 2011), mischaracterizes the first question presented by this case, and only underscores the need for certiorari.[1]

1. The State's central contention is that "*Walker* changed nothing." Resp.Supp.Br.9. Maples disagrees and has explained that *Walker* reinforces important aspects of the adequacy doctrine and casts even further doubt on the legitimacy of the divided Eleventh Circuit decision in this case. Pet.Supp.Br.3-6. But if the State is right, then *Walker* only reinforces the need for certiorari. Indeed, the State itself acknowledges (at 2) that *Walker* did not resolve the circuit splits discussed in the petition concerning when the inconsistent application of state law renders a procedural rule inadequate, whether a court may base an adequacy determination upon a *post hoc* analysis of state law or decisions issued *after* the events in question, and which party bears the burden of proof in determining the adequacy of a state rule. Pet.19-21. Those circuit splits

---

[1] The State acknowledges that the second question presented is *not affected by the Court's decision in Walker.* Resp.Supp.Br.1, 9. It nevertheless goes on to suggest that this issue—which itself warrants certiorari—was "not raised below." Resp.Supp.Br.9. That is incorrect. Pet.Reply.8-10, 1a-6a.

concern critical aspects of the adequacy doctrine—going to the heart of the determination whether a state rule is "firmly established" and "regularly followed."

Moreover, the confusion surrounding the adequacy doctrine is both widespread and well documented. *See* Pet.12-13; NACDL.Br.4-5. Indeed, in *Walker*, California told this Court that certiorari was "need[ed] to further clarify the rules relating to the 'adequacy' of state procedural bars," citing this Court's own statement in *Beard v. Kindler*, 130 S. Ct. 612 (2009), that *Beard* "presented an 'unsuitable vehicle for providing broad guidance on the adequate state ground doctrine.'" *Walker* Petition for Writ of Certiorari 6 (U.S. Feb. 17, 2010) (quoting *Beard*, 130 S. Ct. at 619); *see also Walker* Br. for Criminal Justice Legal Foundation in Support of Certiorari 9 (U.S. Mar. 24, 2010). If Alabama is correct that "*Walker* changed nothing," Resp.Supp.Br.9, then *Walker* does "nothing" to resolve the need for guidance from this Court.

It is true that granting certiorari in this case would mean delving into the adequacy doctrine for the third time in the past few terms. Resp.Supp.Br.3. But it is not unusual for the Court to address an area of law with broad application that has generated widespread confusion by granting certiorari in more than one case to enable the Court to address the issue from the different perspectives that different cases may bring. *Cf., e.g., Skilling v. United States*, 130 S. Ct. 2896 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010); *Black v. United States*, 130 S. Ct. 2963 (2010). This case presents a timely and well-suited vehicle to provide the clarification that—according to the State's own assessment of *Walker*—is still needed.

2. Alabama's efforts to deconstruct *Walker* and remake it into a tool that advances its cause likewise

bolster the need for review. The State emphasizes the Court's observations that "'[a] *discretionary* rule ought not be disregarded automatically upon a showing of *seeming* inconsistencies'" and that the adequacy doctrine does not preclude the "'*appropriate* exercise of discretion.'" Resp.Supp.Br.5, 2 (quoting *Walker*, slip op. at 11, 8 (emphases added)). The State then extrapolates that, "even if the Alabama courts applied their discretion inconsistently between Maples' case and a similar case ... , this Court closed the door on Maples' FERF argument in *Walker*." Resp.Supp.Br.5. In other words, the State's main take-away is that *Walker* lowers the bar for determining when the inconsistent application of a state procedural rule renders the rule inadequate. *See also* Resp.Supp.Br.4 (suggesting that this case should be subject to "*less stringent* FERF review"). But that argument fails to appreciate *Walker*'s unanimous *affirmation* that the adequacy doctrine remains a vital safeguard against the arbitrary use of state rules to bar federal claims (*see* Pet.Supp.Br.3-4) and overlooks the fundamental difference between discretionary and mandatory rules.

Walker involved a discretionary timing rule that gave state courts broad leeway to determine when a state habeas petition was timely. As described by this Court, the California rule at issue directed habeas petitioners "to file known claims 'as promptly as the circumstances allow,'" *Walker*, slip op. at 1 (citation omitted), and without "'substantial delay,'" *id.* at 3 (quoting state cases). In holding that that rule was adequate as applied in *Walker*, the Court stressed that "'[s]ound procedure often requires discretion to extract or excuse compliance with strict rules,' and we have no cause to discourage standards allowing courts to exercise such discretion." *Id.* at 12 (citation omitted).

Unlike the discretionary rule at issue in *Walker*, the procedural rule at issue here is mandatory in nature. Alabama again inexplicably suggests—as it did in its brief in opposition, *see* Pet.Reply.3-4—that the adequacy question is trained on the State's general 42-day deadline for appeals. *See* Resp.Supp.Br.3-6. In fact, however, the adequacy issue presented here concerns Alabama's written procedural rule providing for an out-of-time appeal when "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). *See also* Pet.13-14; Pet.Reply.3-4.[2] As the State recognized before this case reached this Court, Rule 32.1(f) establishes a stand-alone "no-fault, out-of-time-appeal rule." CA11.Appellees.Br.16; *see* Pet.Reply.4. Under that rule, when an inmate is not at fault for the failure to appeal within the prescribed time period—as the State does not dispute is the case for the inmate here—the inmate is "*entitled* to an out-of-time appeal." *Noble v. State*, 708 So. 2d 217, 217 (Ala. Crim. App. 1997) (emphasis added); *see* Pet.Reply.6-7.

As courts have recognized, the equation changes considerably when the procedural rule changes from discretionary to mandatory. *See, e.g., Bostick v.*

---

[2] The State repeatedly refers to the procedural rule at issue as the "Alabama's 42-day deadline" and mentions Rule 32.1(f)'s express, no-fault out-of-time appeal rule only once in passing. Resp.Supp.Br.5. As Maples has explained, the general 42-day rule in no way supersedes Rule 32.1(f) or the cases applying it. Pet.Reply.4. And the State's remarkable effort to bury Rule 32.1(f) in the sand only highlights that it has no persuasive response to the adequacy question actually presented by this case.

Stevenson, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("In *Kindler*, the [Supreme] Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily.") (internal citations omitted). Whatever arguable inconsistencies may be inherent in (and thus tolerable for) the application of a discretionary rule, the inconsistent application of a mandatory rule to similar circumstances is a hallmark of inadequacy. *See Ford v. Georgia*, 498 U.S. 411, 425 (1991) (unanimously holding that "state court's inconsistent application of [mandatory procedural rule]" would violate the adequacy requirement).

Such arbitrariness is particularly stark in this case. In *Walker*, the Court concluded that California case law made it "altogether plain" that the discretionary rule at issue there was fairly applied to bar review of a habeas petition filed five years late. *Walker*, slip op. at 9. But in this case, in stark contrast, the state courts have excused untimely appeals based on "indistinguishable facts"—creating a blatant inconsistency. Pet.App.30a (dissent) (discussing *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002)). Far from sanctioning such arbitrary results—even in the case of discretionary rules—*Walker* teaches that state procedural rules may not be invoked "'to impose novel and unforeseeable requirements.'" *Walker*, slip op. at 12 (citation omitted).

Even putting aside the important distinction between mandatory and discretionary rules (which the State erroneously dismisses as a "distinction without a difference," Resp.Supp.Br.4), the State mistakenly construes *Walker* as "clos[ing] the door" on arguments that the inconsistent and arbitrary application of

procedural rules in analogous circumstances renders a rule inadequate. Resp.Supp.Br.5. *Walker* hardly closes that door. As noted, in *Walker* extant case law made it "altogether plain" that the state rule was properly applied to bar review of federal claims. *Walker*, slip op. at 9. Here, just the opposite is true. *See* Pet.13-19; ACDL.Br.3-12. Moreover, whereas in *Walker* the Court noted that "'seeming inconsistencie[s]'" dissipated on "closer inspection," *Walker*, slip op. at 11 n.7 (citation omitted), here the inconsistencies only become more glaring on further inspection. *See* Pet.Reply.5-7; Pet.App.28a-30a; ACDL.Br.8-9. Accordingly, the Eleventh Circuit could only ground its adequacy determination on a *post hoc* reformulation of Alabama case law based on distinctions nowhere found in the cases themselves. Pet.17-18; Pet.App.13a.[3]

3. The State is also off base in claiming (at 1) that the Eleventh Circuit "correctly applied" this Court's

---

[3] The State also suggests (at 9) that *Walker* cannot help Maples because the Court decided the adequacy issue in favor of the State, not the inmate. But the fact that the Court held that the discretionary rule at issue in *Walker* was adequate takes nothing away from the need to grant certiorari in this case to hold that the arbitrary rule created to bar review of Maples's constitutional claims was *in*adequate. *Compare, e.g., Erickson v. Pardus*, 551 U.S. 89 (2007) (per curiam). The petition for certiorari in *Erickson* was relisted several times at the certiorari stage, presumably to await the Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The fact that the Court held in *Bell Atlantic* by a 7-2 decision that the complaint at issue *failed* to state a claim under the civil pleading standards at issue in *Bell Atlantic* did not prevent the Court from granting certiorari in *Erickson* and holding (by way of summary disposition) that the complaint in that case *met* those standards.

adequacy doctrine in holding that Maples was not entitled to federal habeas review of his ineffective assistance of counsel claims. The State contends that in reaching its result, the court of appeals simply "followed long-standing rules." Resp.Supp.Br.3. But as the dissent below explained, the Eleventh Circuit majority seriously departed from this Court's precedents in holding that the procedural bar at issue was adequate. Pet.App.27a-32a. And the Eleventh Circuit's adequacy ruling contravenes each of the primary justifications that this Court has articulated for the adequacy rule, including in *Walker*.

Fair notice—Alabama admits that a procedural rule is inadequate if it does not provide fair notice of its requirements. Resp.Supp.Br.3. In this case, the divided Eleventh Circuit concluded that Alabama's written no-fault out-of-time appeal rule was "firmly established and regularly followed" such as to deny relief to Maples even though (1) Rule 32.1(f) appears on its face to *grant* out-of-time appeals where, as here, the inmate is not at fault; (2) the Eleventh Circuit relied for its adequacy finding on Alabama case law decided *after* the alleged default (which, by definition, no one could have had notice of), Pet.20; (3) relief had been granted in other cases based on "indistinguishable facts," Pet.App.30a (dissent); and (4) the Eleventh Circuit sought to distinguish those cases by advancing a *post hoc* interpretation of the rule articulated nowhere in Alabama state cases themselves. Such a novel and unforeseen rule is the epitome of an inadequate rule.

Inconsistent Application—As discussed, Alabama contends that in the wake of *Walker* its rule is "FERF, even if Maples can point to a case in which Alabama courts seemingly applied their discretion inconsistently when deciding whether to excuse a tardy appeal."

Resp.Supp.Br.6. But this Court did nothing in *Walker* to backtrack from the settled principle that a mandatory state procedural rule must be "firmly established and regularly followed" to bar review of federal claims. *See Walker*, slip op. at 7. Moreover, the Court stressed that novel, unforeseen, and arbitrary state rules are inadequate. *See id.* at 8 n.4, 12.

Discrimination Against Federal Rights—Although the distinction is found nowhere on the face of Alabama's no-fault out-of-time appeal rule itself, the divided Eleventh Circuit accepted Alabama's argument that (among other things) the rule was generally, though not always, applicable only to *direct*, rather than post-conviction appeals. Pet.App.13a. As Maples explained in his petition, Alabama's courts had, in fact, squarely applied the rule in the context of post-conviction appeals on multiple occasions, and the text of Rule 32.1(f) does not support such a distinction. *See* Pet.13-14. Regardless, the State's *post hoc* explanation has the unmistakable effect of discriminating against *federal* rights. A rule that arbitrarily excuses missed deadlines for which a petitioner is blameless at the direct appeal stage, but not the post-conviction stage, necessarily discriminates against claims that typically cannot be brought until the post-conviction stage, including ineffective assistance of counsel claims. *See* Pet.5; *Ex parte Ingram*, 675 So. 2d 863, 865 (Ala. 1996).

Exorbitant Application—In *Walker*, this Court observed that the "'exorbitant application of [even] a generally sound rule renders the state ground inadequate to stop consideration of a federal question.'" *Walker*, slip op. at 8 n.4 (citation omitted); Pet.Supp.Br.7 n.1. Alabama has never explained how the State has a legitimate interest in barring a capital inmate from merely presenting his federal claims—

even if that inmate was abandoned by his attorneys and the state provided constitutionally inadequate notice of the order from which all agree he failed to appeal through no fault of his own. *See, e.g.*, Pet.5-7; 24-32. And—unlike Alabama—a majority of other states have suggested that an otherwise sound rule would be inadequate to bar review here. Pet.Supp.Br.7 n.1. If the application of Alabama's no-fault out-of-time rule to *bar* Maples's appeal is not an "exorbitant application" requiring a finding of inadequacy, then it is difficult to see what could possibly qualify as one.

4. In the end, Alabama falls back on the jarring and misguided theme of its opposition brief: that certiorari is not warranted because Maples purportedly "is in the same boat as hundreds of other appellants" who have missed deadlines for appeals. Resp.Supp.Br.9. But the difference is that Alabama has an express "no-fault out-of-time appeal" rule, Pet.Reply.4; that rule has been applied by the Alabama courts to allow untimely appeals in "indistinguishable" circumstances, Pet.App.30a (dissent); and no one disputes that Maples was *not* at fault for the missed deadline in his case. Only the arbitrary, discriminatory, and exorbitant application of the State's no-fault out-of-time appeal rule could result in the paradoxical conclusion that Maples's appeal was *barred* in these circumstances. And that is precisely the situation that this Court's adequacy doctrine is designed to protect against.

The State likewise suggests that the Court should not bother with this case on the ground that it involves merely "fact-bound error correction." Resp.Supp.Br.1. The numerous amicus briefs filed in support of certiorari and the national attention this case has attracted underscore the general importance of the questions presented. And, as explained, those

questions meet this Court's customary criteria for certiorari. But to be clear, the horrific circumstances underlying the questions presented by this capital case provide a compelling reason to *grant* certiorari, not deny it.[4]

[4] Alabama's suggestion (at 7) that a GVR would be a "waste [of] time and judicial resources" is based on its misreading of *Walker*, mischaracterization of the adequacy question presented, and failure to appreciate the role of the GVR. Pet.Supp.Br.10-11. And if a GVR were to lead to any "cutting-and-pasting" of *Walker* (Resp.Supp.Br.7) by the Eleventh Circuit on remand, it ought to be of this Court's admonishments that novel, unforeseen, and arbitrary rules are inadequate to bar review of federal claims.

CONCLUSION

For the foregoing reasons, and those in petitioners' previous submissions to this Court, the petition for certiorari should be granted and set for plenary review or, at a minimum, granted so that the decision below may be vacated and the case remanded for further consideration for the reasons herein.

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
J. SCOTT BALLENGER
DEREK D. SMITH
MICHAEL E. BERN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioner

Blank Page