No. 10-63

In the Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

RICHARD F. ALLEN,
Commissioner, Alabama Department
of Corrections,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Alabama Criminal Defense Lawyers Association[1] is a non-profit association for criminal defense attorneys, through which criminal defense lawyers express their positions on legislation, court reform, cases affecting rights of defendants, and other matters affecting criminal justice in Alabama. The organization seeks to promote administration of justice and ensure that Courts enforce maximum lawful access to justice by the criminally accused or convicted.

This organization is interested in the instant case because the Eleventh Circuit has denied access to federal constitutional review to Cory Maples and potentially others in his same circumstances: indigent Alabama Death Row prisoners who, through no fault of their own, relied on volunteer attorneys who missed court or appeal deadlines. The Eleventh Circuit's decision will also have a chilling effect on counsel who volunteer to represent Alabama Death Row prisoners in capital post-conviction litigation. Alabama does not have a state-funded post-conviction litigation program and limits reimbursement for court-appointed post-conviction counsel to $1,000. As a result, Alabama Death Row prisoners rely primarily on volunteer counsel to vindicate their federal constitutional rights.

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[1] The parties consented in writing to the filing of this brief. No counsel for a party authored the brief in whole or in part. No counsel for a party and no party made a monetary contribution intended to fund the preparation or submission of the brief. Attorneys for *Amicus Curiae* notified counsel of record for the parties 10 days prior to the due date for filing briefs.

SUMMARY OF ARGUMENT

The divided Eleventh Circuit panel decision below is fundamentally inconsistent with this Court's precedents on the adequacy of State law rules and warrants this Court's review. Alabama courts by no means have "routinely" denied untimely appeals in situations similar to Maples's. To the contrary, at the time of Maples's procedural default, Alabama courts were consistently *permitting* out-of-+time appeals when a petitioner established that the reason for missing the appellate deadline was "through no fault of his own" and were also permissively interpreting Rule 32.1(f), Ala. R. Crim. P., and its precedential precursors to permit out-of-time appeals in wide-ranging circumstances. The Eleventh Circuit's decision enforcing a procedural default in these circumstances exacerbates the fundamental flaws in what is already perhaps the nation's most troubled capital punishment system.

ARGUMENT

A federal court owes no deference to a state's procedural default ruling unless it rests upon *adequate* state procedural grounds. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977) (emphasis added); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989). Adequacy requires that a state procedural rule "be firmly established and regularly followed; that is, not applied in an arbitrary or unprecedented fashion." *Card v. Duggar,* 911 F.2d 1494, 1516 (11th Cir. 1990); *see also Ford v. Georgia*, 498 U.S. 411, 425 (1991). A state procedural rule must be adequate when the purported procedural default

occurred. *Ford*, 498 U.S. at 424. The Eleventh Circuit mis-applied this principle and failed to undertake a searching review of Alabama's application of Rule 32.1(f), before deciding that the rule was firmly established and regularly followed at the time of procedural default and that it had not been arbitrarily applied to Maples. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002) (adequacy of state procedural rule is federal law question).

I. Alabama Law At The Time Of Maples's Default Established His Right To An Out-of-Time Appeal Under Rule 32.1(f).

Maples did not receive notice from his court-appointed attorneys or the court when the circuit court denied his Rule 32 petition. Consequently, Maples was denied the opportunity to appeal the dismissal of his Rule 32 petition when, through no fault attributable to him, Maples's appointed counsel missed the appeal deadline.

In May 2003, the time of the procedural default, Rule 32.1(f) permitted petitioners to file out-of-time appeals "where the petitioner failed to appeal within the time prescribed and that failure was without fault on the petitioner's part." Pursuant to Rule 32.1(f), Maples's counsel sought leave to file an out-of-time appeal, filing a petition for writ of mandamus to the Alabama Court of Criminal Appeals. Despite entitlement to relief under the Rule's plain language and prior state practice granting similar out-of-time appeals, Alabama appellate courts arbitrarily foreclosed Maples's use of Rule 32.1(f). *Ex parte Maples*, 885 So. 2d 845, 847

(Ala. Crim. App. 2004); *Ex parte Maples*, 920 So. 2d 1138 (Ala. 2004) (table).

The Eleventh Circuit erroneously found that Rule 32.1(f) was not arbitrarily applied in the denial of Maples's untimely post-conviction appeal and wrongly concluded that Alabama courts have "routinely" denied untimely post-conviction appeals. *Maples v. Allen,* 586 F.3d 879, 888-89 (11th Cir. 2009).

In May 2003, Alabama courts did not "routinely" deny untimely appeals in situations similar to Maples. Rather, in May 2003, Alabama courts were consistently *permitting* out-of-time appeals when a petitioner established that the reason for missing the appellate deadline was "through no fault of his own," and also permissively *interpreting* Rule 32.1(f) and its precedential precursors to include out-of-time appeals under a wide variety of circumstances. State law extant in May 2003 demonstrates that Maples's case is analogous to those previously found to have *warranted* granting of an out-of-time appeal.

In *Fountain v. State*, 842 So. 2d 719 (Ala. Crim. App. 2002), *rev'd in part* on other grounds, *Ex parte Fountain*, 842 So. 2d 726 (Ala. 2002), the Alabama Court of Criminal Appeals first recognized that a Rule 32 petitioner has the "right to petition a circuit court for an out-of-time appeal pursuant to Rule 32.1(f), ... when the petitioner has been denied the ability to file a timely appeal because of a mistake by the circuit court." The Court of Criminal Appeals affirmed the circuit court's grant of an out-of-time appeal, because Fountain alleged that he had not received notice of the dismissal of his Rule 32 petition. The Court noted "... Alabama appellate

courts have interpreted the Alabama Rules of Criminal Procedure in such a way as to protect the rights of individuals and to assure fairness in the administration of our judicial process." 842 So. 2d at 722.

In *Ex parte Johnson*, 806 So. 2d 1195, 1196 (Ala. 2001), petitioner alleged he missed the deadline for appealing the denial of his Rule 32 petition because, in spite of repeated inquiries to the clerk of court, the circuit court never notified him about the disposition of his Rule 32 petition. Asserting due process grounds, the petitioner sought and was granted a writ of mandamus directing the circuit court to provide notice of the disposition of his Rule 32 petition. Without disturbing the Alabama Court of Criminal Appeals' opinion in *Fountain*, the Alabama Supreme Court granted Johnson an out-of-time appeal from the denial of his Rule 32 petition. The Court attributed fault for petitioner's inability to perfect a timely appeal to the circuit court, which had failed to give petitioner adequate notice of its ruling.

In *Brooks v. State*, 892 So. 2d 969 (Ala. Crim. App. 2002),[2] the Court of Criminal Appeals relied upon the newly announced decisions in *Ex parte Fountain*, *supra*, and *Ex parte Johnson*, *supra*, to

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[2] *Ex Parte Brooks*, 892 So. 2d 976 (Ala. 2004) (reversing based on holding in *Marshall* that mandamus is sole remedy for out-of-time appeal of Rule 32 petition dismissal); *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Ex parte Robinson*, 865 So. 2d 1250 (Ala. Crim. App. 2003); *King v. State*, 881 So. 2d 542 (Ala. Crim. App. 2002); *Easterling v. State*, 854 So. 2d 142 (Ala. Crim. App. 2002); and, *Palmer v. State*, 842 So. 2d 751 (Ala. Crim. App. 2002).

justify its conclusion that petitioner was entitled to an out-of-time appeal from the dismissal of his Rule 32 petition if, on remand, the circuit court concluded (1) Brooks never received notice of the circuit court's order denying his Rule 32 petition, or (2) the 42-day period for filing a notice of appeal had run before Brooks received his copy of the order.

In *Thompson v. State*, 860 So. 2d 907, 910 (Ala. Crim. App. 2002), petitioner filed a second Rule 32 petition pursuant to Rule 32.1(f), seeking an out-of-time appeal after missing the deadline to appeal the denial of his first Rule 32 petition. He alleged his appointed counsel failed to file a notice of appeal and had been unresponsive to his requests for information about the status of the appeal, and that the circuit clerk had rebuffed his efforts to file a *pro se* appeal. Relying on *Ex parte Fountain, supra*, and *Brooks v. State, supra*, the Court of Criminal Appeals reversed the circuit court's denial of Thompson's second Rule 32 petition. The court granted relief and attributed fault to both "the actions of his appointed counsel and the actions of the circuit clerk." *Thompson*, 860 So. 2d at 910. On remand, the court directed the circuit court to permit petitioner to file an appeal.

Prior to 2003, Alabama courts also routinely granted out-of-time appeals where a *pro se* petitioner showed his failure to perfect a collateral appeal resulted from a defective or absent court notice. Thus Alabama courts had interpreted the "without fault on the petitioner's part" language in Rule 32.1(f) to include situations where a *pro se* petitioner had not received notice of a case dismissal in time to perfect a notice of appeal. Nothing in the terms of Rule 32.1(f) suggests that the same results

would not follow where a petitioner was represented by counsel. And none of these cases suggested that an appeal would not be allowed where the petitioner was without fault because of a clerk's failure to notify petitioner of the dismissal of his Rule 32 petition or because of his attorney's abandonment. *Compare Lee v. Kemna*, 534 U.S. 362, 387 (2002) (stating rule was inadequate because "no published Missouri decision demands unmodified application of the Rules in the urgent situation Lee's case presented").

Until the amendment of Rule 32.1, effective June 1, 2005, a persistent lack of clarity in Alabama appellate opinions existed regarding the proper *mechanism* for pursuing such relief, whether a writ of mandamus or successive Rule 32 petition was required—which clouded the proper application of Rule 32.1 generally. During the period relevant to Maples's appeal from the denial of his Rule 32 petition, two methods for appealing out-of-time were in effect.[3] The Alabama Court of Criminal Appeals'

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[3] In *Fountain, supra*, the Alabama Court of Criminal Appeals instructed the petitioner to file a successive Rule 32 petition to obtain permission to appeal out-of-time, where his failure to appeal resulted from lack of notice that his petition had been denied. The Court of Criminal Appeals opined that this situation fell within the penumbra scope of Rule 32.1(f), which at that time did not include a provision for appealing out-of-time from the dismissal or denial of a Rule 32 petition.

However, decisions of the Alabama Supreme Court directed litigants to petition for writ of mandamus, which requires absence of other available remedy. *Brooks supra*; *Marshall v. State*, 884 So. 2d 900 (Ala. 2003); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001); *Ex parte Weeks*, 611 So. 2d 259 (Ala. 1992). The Alabama Supreme Court's decision in *Marshall, supra*, in September 2003, only directed that

broader construction of Rule 32.1(f) was validated by the Alabama Supreme Court's 2005 revision of that Rule, which included out-of-time appeals in Rule 32 proceedings. *See* Rule 32.1. Note from the Reporter of Decisions, re: revision of Rule 32.1(f) on June 1, 2005. The 2005 revision clarified the proper procedure to follow, but affirmed that out-of-time appeals are permitted for petitioners such as Maples.

In May 2003, case law would have indicated to Rule 32 petitioners that out-of-time appeals were authorized if petitioner could establish (1) failure to perfect an appeal within the time prescribed and (2) that such failure to timely appeal was not petitioner's fault. *Marshall v. State*, 884 So. 2d 898 (Ala. Crim. App. 2002), is directly on point.

As the dissenting opinion below explains, in *Marshall* the Alabama Court of Criminal Appeals allowed an out-of-time appeal from the denial of a Rule 32 petition, based on facts indistinguishable from those presented in Maples's case. In *Marshall*, relying on *Ex parte Fountain, supra* and *Ex parte Brooks, supra*, the court held the State's failure to serve a Rule 32 petitioner with a copy of the order denying relief violated due process, entitling him to an out-of-time appeal.

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mandamus was the proper method of seeking Rule 32.1(f) relief. It did not disturb the substance of the lower court's holding that Marshall was entitled to file an out-of-time appeal. The Alabama Supreme Court's decision could not pose an impediment to Maples, because that decision post-dated his filing of the out-of-time appeal. *See, e.g., James v. Gibson*, 228 F.3d 1217, 1226-27 (10th Cir. 2000), *cert. denied*, 533 U.S. 933 (2001); *Pearson v. Norris*, 52 F.3d 740, 742 (8th Cir. 1995).

Claims of the *Marshall* petitioner are nearly identical to those of Maples: "Marshall claimed that he was due an out-of-time appeal, because, through no fault of his own, he had never received notice of the circuit court's dismissal of his first Rule 32 petition. Specifically, he contends that he did not receive a copy of the dismissal order because the circuit court did not send him a copy, and because his counsel rendered ineffective assistance by failing to inform him that his first Rule 32 petition had been dismissed." *Id.*, 884 So. 2d at 898-99. Other material similarities exist, as Judge Barkett's dissent points out, including that "[l]ike Maples, Marshall did not begin filing his requests with the clerk until after the order denying his Rule 32 petition had been decided" and that both petitioners had Rule 32 counsel who failed to perfect appellate notice *after* having received notice of the denials. *Maples*, 586 F.3d at 896 (Barkett, J., dissenting) (emphasis in original). When Maples pursued the out-of-time-appeal in 2003, he was subject to application of Rule 32.1(f), exactly as articulated in *Marshall* the prior year.

Despite the overwhelming factual similarities between this case and *Marshall*, *supra*, the Eleventh Circuit found the *Marshall* opinion distinguishable from Maples's case, and therefore not capable of establishing that Rule 32.1(f) had been inconsistently applied. The Court speculated, with scant factual or legal bases, that *Marshall* would not permit an out-of-time appeal unless a court clerk assumed a duty to effect personal service on the petitioner. *Maples*, 586 F.3d at 889 (Alabama appellate courts "appeared to find that the state circuit clerk assumed a duty to serve Marshall

personally in prison").[4] The "duty" presumably arose when Marshall directed repeated inquiries to the clerk about the status of his case. This restrictive reading of *Marshall* is inconsistent with that opinion and with prior Alabama precedent which had supported a more expansive interpretation of Rule 32.1(f).

The Eleventh Circuit's unfounded interpretation of *Marshall*, which was controlling authority at the time Maples's procedural default occurred, is also antithetical to a proper adequacy analysis. The ruling in *Marshall* was consistent with the prior precedent discussed above, and Maples was justified in his reliance upon it when he pursued an out-of-time appeal. Nothing in *Marshall* or in prior cases would have led Maples to understand that he was not entitled to pursue an out-of-time appeal, via mandamus, after having failed timely to perfect the notice of appeal from the denial of his Rule 32 petition. Nor does *Marshall* in any way suggest that pursuing an out-of-time appeal is contingent upon a finding that a court official assumed some special responsibility for notification. In any event, the Eleventh Circuit overlooked the

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[4] The majority's speculation is contrary to a proper adequacy analysis of state procedural rules. Respectfully, principles of comity and federalism, which animate procedural default doctrine, do not permit either uncritical acceptance or over-exuberant interpretation of state procedural rules. *See, e.g., Spencer v. Zant*, 715 F.2d 1562, 1573 (11th Cir. 1983)("Thus, it is reasonable to conclude that Georgia's novel application of its procedural rule to Spencer, although not directly contrary to precedent, was not adequately supported by precedent so as to apprise Spencer at trial that the second or third day of voir dire was too late to raise his claim.").

Court of Criminal Appeals' holding that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition." *Ex parte Maples*, 885 So. 2d at 849. Thus, even using the Eleventh Circuit's unduly restrictive reading of state law, Maples was entitled to an out-of-time appeal. Inexplicably, Marshall received the benefit of an out-of-time appeal but Maples did not.

None of the three cases upon which the panel majority's opinion rests support its contrary conclusion that Alabama court's "routinely" denied out-of-time appeals in May 2003.[5] Two of the cases cited, *Shepard v. State*, 598 So. 2d 39 (Ala. Crim. App. 1992), and *Alverson v. State*, 531 So. 2d 44 (Ala. Crim. App. 1988), are distinguishable because they involve situations where the courts found petitioner at fault for failing to perfect his appeal.[6] Here, all

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[5] *Melson v. State*, 902 So. 2d 715 (Ala. Crim. App. 2004), is relevant to the extent that this Court granted Melson a writ of certiorari, vacated the judgment and remanded the case to the Eleventh Circuit for consideration of decision in *Holland v. Florida*, 560 U.S. ___, 2010 U.S. LEXIS 4946 (2010). *Melson v. Allen*, [Ms. 09-5373, June 21, 2010] ___ U.S. ___, 2010 U.S. LEXIS 5124 (2010).

[6] The Eleventh Circuit's approach, relying on distinguishable cases to establish adequacy is directly at odds with this Court's precedents. *See, e.g., Lee v. Kemna*, 534 U.S. at 382 and n.13 ("Lee's predicament, from all that appears, was one Missouri courts had not confronted before ...." The state of Missouri had cited five "readily" distinguishable cases in support of an adequacy argument; none involving facts similar to those in Lee's case. The court remarked: "The adequacy of a state ground, of course, does not depend on an appellate decision applying general rules to the precise facts of the case at bar. But here, no prior decision suggests strict application to a situation such as Lee's.")

agree that Maples was *without* fault for the missed deadline for appeal. In *Shepard*, the court held defendant was not entitled to an out-of-time appeal, because a transcript of the sentencing hearing showed defendant had received notice of appeal rights from both the court and defense counsel. 598 So. 2d at 40. In *Alverson*, the court held petitioner was not entitled to an out-of-time appeal, because evidence failed to support allegations his attorney was careless or negligent in failing to file an appeal. These cases have no persuasive force in a "firmly established and regularly followed" analysis because they are factually distinct from the issue here. There was abundant evidence that Maples's counsel were "negligent" and the fault for failing to perfect his appeal should rest with them, not Maples. *Maples*, 586 F.3d at 897 (Barkett, J., dissenting).

II. The Failings Of Alabama's Post-Conviction System Contributed To Maples's Procedural Default And Will be Exacerbated By The Decision Below.

This Court should find that a state procedural rule is not "adequate" to deny an indigent, death-sentenced prisoner access to federal post-conviction relief, where the state provides no timely access to competent, appointed counsel and the indigent prisoner has not been provided a reasonable opportunity to comply with the rule.

It is well-established that a state procedural rule is not adequate to bar federal review where the prisoner was afforded no meaningful opportunity to comply with the rule. *See, e.g.*, *Ford v. Georgia*, 498 U.S. at 423-24. While most of the decisions applying

this principle in habeas cases involve the novel, sporadic, or retroactive application of state procedural rules, a state's failure to provide any reasonable opportunity for compliance with its rules may also render the rule inadequate to bar federal review.

As below explained, Alabama's *ad hoc* arrangement for the appointment of post-conviction counsel in death penalty cases is broken and does not address claims of constitutional violations in the underlying case.

Alabama's failure to provide any assistance to capital habeas petitioners when filing their initial petition denies them any fair opportunity to seek state post-conviction relief, compounding the effect of constitutional deprivations suffered at trial, such as the provision of inadequate counsel. While Rule 32.1(f) may be capable of serving a legitimate and adequate purpose, its application in this case was inconsistent with judicial treatment of similar criminal defendants and was manifestly unfair. For this additional reason, the rejection of Maples's claims under that rule cannot serve as an adequate basis for withholding merits review in federal habeas proceedings.

Alabama does not have a state-wide public defender system. Instead, each court jurisdiction is free to create its own system for providing counsel to indigent defendants. Elected judges are responsible for deciding which type of indigent defense system the judicial district will use.[7] Thus, the indigent

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[7] See Ala. Code § 15-12-2 (1975) (setting out three alternative methods for three different courts, for reaching the decision as to "the indigent defense system to be used"); Ala. Code § 15-12-

defense system in Alabama "not only fails to be independent of the judiciary, but is wholly dependent on it."[8]

The State of Alabama does not automatically provide counsel in post-conviction proceedings. Instead, appointments of post-conviction counsel in Alabama are made as a discretionary choice of the trial court, after a post-conviction proceeding has already been filed.[9] Most states' legislatures have

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1(5) (1975) ("Indigent defense system" is defined as "(a)ny method or mixture of methods for providing legal representation to an indigent defendant, including use of appointed counsel, use of contract counsel, use of public defenders, or any alternative method meeting constitutional requirements."); Ala. Code § 15-12-3 (1975) (". . .Circuit courts may adopt rules, not in conflict with rules of the Supreme Court, to effectuate a system of indigent defense.")

[8] American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report, at 99, 121 (June 2006). As a result of this system, only four of the sixty-seven Alabama judicial districts have public defender offices and only one of these offices provides representation at capital trials. *Id.*

[9] Ala. Code § 15-12-23(a) (1975) ("In proceedings filed in the district or circuit court involving the life and liberty of those charged with or convicted of serious criminal offenses including proceedings for habeas corpus or other post conviction remedies, and in post-trial motions or appeals in the proceedings, the trial or presiding judge or chief justice of the court in which the proceedings may be commenced or pending may appoint counsel to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person.") (Emphasis added).

recognized the critical role that post-conviction counsel serves in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners as a matter of right. *No* inmates are afforded counsel to file initial post-conviction petitions. Only afterwards might post-conviction counsel be appointed. Consequently, a post-conviction petitioner is only able to gain assistance of counsel *if* a court deems the initial petition, written without counsel, persuasive.

Appointed post-conviction counsel can be compensated at the rate of $60 per hour in-court and $40 per hour out-of-court, as are trial indigent defense counsel. Ala. Code § 15-12-21(d) (1975). This of course is a fraction of what they would be paid in their retained work.[10] But counsel appointed to indigent petitioners in post-conviction actions are further limited to a *total* payment of $1,000.[11]

Nor does Alabama provide any other type of assistance to condemned prisoners pursuing post-conviction litigation.[12] And Alabama allows only

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[10] Joseph P. Van Heest, Rights of Indigent Defendants in Criminal Cases after Alabama v. Shelton, Alabama Lawyer (November 2002).

[11] Ala. Code § 15-12-23(d) (1975) ("The total fees to counsel for the proceedings shall not exceed one thousand dollars ($1,000).")

[12] "Despite the fact that Alabama now has the fastest-growing death row population in the United States, . . . it does nothing at all to provide its condemned inmates with timely legal assistance in preparing and presenting post-conviction claims. It appoints no lawyers to represent death-sentenced inmates at the conclusion of an unsuccessful direct appeal. It furnishes no

one year from the Court of Criminal Appeals' issuance of judgment, for the filing of the Rule 32 petition. Rule 32.2(c), Ala. R. Crim. P.

Because appointments of counsel are generally not made until after the initial post-conviction pleadings have been drafted and the case has already been filed, "most Rule 32 petitioners file their petitions without the assistance of legal counsel." *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005). "Therefore, inmates who are unable to find counsel to represent them before the limitations period for filing a Rule 32 petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their Rule 32 petition and prepare and file a petition in the proper form with the proper claims in the proper court." *Id.*

Yet, it is not uncommon for a Rule 32 court to rule on some or all of a petitioner's claims before appointment of counsel.[13] But delaying appointment

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paralegal or other aid at the prisons to enable death-sentenced inmates to collect the factual information and draft the pleadings necessary to obtain judicial consideration of constitutional claims based on facts not included in the trial record. . . . It maintains no central agency to monitor the progress of capital post-conviction cases, assist in recruiting volunteer counsel, or give volunteer counsel needed technical support." Bryan Stevenson, Symposium: Pro Se Litigation Ten Years After AEDPA. 41 Harvard Civil Rights - Civil Liberties Law Review, 339, 353 (Summer 2006) (footnotes omitted).

[13] See, e.g., *Flowers v. State*, No. CC-97-20.60 (Montgomery County Cir. Ct. Jan. 28, 2003) (Order Dismissing the Rule 32 Petition As Untimely Filed) (dismissing petition filed pro se); *Smith v. State*, No. CC-98-2064.60 (Mobile County Cir. Ct. Oct. 9, 2002) (Order Dismissing the Rule 32 Petition as Untimely Filed) (dismissing petition filed pro se). See also, Rule 32.7(c),

until after the petition has been filed effectively deprives counsel of any meaningful opportunity to represent her client. Alabama's procedure for discretionary appointments is "problematic because there is too great a risk that the post-conviction court will be unable to accurately ascertain the need for an attorney on a case-by-case basis."[14]

With no state-funded institution or centralized system for providing capital post-conviction representation, Alabama death-sentenced prisoners have largely relied on volunteer counsel, recruited through non-profit organizations or the American Bar Association's Death Penalty Representation Project.[15]

Not surprisingly, it is difficult to recruit volunteer counsel for these complex cases. Even ten

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Ala. R. Crim. P. ("If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.")

[14] Celestine Richards McConville, The Meaninglessness of Delayed Appointments and Discretionary Grants of Capital Post-conviction Counsel, 42 Tulsa L. Rev. 253, 257 (Winter 2006) (concluding "that Alabama's system fails to adequately protect the rights of capital inmates and thus does not provide a meaningful right to capital post-conviction counsel.")

[15] The Alabama Bar Association's laudable Volunteer Lawyers Project ("VLP") limits its recruitment for pro bono attorneys to certain non-criminal cases that are "simple, straightforward and appears to be resolvable within 20 hours or less." Pamela H. Bucy, The VLP and the Thief, 71 Alabama Lawyer 45 (January 2010).

years ago, when Alabama's death row was fifteen percent smaller, recruitment efforts were strained, as the director of the ABA project observed in 1999:

> Without doubt, Alabama is currently in need of the largest number of pro bono counsel. There are more than 250 capital indictments pending in the Alabama trial courts at any given time. With 173 death-sentenced individuals, Alabama has the fifth largest death row in the country...Although the ABA Death Penalty Representation Project has recruited attorneys for seven Alabama prisoners, at least 30 more men and women are in immediate need of post-conviction representation. No court in Alabama routinely appoints counsel for death row prisoners who have concluded direct appeal. If a condemned inmate files a post-conviction petition pro se, the circuit court may appoint a local lawyer whose total fee may not exceed $600. Counsel is not entitled to receive any money for investigation or expert assistance.

Elisabeth Semel, The Lone Star State Is Not Alone In Denying Due Process To Those Who Face Execution, 23 The Champion 28, 29 (July 1999) (footnotes omitted). Alabama's death row continues to grow, increasing the number of volunteer counsel

who must be found.[16]

Having to rely solely on volunteer counsel imposes numerous additional burdens on the ability to litigate post-conviction challenges to constitutional violations. Volunteer counsel are often unfamiliar with the complexities of habeas law. Volunteer counsel require ongoing training and mentoring.[17] Volunteer counsel from out of state have difficulty conducting time-intensive investigation into sensitive mitigation issues such as family histories of violence, abuse, and mental illness.[18] Volunteer counsel will have to spend a substantial amount of time on their death penalty

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[16] *Id.*, McConville, supra at 257 - 258 (quoting Equal Justice Initiative of Alabama, Representation of Death Row Prisoners, http://www.eji.org/representation.html: "[i]n the past few years, Alabama sentenced more people to death per capita than any other state in the country.")

[17] Ron Tabak, The Private Bar's Efforts To Secure Proper Representation For Those Facing Execution, 29 Justice System Journal 356, 359 (2008).

[18] Robin M. Maher (current director of the ABA Death Penalty Representation Project), The ABA and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra Law Review 763, 771 (Spring 2008) ("Many of the volunteer lawyers that I recruit have never handled a death penalty case before. . . . Developing mitigation evidence and making a case for the life of their client is one of the most important tasks defense lawyers must handle. But unlike the law of capital punishment, which they will eventually learn and master, developing mitigation evidence that may result in a different sentence for their client is not easy for volunteer lawyers, even when they are among the country's top litigators [or] (f)or out-of-state lawyers who volunteer far from home ....")

cases, to the detriment of their private practice.[19]

Habeas cases require expert services, which must also be either volunteered or paid.[20] The need for substantial funds to support the initial investigation and necessary expert services is another factor that may influence the search for volunteer counsel. The substantial time and financial commitment required by these cases makes it difficult for firms to offer their services, especially for smaller firms or solo practitioners. This also increases the likelihood volunteer counsel will have to be sought from large, well-funded firms outside the state, even though such lawyers will be less familiar with state rules, state practice, and local investigation options.

Unless it is reconsidered, the Eleventh

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[19] "One survey estimated that taking one capital case through the state post-conviction proceeding alone requires one-fifth to one-fourth of a private attorney's yearly workload." Comment, 18 Hastings Constitutional Law Quarterly 211, 235, citing Wilson & Spangenberg, State Post-Conviction Representation of Defendants Sentenced to Death, 72 Judicature 331, 336 - 337 (1989). Even the Model Rules of Professional Conduct recommend only that lawyers donate only 50 hours of pro bono time per year, far less than a capital habeas case will require. Model Rules of Prof. Conduct R. 6.1 (2008) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.").

[20] Hannah Jacobs Wiseman, Pro Bono Publico: The Growing Need for Expert Aid, 60 S. C. L. Rev. 493, 495 (Winter 2008) ("Increasingly, experts are necessities in legal cases, and low income individuals without access to quality expert testimony are at a strong disadvantage.")

Circuit's decision in *Maples* will not only directly deny access to federal constitutional review to death-sentenced prisoners who are faultless in their procedural predicament; it will also have a chilling effect on the already-difficult task of finding volunteer counsel to represent Alabama Death Row prisoners in capital post-conviction litigation. Capital post-conviction litigation is complex, difficult, and stressful. The Eleventh Circuit's decision, if allowed to stand, adds to this pro bono burden a legal principle that small mistakes, which will inevitably occur even where counsel are well-intentioned, will have devastating legal significance. Alabama's failure to provide death-sentenced prisoners any reasonable opportunity for compliance with its post-conviction rules, including the rule at issue in Maples's case, renders the rule inadequate to bar federal review.

CONCLUSION

Respectfully, this Court should grant Maples's Petition for a Writ of Certiorari, vacate the Eleventh Circuit's divided panel opinion, and remand this case with the direction that Maples's federal post-conviction action be allowed to proceed.

Respectfully submitted,

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