Supreme Court, U.S.
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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 A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As explained in the petition, the divided Eleventh Circuit decision below directly conflicts with the decisions of this Court and other circuits on the gateway standards governing both when a purported state procedural rule is "adequate" as a matter of federal law to bar habeas review of constitutional claims, and when "cause" exists to excuse any default. As underscored by *amici*, as well as the recent grant of certiorari in *Walker v. Martin*, No. 09-996, the proper contours of those standards is a matter of exceptional national importance, and the ability to obtain federal court review of constitutional claims should not vary from one circuit to the next. The traditional criteria for certiorari are therefore satisfied. S. Ct. R. 10.

In response, the State focuses its efforts on mischaracterizing the questions presented and attempting to manufacture hurdles to reaching them. On the adequacy question, the State tries to redirect the focus to the general 42-day deadline for appeals. But that is just a smokescreen. As the State explicitly recognized below, Ala.R.Crim.P.32.1(f) establishes a "no-fault, out-of-time appeal rule" for post-conviction proceedings. CA11 Appellees Br.16. And, as the dissent below explained, Alabama courts have allowed untimely appeals under Rule 32.1(f) in "indistinguishable" circumstances. Pet.App.30a. The split decision below concluding that Alabama has a "firmly established and regularly followed" rule *barring* appeals in such circumstances is based on a *post hoc* reformulation of Alabama case law that even the State does not seriously defend. Pet.12-21.

The State does not deny that the adequacy doctrine is widely regarded as confused and in need of

clarification. Pet.12-13. The State suggests that the adequacy issue *in this case* presents a "State specific inquiry." Opp.27. But given the nature of the inquiry, the same could be said in *any* adequacy case. And more to the point, the first question presented concerns the *standards* that govern the adequacy determination—a matter of general and unquestioned importance. Ultimately, the State reveals that its position is that the adequacy doctrine should be "'scrap[ped] ... altogether.'" Opp.29. And that is where its arguments in support of the decision below lead. But this case graphically illustrates the need for an adequacy safeguard to ensure that federal claims are not barred by arbitrary assertions of state law.

On the question of cause, the State makes virtually no effort to defend its actions on the merits. The State does not even *cite*—much less attempt to distinguish—the decision of this Court establishing that the State failed to provide constitutionally adequate notice to Maples of the denial of his post-conviction petition. *Jones v. Flowers*, 547 U.S. 220 (2006). That external constitutional violation establishes cause for any default. Pet.24-27. Instead of confronting *Jones*, the State simply cries waiver. But the State has explicitly *conceded* that this argument was briefed below, Opp.Add.2a, and counsel by no means repudiated it at oral argument. This waiver argument, in other words, is just another ploy to evade review.

In the end, the State's main point seems to be that courts "routinely" dismiss untimely appeals so why bother with this case. Opp.15; *see* Opp.1-2, 39-40. Never mind that a man's life is at stake. Never mind that the State contributed to the missed deadline—when a clerk received the unopened envelopes mailed

to Maples's lead counsel stamped "Return to Sender—Left Firm," and did nothing. And never mind that Alabama has an express "no-fault, out-of-time appeal rule." In the State's view, this case is "no different" than the run-of-the-mill civil case. Opp.15. This Court, however, has never taken such a cavalier attitude toward the cases that reach its steps.[1]

I. THE ADEQUACY ISSUE MERITS REVIEW

In holding that Alabama had adopted a firmly established and regularly followed rule *barring* untimely appeals in Maples's situation, the Eleventh Circuit devised *post hoc* a tripartite framework out of Alabama case law applying Rule 32.1(f) based in large part on cases decided *after* the events at issue and on distinctions that the Alabama courts themselves have never drawn. Pet.17-18; Pet.App.13a. That revisionist approach directly contravenes this Court's teaching that a federal court may not manufacture a firmly established and regularly followed rule by reconceiving state law "in retrospect." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958). The State does not attempt to defend the Eleventh Circuit's tripartite test, or its reliance on cases decided *after* the events at issue—in direct conflict with other circuits. Pet.20-21.

Instead, the State grounds its response on a new argument that is even more at odds with state law.

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[1] The decision below bars federal review of serious ineffective-assistance-of-counsel claims. Pet.3-4; Pet.App.30a-31a & n.3. The State briefly tries to defend (Opp.5 n.1) counsel's decision to forego an intoxication defense, but it ignores its own witness's testimony that Maples used crack and crystal methamphetamine that night. Pet.3. Moreover, the State completely overlooks counsel's fundamental failures at the penalty phase. Pet.4-5.

The State claims that Rule 32.1(f) is essentially irrelevant—relegating that rule to a footnote (Opp.17 n.5)—and argues that the basic 42-day deadline for appeals (Ala.R.App.P.4(a)(1)) is the beginning and end of the adequacy analysis. In other words, the State asks the Court to pretend that Rule 32.1(f) does not exist. But the State has recognized that Rule 32.1(f) is a stand-alone "out-of-time appeal rule" and, indeed, argued below that it was "firmly established." CA11 Appellees Br.16-21. Rule 4(a) in no way supersedes Rule 32.1(f) or cases applying it. Ala.R.App.P.1.[2]

In a footnote, the State now suggests that Rule 32.1(f) "did not apply to post-conviction petitioners like Maples until January 2005"—citing a case decided *after* the events at issue. Opp.17 n.5. But in 2003, the State argued that Rule 32 was the "proper method" for an out-of-time post-conviction appeal, and acknowledged that a writ of mandamus to pursue such an appeal was likewise governed by Rule 32. Add.1a-2a. The State also has conceded that Maples pursued the "proper vehicle" for his out-of-time appeal. CA11 Appellees Br.19. Moreover, at all relevant points, Alabama law recognized that Rule 32.1(f) *did* apply to post-conviction appeals. Pet.13; Alabama Justices Br.12-13; ACDLA Br.7-8 & n.3; *see also, e.g., Russ v. State*, 853

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[2] The State claims that untimely appeals are "regularly" dismissed under Rule 4(a)(1). Opp.17. But all the cases it cites for that proposition fall *outside* of the realm of Rule 32.1(f). Opp.17-18. The fact that Alabama courts dismiss untimely appeals outside the Rule 32.1(f) context in no way suggests that Alabama has a firmly established rule against untimely appeals for cases, such as this, that fall *within* Rule 32.1(f). Likewise, the fact that litigants have "notice" of Rule 4(a)(1) hardly means that they are on notice that Rule 32.1(f) will be arbitrarily disregarded. Opp.18-19.

So. 2d 1034 (Ala. Crim. App. 2002). To the extent the State suggests there is case law to the contrary, it at best indicates there was no *firmly established* rule.

The State's interpretation of the extant Alabama case law—just like the Eleventh Circuit's—is a transparently *post hoc* rationalization. Alabama courts have consistently granted out-of-time appeals in circumstances that are analogous and, indeed, even "indistinguishable" (Pet.App.30a). Pet.15; ACDLA Br.3-12. Given that body of law, the Eleventh Circuit's holding that the State has established a "firmly established and regularly followed" rule *against* allowing untimely appeals in Maples's situation renders this Court's adequacy doctrine meaningless.

The State attempts to reinvent *Marshall* by arguing that "[1] [Marshall] was proceeding *pro se* and [2] the clerk assumed a duty to serve him, but failed to do so." Opp.21. The first ground is inaccurate. Marshall had counsel when his Rule 32 petition was denied; that is why he alleged "his *counsel* rendered ineffective assistance by failing to inform him that his first Rule 32 petition had been dismissed." *Marshall v. State*, 884 So. 2d 898, 898-99 (Ala. Crim. App. 2002) (emphasis added); *see* Pet.App.14a n.9 (Rule 32 petition was "counseled"). The second ground just invents a rationale not found in the Court of Criminal Appeals' decision in *Marshall*, and in any event fails to distinguish this case. Pet.16 & n.3; Pet.App.29a & n.2.

The State invites this Court to take "a quick perusal" of the record in *Marshall* and take judicial notice of supposedly important facts *not mentioned* in the court's decision. Opp.22. But that record confirms that Marshall was represented by counsel when his Rule 32 petition was denied. And more important,

judicial decisions are ordinarily taken at face value. The State cannot plausibly contend that Alabama defendants must review not only the decisions but the underlying record in decided cases to unearth distinctions or rationales the decisions do not mention.[3]

The State claims that the numerous other cases cited by Maples and *amici* are distinguishable because they involved *pro se* petitioners. Opp.21 n.8. But Rule 32.1(f) does not distinguish between *pro se* and counseled petitioners. Nor does the case law. Regardless, Jenkins was not *pro se*. *Jenkins v. State*, 12 So. 3d 166, 166 (Ala. Crim. App. 2008) (referring to Jenkins's "attorney"). And the State admits that the defendant in *Thompson* had counsel. Opp.21 n.8.

In a last-ditch effort to get around Rule 32.1(f), the State suggests—for the first time—that Rule 32.1(f)'s no-fault, out-of-time appeal rule is wholly discretionary. Opp.20. According to the State, the rule only allows a defendant "to request" an out-of-time appeal. Opp.17 n.5. That is incorrect. While the *fault* determination may entail some judgment, Pet.23, Alabama courts have long treated the ultimate relief as mandatory when the no-fault requirement is satisfied. *See, e.g.*, *Noble v. State*, 708 So. 2d 217, 217 (Ala. Crim. App. 1997) ("If the failure to timely file the notice of appeal was through no fault of the appellant's, he is *entitled* to an out-of-time appeal.") (emphasis added); *King v. State*, 881 So. 2d 542, 543 (Ala. Crim. App. 2002)

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[3] The State also theorizes that an out-of-time appeal was allowed in *Marshall* only because the Constitution required it. Opp.22-23. *Marshall* did not say that, and both the text of Rule 32.1(f) and the case law applying confirm that it is not so limited. In any event, barring an appeal here *does* violate due process. Pet.24-27.

(recognizing the petitioner's "right" to an out-of-time appeal in certain circumstances); *Russ*, 853 So. 2d at 1035 (holding that the trial court "shall grant" an out-of-time appeal if Russ received inadequate notice of the denial of his Rule 32 petition). The State does not dispute that Maples was without fault, so any discretionary aspect of Rule 32.1(f) is inapplicable.

The State points to this Court's 90-day filing deadline for certiorari. Opp.24-26, 39-40. But this Court—unlike Alabama—does not have an express "no-fault, out-of-time appeal rule." This Court's precedent offers only the generalized guidance that the Court can relax procedural rules "in the exercise of its discretion when the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970). That is a good example of a discretionary rule. But it just underscores that Rule 32.1(f) is the *antithesis* of such a rule, and that the State is quite wrong in claiming that the Alabama law on untimely appeals is just like the law in "every appellate court in the country." Opp.40.

The adequacy question presented by this case is a subject of multiple circuit conflicts. Pet.19-21. Instead of disputing the existence of those conflicts, the State asserts that they do not warrant review. Opp.27-28. But these conflicts are squarely implicated and outcome determinative, and thus provide a sufficient basis for certiorari. The availability of federal court review of constitutional claims on habeas should not vary based on *where* a habeas petition is filed.

This Court recently granted review in *Walker* to consider whether a California rule is adequate. At a minimum, this case should be held for *Walker*. But this case independently warrants certiorari, and the Court would be able to provide far more meaningful guidance

on the adequacy doctrine if it set this case for argument with *Walker*. NACDL Br.6-23. The stakes are enormous because some—including the State here—have suggested that this Court should "scrap" the adequacy doctrine altogether. Opp.29. This case underscores why that would be seriously ill-advised.

II. THE CAUSE ISSUE MERITS REVIEW

When it comes to the cause issue, the State takes its avoidance efforts to the next level. Astonishingly, the State does not even mention, much less discuss, *Jones v. Flowers*. That case establishes that the State failed to provide constitutionally adequate notice to Maples. Pet.24-27. That constitutional violation unquestionably establishes cause for any default. The State's only real response is to cry waiver. That argument fails.[4]

Indeed, the State has *conceded* that Maples raised this argument below, as the State's own appendix

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[4] The State inexplicably suggests that the clerk may not have timely received the unopened letters by return mail. Opp.32. Maples has never received an evidentiary hearing on the events at issue because of the erroneous default ruling. But Maples would welcome such a hearing and, to be clear, Maples's counsel long ago confirmed that the clerk received the unopened returned envelopes—and just stuck them in a file. Add.7a-8a.

The State also suggests that a letter to local counsel was enough. Opp.32. But a scheme must be "reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230. The State admits that *86%* of its capital inmates are represented by out-of-state attorneys or the Equal Justice Initiative, Opp.16 n.4, and knows that local counsel in such proceedings "most often do nothing other than provide the mechanism for foreign attorneys to be admitted," Alabama Justices Br.18. It is thus patently unreasonable for the State to do nothing when it knows that notice to out-of-state attorneys has failed.

confirms. Opp.App.2a ¶¶2-3 ("Maples argues that fault lies with the circuit clerk, a State actor ... Maples correctly cites his original blue brief for the proposition that he raised this argument to the panel."); Add.2a-6a. The State nevertheless claims that Maples inexplicably waived this point during oral argument. Opp.30. But counsel for Maples never explicitly repudiated the argument made in his own brief. Nor did the Eleventh Circuit find otherwise. That should be the end of the matter—particularly since this Court undeniably has the authority to address the issue even if it had *not* been raised below. Pet.25 n.5.

In any event, in his briefs Maples pointed to *both* (1) the clerical error by the New York mailroom in handling the letters, *and* (2) the state clerk's failure to do anything when it received the unclaimed letters in the return mail. The State focuses on an exchange at oral argument about the New York mailroom error and counsel's comment that he was not "shifting the blame" to the state clerk. That comment simply acknowledges that multiple failures, including the state clerk's inaction, contributed to the missed deadline, and no single actor was to blame. While the court clerk was not at fault for mailroom errors in New York, Maples has always argued that cause was independently established when the clerk "took no action" once he received the returned unopened letters. Add.4a.

The State's response is equally unconvincing when it comes to attorney abandonment. Pet.27-32. Instead of defending the decision below, the State again argues waiver. And again it is wrong. The State urged below that Maples had argued cause based on "his attorneys' failure to act." CA11 Appellees Br.22. In his brief, Maples explained that his *pro bono* attorneys had left

the case and local counsel was uninvolved. CA11 Maples Br. 9-10. So the State is really just arguing about whether Maples was actually abandoned. But more fundamentally, the problem is that the Eleventh Circuit short-circuited the cause inquiry altogether because it erroneously believed *Coleman v. Thompson*, 501 U.S. 722 (1991), controlled. Pet.App.17a; Pet.27-32.

The State suggests that Maples was represented by Sullivan & Cromwell (S&C) throughout. But "[l]awyers at S&C handle *pro bono* cases on an *individual* basis," Pet.App.257a (emphasis added)—thus, notice was addressed to counsel of record *individually*. Add.7a-8a. Moreover, while other lawyers were working on the case, Pet.29 n.6, none of those lawyers had even yet been admitted *to practice* in Alabama, Pet.App.229a, much less had entered their appearance as counsel in Maples's case. Had they been Maples's lawyers, Alabama would have been required to mail them notice of the order. Ala.R.Crim.P.34.4.

The standard for determining whether cause exists in this context is unquestionably important. And the Eleventh Circuit's conclusion that Maples did not establish cause not only is wrong under this Court's precedents; it conflicts with the decisions of numerous other courts. Pet.29-31; Constitution Project Br.7-19.

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The result reached in this capital case is "intolerable." Constitution Project Br.18. But the important questions presented are by no means limited to this case. Indeed, the Eleventh Circuit has the third highest number of habeas petitions filed each year (706), and the third highest number of petitions in

capital cases (34), of any federal circuit.[5] The decision below has great consequences for habeas petitioners in that Circuit. Moreover, the decision further unsettles a vital area of law that necessitates clarification by this Court. Further review is warranted.[6]

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[5] Administrative Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, Table B-7, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/B07Mar09.pdf.

[6] The State's suggestion (Opp.37-38) of a default under Ala.R.Crim.P.32.6(b) is a red herring and just underscores its "gotcha" mentality. The Alabama post-conviction court *rejected* the State's motion to dismiss Maples's detailed, 100-page petition on this basis. Order, *Maples v. Alabama*, No. CC-95-842.60 (Ala. Cir. Ct. Dec. 27, 2001) ("[T]he Petition is sufficiently pled"). The analysis of the particular claims in the court's subsequent order likewise makes clear that the claims were dismissed as "without merit," not for insufficient pleading. In any event, the State may raise this meritless argument on remand, but it provides no basis for denying review here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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