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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner hereby submits this supplemental brief in response to the Court's decision in *Walker v. Martin*, No. 09-996, slip op. (Feb. 23, 2011), which addresses the adequacy of a discretionary California timeliness requirement under the procedural default doctrine.

INTRODUCTION

The death-row petitioner in this case, Cory Maples, is just one court—this Court—away from being executed despite an almost unimaginable series of events that have thus far deprived him of federal habeas review on the merits of serious constitutional claims, even though all agree he bears no fault for that predicament. As explained by the petition and multiple amicus briefs filed in support of certiorari, the divided Eleventh Circuit decision holding that Maples may be executed without federal court review of his constitutional claims not only directly conflicts with the decisions of this Court and those of other circuits, but raises issues of exceptional national importance warranting resolution by this Court. Although the grave injustice that would be done by executing a man in these circumstances alone calls for plenary review by the Nation's highest Court, the questions presented meet the Court's customary criteria for certiorari. *Walker* only strengthens the case for certiorari.

The Court's decision in *Walker* underscores why certiorari is needed on the first question presented by the petition—while taking nothing away from the need for plenary review on the second question. In *Walker*, this Court not only admonished that "federal courts must carefully examine state procedural requirements

to ensure that they do not operate to discriminate against claims of federal rights," but also stressed that "a state rule must be 'firmly established and regularly followed'" to be adequate and that the "exorbitant application" of an otherwise sound state rule may render it inadequate. *Walker*, slip op. at 13, 7, 8 n.4. *Walker*'s teachings on both the central requirements and importance of the adequacy doctrine confirm that the Eleventh Circuit's conception of that doctrine was profoundly misguided. At the same time, because *Walker* involved a relatively uncommon *discretionary* timeliness rule, the decision does not eliminate the need for review to clarify when a mandatory state procedural rule such as the Alabama "no-fault out-of-time appeal" rule at issue is inadequate to bar federal review because it is inconsistently, discriminatorily, or arbitrarily applied. That question implicates multiple circuit splits left unresolved by *Walker* that are even more glaring in *Walker*'s wake. Pet.12-21, 32-33.

Certiorari also is warranted to review the second question presented, concerning the Eleventh Circuit's remarkable holding that Maples failed to establish cause to excuse a procedural default that all acknowledge was not his fault. As explained in the petition and by amici, the divided court of appeals utterly failed to account for the State's own culpability for the procedural default when a state court clerk received the unopened and unclaimed letters addressed to Maples' lead counsel and just stuck them in a file drawer, in blatant conflict with this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006). Likewise, the court erred by finding that Maples could be held culpable for the actions of attorneys "who [were] not operating as his agent in any meaningful sense of that word," notwithstanding that "[c]ommon sense dictates

that a litigant cannot be held constructively responsible for the conduct of [such] an attorney," *Holland v. Florida*, 130 S. Ct. 2549, 2568 (2010) (Alito, J., concurring). The Eleventh Circuit's decision on cause is irreconcilable with this Court's precedents, and conflicts with the decisions of other circuit courts and state courts of last resort. Pet.24-32.

This Court often holds a petition to see if a pending merits case will eliminate the need for plenary review, and then grants certiorari when it does not. *See, e.g.*, *Schwarzenegger v. Entertainment Merchants Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448). That is the case here. The petition should be granted and set for plenary review or, at a minimum, the Court should vacate the decision below and send the case back to the Eleventh Circuit for further consideration in light of *Walker* and other precedents bearing on the questions presented.

ARGUMENT

I. PLENARY REVIEW IS WARRANTED

1. In *Walker*, this Court removed any doubt that the adequacy doctrine remains a vital safeguard for ensuring that federal habeas review of constitutional claims is not defeated by the arbitrary application of state rules. It therefore rejected invitations to "scrap" adequacy analysis altogether, Criminal Justice Legal Foundation Brief in Support of Certiorari in *Walker* 15; *Walker* Pet.Br.24 & n.1, and instead reinforced critical aspects of the doctrine. The Court admonished that "[t]o qualify as an 'adequate' procedural ground, a state rule must be firmly established and regularly followed." *Walker*, slip op. at 7. State bars are therefore inadequate when they "'impose novel and

unforeseeable requirements without fair or substantial support in prior state law.'" *Id.* at 12 (citation omitted). In addition, the Court recognized that in "exceptional cases ... exorbitant application of [even] a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Id.* at 8 n.4 (quoting *Lee v. Kemna*, 534 U.S. 362, 376 (2002)). In short, at a time when some—such as amicus Criminal Justice Legal Foundation—apparently believed that the Court was predisposed to *dispense* with the adequacy doctrine, the Court unanimously embraced it.

Of course, in *Walker* the Court also reaffirmed its recent holding in *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009), that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." "Guided by that decision," this Court held that California is not foreclosed from applying a discretionary timeliness bar under which post-conviction claims may be defaulted when "substantially delayed without justification." *Walker*, slip op. at 1-2. The Court concluded that California's time rule was "firmly established," because "California's case law made it altogether plain" that a five-year delay was "substantial." *Id.* at 9. The Court then concluded that California's rule was "regularly followed," noting that "a *discretionary* rule ought not be disregarded automatically upon a showing of seeming inconsistencies." *Id.* at 11 (emphasis added). Accordingly, the Court unanimously held that the discretionary state rule in *Walker* was adequate.

2. *Walker* reinforces why certiorari is warranted in this case on the first question presented. The Eleventh Circuit's split decision on the adequacy question is fundamentally out of step with this Court's teachings in *Walker* on the importance of the adequacy doctrine and

its central requirements that a rule must be "firmly established" and "regularly followed" to be adequate—and may be inadequate when applied "'to impose novel and unforeseen requirements.'" *Walker*, slip op. at 12 (citation omitted)

The decision in *Walker* does not eliminate the need for review in this case. As explained by Maples's amicus brief in *Walker*, *Walker* is "hardly representative of the typical case in which the adequacy issue arises on federal habeas." *Walker* Brief for Cory R. Maples 23 (Oct. 27, 2010) (heading) (capitalization altered). While the Court's decisions in *Beard* and *Walker* have helped address the adequacy of *discretionary* rules generally, they do not eliminate the serious confusion that exists concerning more common adequacy cases involving the question of when a particular mandatory state procedural rule should be deemed "firmly established and regularly followed" in a given case. *See* Pet.12-13, 21; NACDL.Br.4-5.

Both states and habeas petitioners have consistently urged this Court to "further clarify the rules relating to the 'adequacy' of state procedural bars." *Walker* Petition for Writ of Certiorari 6 (U.S. Feb. 17, 2010) (California); Petition for Writ of Certiorari 6, *Beard v. Kindler*, No. 08-992 (U.S. Feb. 2, 2009) (criticizing development of doctrine as "uneven") (Pennsylvania); Petition for Writ of Certiorari 21, *Cone v. Bell*, No. 07-1114 (Feb. 25, 2008). As the multiple amici that have filed in support of certiorari have emphasized, this is an ideal case for providing needed guidance on the adequacy doctrine. The fact that this Court has just decided an adequacy case in *Walker* provides no more reason to deny certiorari here than the Court's recent decision in *Beard* provided a reason to deny certiorari in *Walker*. Indeed, *Walker*

presented an application of *Beard*. This case would permit the Court to address the more common situations in which adequacy issues have arisen—outside the context of discretionary rules.

Unlike the narrow issue in *Walker*, this case directly implicates many of the most important circuit splits concerning when a mandatory state procedural rule should be deemed "firmly established and regularly followed": (1) the circumstances under which indeterminate exceptions or inconsistent application make a state procedural rule inadequate to bar federal review, Pet.20; (2) the extent to which *post hoc* analysis by federal courts or later decisions by state courts may be relied upon to harmonize state decisions that appeared inconsistent at the time, Pet.20-21; and (3) the proper allocation of the burden of proof in determining the adequacy of a state procedural rule, Pet.19-20. The Eleventh Circuit's application of the adequacy doctrine in this case—holding that Alabama's "no-fault out-of-time appeal" rule inexplicably *barred* federal habeas review in a case where all agree that the petitioner was *not* at fault for the missed appeal—is egregious and merits review. Pet.13-19; Pet.Reply.3-7.

3. The petition also presents a second question that independently merits certiorari and is not affected by *Walker* concerning the circumstances in which a habeas petitioner may establish cause when all agree he is not at fault. Alabama provided constitutionally inadequate notice of the state court decision denying Maples's petition for post-conviction relief. Although the Alabama Court of Appeals found that "[t]he circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition," Pet.7, App.234a, the state court clerk indisputably did *nothing* when the copies of the order sent to Maples's

pro bono attorneys of record in New York were returned unopened and marked "Return to Sender—Attempted Unknown" or "Return to Sender—Left Firm." Pet.6; Pet.Reply.7a-8a (letters). The Eleventh Circuit's decision holding that Maples failed to establish cause directly conflicts with this Court's decision in *Jones v. Flowers*, 547 U.S. at 229. And Alabama's failure to even *attempt* to justify its own actions under *Jones* speaks volumes. Pet.Reply.2.

Further, the Eleventh Circuit's belief that *Coleman v. Thomson*, 501 U.S. 722 (1991), required Maples to bear responsibility for missed deadlines stemming from *all* attorney misconduct—even when rising to abandonment—cannot be squared with this Court's recent decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010). Even the dissent in *Holland* recognized that a petitioner cannot be held constructively responsible for a lawyer's conduct if the lawyers' actions severed the agency relationship or amounted to disloyalty. 130 S. Ct. at 2573 n.9. And in conflict with the decision below, numerous federal courts of appeals and state courts have concluded that a procedural default precipitated by an effective abandonment by counsel would constitute extraordinary circumstances external to the party's own conduct—and thus cause. *See* Pet.29-30.[1]

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[1] Abandonment goes to the adequacy issue as well. Only last term, a *majority* of States—in a brief authored by Petitioner in Walker—told this Court that a state procedural rule may be inadequate when applied to deprive a litigant of "merits review of his federal claim ... in an extreme case of abandonment [because] it might not qualify as affording fair notice." Brief for California et al. as Amicus Curiae, *Beard v. Walker*, 130 S. Ct. 612 (2009); *see also Lee*, 534 U.S. at 376; Pet. 18-19 (noting that in an "exceptional

As amici have explained, the second question presented merits certiorari in its own right. *See, e.g.*, Constitution Project.Br.7-16; Alabama Appellate Court Justices and Bar Presidents.Br.14-23.

4. The extraordinary importance of both questions presented—underscored by the breadth of amicus participation on both issues—weigh strongly in favor of granting certiorari. The questions presented are frequently recurring, and in capital cases their answers may literally mean the difference between life and death. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment) (noting that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings"). Moreover, the decision below will effect countless others on adequacy as well as cause, because the Eleventh Circuit has the third highest number of habeas petitions filed each year and the third highest number of habeas petitions in capital cases of any federal circuit. Pet.Reply10-11.

The fact that this case originated from Alabama heightens its importance too, as amici have explained. Alabama has more death row inmates per capita than any other state in the country. NACDL.Br.14. And unlike nearly all other states, Alabama does not provide counsel to inmates on death row, notwithstanding that Justice Department statistics show that *one-third* of Alabama death sentences are overturned when actually evaluated on the merits. NACDL.Br.15-16. As this case illustrates, the

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cases," the application of an otherwise "sound rule renders the state ground inadequate to stop consideration of a federal question.").

arbitrary rules governing access to the federal courts established by the decision below are likely to impose unique hardships on habeas petitioners in Alabama. That is especially true for death row inmates like Maples, who, as amici have explained, already face exceptional burdens under Alabama's legal system for capital cases. *See* NACDL.Br.14-18; ACDLA.Br.12-21; Alabama Appellate Court Justices and Bar Presidents.Br.14-23.

The horrific facts of this case—which already have received national attention—also increase the importance of certiorari. Allowing a man to be put to death without any federal habeas review of the merits of serious constitutional claims like Maples's may call into question the legitimacy of the system of capital punishment and "transgress[] the constitutional commitment to decency and restraint." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Appreciating the gravity of the interests at stake, this Court not infrequently summarily reverses in capital cases even where the traditional requirements for certiorari may not be met. *See, e.g., Sears v. Upton*, 130 S. Ct. 3259 (2010); *Jefferson v. Upton*, 130 S. Ct. 2217 (2010); *Magwood v. Culliver*, 130 S. Ct. 624 (2009). Here, the customary requirements for certiorari are met—but the decision below is just, if not more, egregious as those that this Court has seen fit to summarily reverse.

II. AT A MINIMUM, A "GVR" IS WARRANTED

At the least, the Court should GVR this case. The Eleventh Circuit not only ignored requirements of the adequacy doctrine underscored in *Walker*, but rested on at least two propositions that this Court did not embrace in *Walker*. First, the court below appeared to find that a state's inconsistent application of its

procedural rules would *not* bar the adequacy of that rule, *see* Pet.App.12a, effectively tracking the State's suggestion in *Walker* that "'inconsistent' application in the state's enforcement of its procedural rule in other cases is *immaterial* to 'adequacy.'" *Walker* Pet.Br.25 (Aug. 25, 2010) (heading) (capitalization altered) (emphasis added). But this Court rejected that position in *Walker*, reaffirming that a state procedural rule must be "firmly established and regularly followed." *Walker*, slip op. at 7 (citation omitted).

Second, the court below held that Maples could not demonstrate the inadequacy of Alabama's rule because Maples could "point to no Alabama case where an out-of-time appeal has been granted in circumstances such as his case." Pet.App.16a. In effect, it concluded that Maples was doomed because he could not point to a case exhibiting *precisely* identical facts in which an appeal was granted, notwithstanding the rule's plain language mandating relief where a petitioner "failed to appeal within the prescribed time ... and that failure was without fault on the petitioner's part," Ala. R. Crim. P. 32.1(f), and highly analogous state case law. As the dissent below explained, there is Alabama case law directly on point. Pet.App.27-30 (dissent). But in any event, *Walker* teaches that the adequacy inquiry is not driven by the ability to point to a decision applying the state procedural rule to *identical* facts.

This Court has emphasized that the GVR mechanism permits the Court to account for the "equities of the case," *Lawrence v. Chater*, 516 U.S. 163, 167-68 (1996) (per curiam), a factor that weighs heavily in favor of action here. Nor has the Court hesitated to GVR cases where the lower court failed adequately to examine specific claims essential to the judgment, simply to give this Court the benefit of the

lower court's views on issues that might affect this Court's ultimate review of the case. *See, e.g.*, *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006). In this case, the Eleventh Circuit's decision predates *Walker* and *Holland*, and does not even discuss *Jones v. Flowers*, all cases bearing upon the judgment reached below. Although only plenary review would permit this Court to resolve the substantial confusion surrounding the important questions presented, at a minimum the Court should GVR to permit the Eleventh Circuit to consider *Walker* and the substantial and directly relevant authority of this Court not discussed in its decision.

CONCLUSION

For the foregoing reasons, and those in the petition for certiorari and reply brief in support of certiorari, 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,

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