

**In the  
Supreme Court of the United States**

October Term, 2000

---

Ernest Paul McCarver,  
*Petitioner,*

v.

North Carolina,  
*Respondent.*

---

On Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTH CAROLINA,  
AND THE EQUAL JUSTICE INITIATIVE OF ALABAMA, IN SUPPORT OF PETITIONER

---

Steven R. Shapiro  
American Civil Liberties Union  
Foundation  
125 Broad Street  
New York, New York 10004  
(212) 549-2500

Larry W. Yackle  
*(Counsel of Record)*  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, Massachusetts 02215  
(617) 353-2826

Diann Y. Rust-Tierney  
American Civil Liberties Union  
Foundation  
122 Maryland Avenue, N.E.  
Washington, D.C. 20002  
(202) 544-1681

Bryan A. Stevenson  
Equal Justice Initiative of Alabama  
643 South Perry Street  
Montgomery, Alabama 36104  
(334) 269-1803

---

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES

INTEREST OF *AMICI*

SUMMARY OF ARGUMENT

ARGUMENT

I. PRISONERS WITH MENTAL RETARDATION FACE AN UNACCEPTABLE RISK OF ERRONEOUS  
CONVICTIONS AND UNLAWFUL DEATH SENTENCES

II. STATES THAT AUTHORIZE THE DEATH PENALTY FOR PERSONS WITH MENTAL RETARDATION OFTEN  
HAVE NO GENUINELY EFFECTIVE SYSTEM FOR ENSURING THAT SUCH PRISONERS HAVE LAWYERS TO  
ADVANCE THEIR CLAIMS IN STATE POSTCONVICTION PROCEEDINGS

III. PRISONERS WITH MENTAL RETARDATION WHO DO NOT MEET THE EXACTING PROCEDURAL  
REQUIREMENTS ATTENDING POSTCONVICTION PROCEEDINGS FORFEIT ANY OPPORTUNITY TO WIN  
STATE RELIEF

CONCLUSION

**TABLE OF AUTHORITIES**

**Cases**

*Arthur v. Haley*,  
CV-01-N-00983-S (N.D. Ala. 2001)

*Arthur v. State*,  
2001 WL 429289 (Ala. Crim. App.)

*Barbour v. Haley*,  
CV-of-T-0612-N (M.D. Ala. 2001)

*Cunningham v. Zant*,  
928 F.2d 1006 (11th Cir. 2001)

*Daniel v. Thigpen*,  
742 F.Supp. 1535 (M.D. Ala. 1990)

*Dobyne v. State*,  
2000 WL 869500 (Ala. Crim. App.)

*Ex parte Berryhill*,  
2001 WL 470226 (Ala. Sup. Ct.)

*Ex parte Boatwright*,  
471 So.2d 1257 (Ala. Sup. Ct. 1985)

*Gibson v. Turpin*,  
513 S.E.2d 186 (Ga. 1999)

*Jackson v. Herring*,  
42 F.3d 1350 (11th Cir. 1995)

*Murray v. Carrier*,  
477 U.S. 478 (1978)

*Neal v. Pocket*,  
239 F.3d 683 (5th Cir. 2001)

*Penry v. Johnson*,  
No. 00-6677, U.S. (June 4, 2001)

*Penry v. Lynaugh*,  
492 U.S. 302 (1989)

*Smith v. Zant*,  
887 F.2d 1407 (11th Cir. 1989)

*State v. Daniel*,  
No. 81-53 (Russell County, Ala. Cir. Ct)

*Thigpen v. State*,  
2001 WL 429255 (Ala. Crim. App.)

*Washington v. Murray*,  
952 F.2d 1472 (4th Cir. 1991)

*Williams v. State*,  
2000 WL 1603780 (Ala. Crim. App.)

*Williams v. Taylor*,  
529 U.S. 362, 120 Sup.Ct. 1495 (2000)

## **Statutes and Regulations**

21 U.S.C. §848

28 U.S.C. §2244(d)(1)

28 U.S.C. §2244(d)(2)

28 U.S.C. §2254(d)(1)

Ala. Code § 15-12-23(a)

Ala. Code §15-12-23 (1975),

as amended by Act 99-427 (1999)

Ala.R.App.P. 4(a)

Ala.R.App.P. 4(c)

Ala.R.Crim.P. 32

Antiterrorism and Effective

Death Penalty Act of 1996,

Pub.L.No. 104-132, 110 Stat. 1214 (1996)

Calif. Sup. Ct. R. XV(B)

Code of Laws of S.C. Ann. §17-27-160

Code of Va. §19.2-163.7

Mo. Rev. Stat. §547.360.5

Mo. Rev. Stat. §547.370

N.C. Gen. Stat. §7A-451(3)

N.C. Gen. Stat. §7A-486.3(5)

Ohio Rev. Code Ann. §2953.21(I)(1)

Okla. Stat. Ann., tit. 22, §1356

Or. Rev. Stat. §138.590

Pa.R.Crim.P. 904(F)

Utah Code Ann. §78-35a-202

## Other Authorities

Annotation, "Propriety of Imposing Capital Punishment on Mentally Retarded Individuals," 20 A.L.R.5th 177

Bonnie, Richard J., "The Competence of Criminal Defendants with Mental Retardation To Participate In Their Own Defense," 81 J.Crim.L.& Criminology 419 (1990)

Ellis, James W. & Luckasson, Ruth A., "Mentally Retarded Criminal Defendants," 53 Geo.Wash.L.Rev. 414 (1985)

Human Rights Watch, "Beyond Reason: The Death Penalty and Offenders with Mental Retardation" (March, 2001) (<http://www.hrw.org>)

Keyes, Denis W., *et al.*, "Mitigating Mental Retardation in Capital Cases: Finding the 'Invisible' Defendant," 22 Mental & Physical Disabilities L.Rep. 529 (1998)

Liebman, James S. *et al.*, "Capital Attrition: Error Rates in Capital Cases, 1973-1995," 78 Tex.L.Rev. 1839 (2000)

### INTEREST OF *AMICI* (1)

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of North Carolina is one of its statewide affiliates. The ACLU has long supported abolition of the death penalty as a form of cruel and unusual punishment. It has also long believed that the death penalty is administered in this country in a manner that is both arbitrary and discriminatory. These concerns prompted the creation of the ACLU's Capital Punishment Project, and this case once again brings those concerns into sharp focus. The question of whether persons with mental retardation can be executed by the state is thus one of substantial importance to the ACLU and its members.

The Equal Justice Initiative of Alabama (EJI) is a private, nonprofit organization that provides legal assistance to indigent defendants and prisoners who have been denied fair and just treatment in criminal cases. EJI litigates on behalf of death row prisoners, juveniles, people wrongly convicted or charged with violent crimes, poor people denied effective legal representation, and others whose trials are marked by racial bias or prosecutorial misconduct. EJI works with communities that have been marginalized by poverty and discouraged by unequal treatment. Of special relevance here, EJI has provided legal representation to criminally accused poor people and death row prisoners who suffer from mental retardation.

The emerging consensus in this country, and the virtually unanimous view in the rest of the world, is that the execution of persons with mental retardation cannot be reconciled with the minimum standards of decency that the Constitution imposes through the Eighth Amendment. As explained below, that is true not only because of the inherent cruelty of subjecting a defendant with diminished mental capacity to the ultimate punishment, but also because the unique challenges presented by death penalty cases involving persons with mental retardation have resulted in serious obstacles to fair and appropriate treatment for this class of imprisoned people who are at special risk of unjust punishment. For these reasons, *amici* respectfully urge that the decision below be reversed.

### STATEMENT OF THE CASE

We adopt petitioner's statement of the case, which explains that the constitutionality of executing persons with mental retardation is before the Court for determination.

### SUMMARY OF ARGUMENT

Petitioner's brief in this case explains that the Eighth Amendment bars the execution of persons with mental retardation. Whatever the situation may have been when this Court last confronted the question more than a decade ago, *see Penry v. Lynaugh*, 492 U.S. 302 (1989), a consensus now exists, both in this country and worldwide, that imposing the death penalty on

persons with mental retardation serves no legitimate penal interest. On that basis alone, *amici* share petitioner's view that the execution of persons with mental retardation constitutes cruel and unusual punishment regardless of any individual prisoner's factual or legal guilt. States that authorize capital punishment of persons with mental retardation are out of step with the maturing standards of the nation as a whole.

This brief fortifies petitioner's substantive argument by giving it a procedural context. States that authorize the death penalty for persons with mental retardation put this special class of defendants at an unacceptable risk of erroneous and unlawful execution. Unwarranted executions cannot be forestalled merely by allowing, or even requiring, sentencing authorities to consider mental retardation as a factor in mitigation. Numerous cases in the lower courts demonstrate that defense counsel have often failed to develop their clients' mental retardation as a mitigating factor at the penalty phase, thus permitting defendants with mental retardation to be sentenced to death erroneously and unlawfully.

Once invalid death sentences are imposed upon defendants with mental retardation, they typically can be corrected only in postconviction proceedings, first in state court and later in federal habeas corpus. Postconviction litigation in capital cases is notoriously complex. Far too often, however, indigent petitioners seeking postconviction relief must navigate their way through what has increasingly become a procedural maze with unforgiving deadlines, without the timely benefit of appointed counsel. Instead, they may be required either to locate counsel on their own or to proceed *pro se*. It is unrealistic to expect prisoners who are fully possessed of their faculties to find their way through complicated postconviction litigation by themselves. It is wholly irrational to expect prisoners with mental retardation to do so. This brief focuses on Alabama, which is where the Equal Justice Initiative has concentrated its efforts. But Alabama is not alone.

The rigid filing deadlines and inflexible pleading requirements that have now become the norm in postconviction litigation present daunting difficulties for any *pro se* litigant. For a person with mental retardation who has been sentenced to death and then left to fend for himself without further legal representation, those procedural rules loom as insuperable barriers to any possibility of postconviction relief. Accordingly, defendants with mental retardation are placed at special risk of initially receiving the death penalty in inappropriate circumstances, and then actually suffering erroneous and unlawful execution when federal errors escape correction in postconviction proceedings.

When unrepresented prisoners with mental retardation fail to satisfy state procedural requirements, they usually forfeit the opportunity to obtain relief from the state courts. They also typically forfeit the ability to seek federal habeas relief under the governing federal rules, as now augmented by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996). A state's treatment of prisoners with mental retardation therefore reaches beyond its own institutions to corrupt the corrective processes ostensibly available from the Article III judiciary.

This brief illustrates these points with cases from Alabama and other states that retain capital punishment for prisoners with mental retardation. Many of those states also rigorously enforce exacting procedural rules for the conduct of postconviction litigation, while failing to provide prisoners with mental retardation with the professional counsel they need to satisfy the state's procedural requirements. Consequently, prisoners with mental retardation are often deprived of the opportunity to advance potentially valid claims both in state court and in federal court. What results is a system of indifferent brutality, the essence of cruel and unusual punishment in violation of the Eighth Amendment.

## ARGUMENT

### I. PRISONERS WITH MENTAL RETARDATION FACE AN UNACCEPTABLE RISK OF ERRONEOUS CONVICTIONS AND UNLAWFUL DEATH SENTENCES

If the past quarter century has taught us nothing else, it has taught us that capital punishment may be imposed erroneously and unlawfully upon defendants with mental retardation, among others. States that retain the death penalty for defendants with mental retardation insist that it is sufficient if mental retardation can be considered as a mitigating factor during the sentencing phase of the prosecution. Yet, experience demonstrates otherwise. Given the failure of these half measures, only a general rule barring capital punishment of persons with mental retardation can hope to be successful in satisfying constitutional norms.<sup>(2)</sup>

There have been too many cases that have already come to light in which a defendant's mental retardation was either not explored at trial or inadequately presented to the jury, and others that have undoubtedly not yet come to light. The reasons for this are not difficult to discern. The prevalence of inadequate assistance of counsel at the trial stage has been well documented. See James S. Liebman, *et al.*, "Capital Attrition: Error Rates in Capital Cases, 1973-1995," 78 Tex.L.Rev. 1839, 1849-50 (2000). And while this is a problem in all capital cases, it is a special problem for defendants with mental retardation. Lawyers who fail to perform the routine tasks of defense counsel can hardly be expected to understand the depth and significance of a defendant's mental retardation, or to portray that retardation to the jury in a way that decreases rather than increases the likelihood of a death sentence.

By their very nature, capital cases are difficult to litigate, both because of the stakes involved and because of the special procedural rules that apply in capital cases. Representing a client with mental retardation, however, presents unique

problems even for highly skilled and experienced lawyers. See generally Richard J. Bonnie, "The Competence of Criminal Defendants with Mental Retardation To Participate In Their Own Defense," 81 J.Crim.L. & Criminology 419 (1990). Among other things, a defendant with mental retardation may seek to mask significant cognitive deficiencies by appearing to understand what is in fact not understood in the hope of pleasing those around him. See James W. Ellis & Ruth A. Luckasson, "Mentally Retarded Criminal Defendants," 53 Geo. Wash.L.Rev. 414 (1985).

The fact that prisoners with mental retardation have received death sentences despite their actual innocence is therefore tragic but not surprising.(3) In one well-publicized example, Earl Washington was convicted in Virginia and sentenced to death solely on the basis of his confession. No one disputed that Washington was a person with mental retardation. He had an I.Q. of 69, indicating the relative intelligence of a 10-year-old. *Washington v. Murray*, 952 F.2d 1472, 1475 (4th Cir. 1991). He was highly suggestible, easily led, and acted in accordance with a need to please. *Id.* at 1478 n.5. Yet, the prosecution offered no physical evidence tying him to the crime. Instead, it relied entirely on a confession that the Fourth Circuit characterized as "obtained by interrogation almost a year after the crime, from a mildly retarded person upon whom suspicion had not earlier focused during the crime's investigation, and who was not indeed suspected when the critical interrogation which elicited his inculpatory statement was commenced, apparently blindly, while he was in custody in connection with an unrelated crime." *Id.* at 1477.

After this Court denied *certiorari* on direct review, Washington had no counsel to pursue postconviction relief. Just two weeks before his scheduled execution, he was in a small cell in the basement of Virginia's State Penitentiary in Richmond, down the hall from the electric chair, with no one to represent his interests and certainly unable to represent himself. Fortuitously, lawyers handling another case discovered him there and obtained an emergency stay. Ultimately, DNA evidence demonstrated that he was innocent and had confessed only because he understood that a confession was what the police wanted to hear. Earl Washington received a full pardon -- after serving 17 years in prison for a crime he did not commit.

Anthony Porter was sentenced to death in Illinois after a trial in which he managed to conceal his mental retardation. His original lawyer failed to investigate his mental capacity and thus failed to present mental retardation as a mitigating circumstance. Years later, new counsel learned of Porter's condition and obtained a stay 48 hours before his scheduled execution to allow for the appropriate psychological examinations. While those tests were undertaken and the results reported, journalism students at Northwestern University unearthed evidence that proved Porter's innocence. He, too, was released after spending 16 years on death row.

The Washington and Porter cases are not isolated exceptions. To the contrary, they are representative of a growing body of cases in which defendants with mental retardation have been convicted and sentenced to death in extremely disturbing circumstances. A recent study by Human Rights Watch details many of these cases, demonstrating beyond question that defendants with mental retardation face insurmountable difficulties in capital cases and thus are at special risk of erroneous and unlawful execution. See Human Rights Watch, "Beyond Reason: The Death Penalty and Offenders with Mental Retardation" (March, 2001) (<http://www.hrw.org>).(4)

Based on the currently available public record, it is no longer possible to deny that defendants with mental retardation have been condemned to death when properly informed judges or juries would have imposed a different sentence. Even competent lawyers can overlook evidence of mental retardation. See Denis W. Keyes, *et al.*, "Mitigating Mental Retardation in Capital Cases: Finding the 'Invisible' Defendant," 22 Mental & Physical Disabilities L.Rep. 529 (1998). In too many instances, however, the fault lies with ineffective lawyers at the penalty phase of the proceedings in state court.

A series of cases from the Eleventh Circuit illustrates this point vividly.(5) In each case, the petitioner was convicted or sentenced in violation of the United States Constitution and thus received federal habeas corpus relief. None of these prisoners was sentenced to death in subsequent proceedings.

In *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991), the circuit court found counsel's representation at the penalty phase ineffective for failure to develop evidence of the defendant's mental retardation. Counsel in that case neglected to show the sentencing jury that personnel at a state hospital had found the defendant to have an IQ of only 58. *Id.* at 1018 n.20. On resentencing by a properly informed jury, Mr. Cunningham received a life sentence. See *Gibson v. Turpin*, 513 S.E.2d 186, 197-98 (Ga. 1999)(Fletcher, P.J., dissenting).

In *Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989), the circuit court upheld (by an equally divided vote) a district court judgment awarding habeas relief on the ground that the petitioner had been sentenced to death in part on the basis of an invalid confession. There, too, an expert witness at a federal evidentiary hearing testified that the defendant was a person

with mental retardation and thus was unlikely to have understood the *Miranda* warnings when they were read to him. *Id.* at 1412 (Tjoflat, J., concurring). Mr. Smith was not resentenced to death.

In *Daniel v. Thigpen*, 742 F.Supp. 1535 (M.D. Ala. 1990), the district court awarded habeas relief on the basis of defense counsel's wholesale failure to develop his client's severe intellectual impairments. Following this ruling, Mr. Daniel was committed to a mental institution after being deemed incompetent to stand retrial. *State v. Daniel*, No. 81-53 (Russell County, Ala. Cir. Ct). *See also Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995)(counsel's failure to develop evidence of defendant's low intelligence as a mitigating factor supports finding of ineffective assistance).

The special risk faced by defendants with mental retardation in capital cases is therefore clear: they are less capable of assisting in their own defense and more likely to be victimized by the ineffective assistance of counsel. In a certain percentage of cases, those risks will inevitably result in an erroneous conviction or unlawful sentence, as the above cases show. When that occurs, postconviction proceedings often provide the only possibility of relief.(6) To seek that relief, petitioners with mental retardation must initially pursue their state postconviction remedies; thereafter, they may petition for federal habeas corpus relief. Unfortunately, for many death-sentenced prisoners with mental retardation, the postconviction process is often more of trap than an opportunity.

## II. STATES THAT AUTHORIZE THE DEATH PENALTY FOR PERSONS WITH MENTAL RETARDATION OFTEN HAVE NO GENUINELY EFFECTIVE SYSTEM FOR ENSURING THAT SUCH PRISONERS HAVE LAWYERS TO ADVANCE THEIR CLAIMS IN STATE POSTCONVICTION PROCEEDINGS

Postconviction proceedings can catch errors before it is too late. The *sine qua non* of success is effective professional advocacy. Yet, states that retain capital punishment for persons with mental retardation do not always ensure that such prisoners have counsel when they need professional help at the postconviction stage in state court. The record is, at best, a checkered one.

In North Carolina, the Appellate Defender's Office is responsible for identifying and recruiting private lawyers to handle postconviction cases.(7) Apparently, that office has so far been able to fulfill its statutory responsibility by finding lawyers for all indigent prisoners whose sentences have been affirmed on direct review. However, that task will inevitably become more difficult as the numbers on death row rise. Other states automatically appoint counsel for indigents as soon as death sentences are affirmed on direct review. It is our information and belief that California, Pennsylvania, Oklahoma, Utah, Virginia, and Wyoming function in that way.(8)

By contrast, in Alabama, Missouri, Ohio, Oregon, South Carolina, and perhaps other states, there is no clear provision for automatically providing indigents with postconviction counsel promptly after death sentences are affirmed on direct review. Counsel may ultimately be provided, but only after prisoners first manage to file either an application for counsel or an actual pro se petition for postconviction relief.(9) Because prisoners with mental retardation are often manifestly unable to take the initiative in the state postconviction process, they are at grave risk of forfeiting their right to seek postconviction relief through no fault of their own.

In Alabama, where EJI is located and does most of its work, indigent prisoners are sent to death row without any official assurance that they will be advised about, let alone assisted with, state postconviction procedures. *See Ex parte Berryhill*, 2001 WL 470226 (Ala. Sup. Ct.)(explaining that Alabama's statutory provision for experienced counsel applies only to prisoners under sentence of death on "first appeal as of right").

Alabama holds out the promise of an avenue by which prisoners may seek postconviction relief in state court. Rule 32 of the Alabama Rules of Criminal Procedure invites prisoners to advance a variety of claims against death sentences. A trial-level state judge has discretion to appoint counsel to develop a Rule 32 petition, but only after a prisoner has first filed a *pro se* pleading -- again, the very thing that prisoners with mental retardation will often be incapable of doing. Even then, state law limits counsel's compensation to a maximum of \$1,000.(10)

In recent years, EJI has attempted to fill the void left by the state's indifference. EJI has identified prisoners whose death sentences are affirmed on direct review and monitored their fate thereafter. Occasionally, EJI has recruited volunteer lawyers to assist; more often, EJI has itself assumed responsibility for representing prisoners. These informal private efforts have been inadequate to the task.(11) In the near future, they are likely to become hopelessly deficient. The need for professional advocates at the postconviction stage far exceeds the supply even now. Very soon, that supply will be exhausted, and indigent prisoners will be left on their own.

The numbers tell the story. In 1998-99 (the most recent year for which data are available), the State of Alabama sentenced more people to death per capita than any other state in the country. The number of prisoners under sentence of death has doubled in the last decade to the astounding current total of 185. Most of those prisoners are indigent and unrepresented after their sentences are affirmed. EJI simply cannot keep up with the flood of new cases building by the day.

Even now, the small EJI staff devotes the lion's share of its time filing place-holder petitions for prisoners who otherwise would miss crucial filing dates. There is no time to evaluate potential claims carefully and thus to screen out claims that are unlikely to be successful. There is only time to identify claims that have sufficient merit to justify litigation. As a result, Alabama's "system" perpetuates the difficulties that have so often attended capital litigation in the past -- rushed eleventh hour petitions where careful, thorough, professional legal work should prevail.

This situation will only get worse. The number of death row inmates in Alabama is increasing at a far greater rate than the financial or legal resources needed to represent them in postconviction proceedings. Soon, those resources will be exhausted and EJI will no longer be able to recruit lawyers for the ever expanding class of death row inmates in Alabama, who will then be left to proceed pro se or not at all. Some of those unrepresented prisoners who slip through the cracks will undoubtedly be men and women with mental retardation who will lose their rights without ever knowing they had rights to lose.>

### III. PRISONERS WITH MENTAL RETARDATION WHO DO NOT MEET THE EXACTING PROCEDURAL REQUIREMENTS ATTENDING POSTCONVICTION PROCEEDINGS FORFEIT ANY OPPORTUNITY TO WIN STATE RELIEF

It is idle to suppose that prisoners with mental retardation can manage state postconviction litigation by themselves. The Mississippi Supreme Court has put the matter bluntly:

Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [state law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy. *Jackson v. State*, 732 So.2d 187, 190 (Miss. 1999).

The pitfalls are everywhere apparent. A Rule 32 petition in Alabama must be filed within two years after the affirmance of a conviction on direct review. Ala.R.Crim.P. 32.2(c). The Court of Criminal Appeals has held that filing deadline to be a strict jurisdictional requirement. *Williams v. State*, 2000 WL 1603780 (Ala. Crim. App.). Accordingly, prisoners who fail to file within the time prescribed, including prisoners with mental retardation who have no lawyers to assist them, are absolutely foreclosed. There are no exceptions for capital cases of any kind, regardless of the "cause" that prisoners may offer to explain their failure to file within the time allowed. *Arthur v. State*, 2001 WL 429289 (Ala. Crim. App.)(explicitly rejecting the possibility of equitable tolling).(12)

A timely Rule 32 petition cannot be considered if it advances claims that were or might have been raised at trial or on direct review. Ala.R.Crim.P. 32.2(3), (5); e.g., *Dobyne v. State*, 2000 WL 869500 (Ala. Crim. App.). There are no exceptions to this airtight system of forfeitures. If a claim might have been advanced in prior proceedings but was not, it is absolutely barred in a Rule 32 proceeding. Prisoners with mental retardation who are uncounseled will be utterly unable to thread their way through this procedural maze. Instead, they are likely to be barred by procedural default hurdles that effective advocates might negotiate. Thus, they will be denied a fair opportunity to litigate what may be meritorious claims.

If a Rule 32 petition is filed within the prescribed time and advances a cognizable claim, it will still be dismissed if it fails sufficiently to specify the factual basis of that claim. The prisoner bears the burden of "pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner" to relief. Ala.R.Crim.P. 32.3. This is a demanding task for professionals; it is plainly unrealistic for prisoners with mental retardation proceeding pro se:

The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Ala.R.Crim.P. 32.6(b).

If a motion does not meet these standards of precision, it must be summarily dismissed. Ala.R.Crim.P. 32.7(d); see *Ex parte Boatwright*, 471 So.2d 1257, 1258 (Ala. Sup. Ct. 1985)(explaining that a Rule 32 petition should be summarily dismissed if it contains only general statements of a prisoner's legal claims).

Finally, prisoners seeking to appeal from the denial of a Rule 32 petition must file a notice of appeal within 42 days of the entry of the trial court judgment. Ala.R.App.P. 4(a). Alabama recognizes a state version of the "mailbox rule" for cases involving prison inmates. Ala.R.App.P. 4(c). But the Court of Criminal Appeals employs exacting evidentiary standards to determine precisely when prisoners delivered papers to prison authorities. *See, e.g., Thigpen v. State*, 2001 WL 429255 (Ala. Crim. App.) (finding a prisoner's unsworn certificate of service insufficient and remanding for a judicial determination of the day on which the prisoner delivered his notice of appeal to penal officers). Here again, it is unrealistic to think that prisoners with mental retardation proceeding *pro se* can comprehend what is required of them and satisfy those requirements in the time allotted. Here again, prisoners with mental retardation are at special risk of losing the opportunity for vindicating their claims.

#### IV. PRISONERS WITH MENTAL RETARDATION WHO COMMIT PROCEDURAL DEFAULT IN STATE POSTCONVICTION PROCEEDINGS TYPICALLY ARE ALSO PROCEDURALLY BARRED FROM OBTAINING RELIEF IN FEDERAL HABEAS CORPUS

The malfunctions that pervade postconviction litigation in state court carry over to litigation in the federal system, robbing prisoners with mental retardation of any fair access to federal as well as state courts. Illustrations abound. We focus on just three.

First, federal standards regarding procedural default build upon state procedural law. Once the state courts in Alabama and elsewhere refuse to consider a prisoner's claims because of default, the federal courts must usually decline to examine those claims as well. Independent state procedural grounds that would be adequate to foreclose this Court's jurisdiction on direct review equally foreclose federal habeas corpus adjudication in the absence of "cause and prejudice" or a showing of probable innocence. *See generally Murray v. Carrier*, 477 U.S. 478 (1978).

Lawyers who handle litigation in state court often fail to appreciate that what they do in that context can have important implications for federal habeas corpus proceedings later. *A fortiori*, prisoners with mental retardation attempting to represent themselves in state court are at substantial risk of committing some procedural error (however understandable in the circumstances) and, on that basis, compromising their ability to advance federal constitutional claims in federal court.

Second, the filing deadlines governing federal habeas corpus petitions are also linked to state procedures. Ordinarily, state prisoners must file federal habeas corpus petitions within one year after the conclusion of direct review. 28 U.S.C. §2244(d) (1). That filing period is tolled while a properly filed petition for state postconviction relief is pending. 28 U.S.C. §2244(d) (2). Prisoners with mental retardation may have enormous difficulty comprehending these new federal requirements and reconciling them with related state requirements.

It is our information and belief that there are now approximately 40 prisoners in Alabama whose death sentences have been affirmed on direct review and who have not yet begun postconviction proceedings. In those cases, the clock is either running already or about to begin running. It is also our information and belief that some of those inmates are prisoners with mental retardation who, unaided, are unlikely to be able to stop the clock either by filing a Rule 32 petition in state court or by filing a timely federal habeas corpus petition. Most of the prisoners concerned are presumably entitled to apply for the appointment of counsel pursuant to 21 U.S.C. §848. Yet, persons with mental retardation are no more able to do that successfully than they are able to file their own petitions *pro se*.

It is only a matter of time, in our view, before some Alabama death row prisoners with mental retardation will be procedurally barred from advancing what may be meritorious federal claims -- foreclosed for no reason other than their inability to cope with the complexities of state practice. This is an intolerable state of affairs, produced by the conjunction of two indefensible state policies: the authorization of capital punishment for defendants with mental retardation and the denial of counsel to represent those prisoners after direct appeal is complete.

Third, the limitation on federal court authority to award habeas corpus relief, established by 28 U.S.C. §2254(d)(1), links federal habeas corpus to state proceedings in yet another way. Section 2254(d)(1) bars a federal habeas court from granting relief with respect to a claim that was previously adjudicated on the merits in state court, unless the resulting state court decision was "contrary to" clearly established federal law or "involved an unreasonable application" of that law.

This Court held in *Williams v. Taylor*, 529 U.S. 362, 120 Sup.Ct. 1495 (2000), that a state court decision fails the test established by the "contrary to" clause either by applying a rule that is "substantially different" from the rule reflected in this Court's contemporaneous decisions or by arriving at a result that is different from the result this Court itself reached in a prior case in which the facts were "materially indistinguishable." *Id.* at 1519. A state court decision fails the test established by the "unreasonable application" clause if it "correctly identifies the governing legal rule," but "unreasonably" applies that

rule to the facts of a particular case. *Id.* at 1520.(13) Thus, a federal court can award habeas relief only when a previous state court decision was erroneous and "also" unreasonable. *Id.* at 1499. Given §2254 (d)(1), federal habeas corpus may offer no relief to some prisoners with mental retardation sentenced to death in state court.

The recent decision in *Neal v. Pocket*, 239 F.3d 683 (5th Cir. 2001), provides a vivid illustration. In that case, the jury sentenced a defendant with mental retardation to death after hearing only an "abbreviated" account of his mental retardation and personal stressful experiences. *Id.* at 689. When the prisoner obtained different counsel in postconviction proceedings, a much more specific, accurate, and revealing story emerged. New counsel offered affidavits and reports from other doctors and prison authorities, which made "disturbing reading" even for circuit judges with extensive experience in capital cases. *Id.* at 689. As Judge Jolly summarized the new evidence, it showed that the prisoner was, indeed, a person with mental retardation. As a teenager, he had lived for two years in a mental institution with patients suffering from chronic mental disorders. Later, he had been subjected to repeated sexual assaults by prisoners in an Oklahoma penal facility.

The Fifth Circuit concluded that the prisoner's trial counsel had been ineffective in failing to bring that evidence to the attention of the jury in mitigation of a death sentence.

With respect to the "prejudice" element of the Sixth Amendment claim, the court concluded specifically that there was "a reasonable probability" that the jury would not have sentenced the prisoner to death if the jurors had known about his condition and experiences. *Id.* at 694. Nevertheless, the court could not say that the Mississippi Supreme Court had been "unreasonable" in reaching the opposite conclusion. Accordingly, the Fifth Circuit held that §2254(d)(1) barred an award of federal habeas relief.

The decision in *Neal* plainly demonstrates the plight of prisoners with mental retardation under sentence of death. This class of defendants is at special risk of erroneous and unlawful execution. Specifically, defendants with mental retardation are likely to be convicted and sentenced in violation of their federal rights, without proper attention to their mental deficiencies. Once sentenced, they are likely to be procedurally foreclosed from advancing their claims in postconviction proceedings, in both state and federal court. As a result, they may be executed for crimes of which they are actually or legally innocent.

## CONCLUSION

For the reasons stated herein, the judgment below should be reversed, and this Court should hold that the United States Constitution prohibits the execution of persons with mental retardation under any circumstances.

Respectfully submitted,

Larry W. Yackle  
(*Counsel of Record*)  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, Massachusetts 02215  
(617) 353-2826

Bryan A. Stevenson  
Equal Justice Initiative of Alabama  
643 South Perry Street  
Montgomery, Alabama 36104  
(334) 269-1803

Steven R. Shapiro  
American Civil Liberties Union Foundation  
125 Broad Street  
New York, New York 10004  
(212) 549-2500

Diann Y. Rust-Tierney  
American Civil Liberties Union Foundation  
122 Maryland Avenue, N.E.  
Washington, D.C. 20002  
(202) 544-1681

1. Pursuant to Rule 37.3, *amici* are informed that the parties have lodged "a blanket consent for all *amici curiae* briefs" with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.
2. This Court's recent decision in *Penry v. Johnson*, No. 00-6677, U.S. (June 4, 2001), properly held that a jury can impose a valid death sentence only if it is allowed to "consider and *give effect* to" a defendant's mitigating evidence. Slip op. at 13 (emphasis in original)(citations omitted). The Court plainly did not rule that such instructions were sufficient. Indeed, if anything, the *Penry* litigation demonstrates in our view the difficulty of assuming that the concept of mitigation will adequately assess the complex issues of guilt and moral culpability that inescapably arise in capital cases involving defendants with mental retardation.
3. We certainly do not mean to suggest that such miscarriages of justice are limited to defendants with mental retardation. The public record clearly demonstrates otherwise. A capital defendant's mental retardation nevertheless increases the risk of erroneous conviction and sentence.
4. The Washington and Porter cases are among those featured in the Human Rights Watch Report. See "Beyond Reason," at 44-47.
5. See also Annotation, "Propriety of Imposing Capital Punishment on Mentally Retarded Individuals," 20 A.L.R.5th 177 (citing many other cases in which lawyers failed to develop mental retardation as a mitigating circumstance at the sentencing phase of capital trials).
6. We wish to emphasize again, however, that even a system that operates with procedural regularity cannot justify the execution of individuals whose mental limitations demand a different assessment of their moral and legal culpability.
7. N.C. Gen. Stat. §7A-486.3(5); §7A-451(3).
8. Calif. Sup. Ct. R. XV(B); Okla. Stat. Ann., tit. 22, §1356; Pa.R. Crim.P. 904(F); Utah Code Ann. §78-35a-202; Code of Va. §19.2-163.7; Wyo. Stat. Ann. §7-6-104(c)(ii). It is impossible to determine the effectiveness of a state's scheme for postconviction counsel simply by reading the apparently controlling statutes. The real story lies in informal practices and customs known only to local authorities and practitioners. Accordingly, we hesitate to assert with any claim of accuracy that a particular state automatically provides prisoners with mental retardation with counsel to prepare postconviction petitions. Of course, we cannot verify whether states that have established that formal policy actually deliver on their promise or, certainly, whether the lawyers provided render effective representation.
9. Ala. Code §15-12-23(a); Mo. Rev. Stat. §§547.360.5, 370; Ohio Rev. Code Ann. §2953.21(I)(1); Or. Rev. Stat. §138.590; Code of Laws of S.C. Ann. §17-27-160.
10. Ala. Code §15-12-23 (1975), as amended by Act 99-427 (1999).
11. When volunteer lawyers enter cases, they often decline to commit themselves for the duration and withdraw once they have performed some specified function. Volunteer counsel then becomes a sometime thing. Prisoners may be represented by one attorney, abandoned, and then (if they are fortunate) picked up by another volunteer, whose own commitments are limited. See, e.g., *Barbour v. Haley*, CV-of-T-0612-N (M.D. Ala. 2001)(explaining that a prisoner had been abandoned at crucial stages in state court).
12. The Arthur case is a perfect, and perfectly deplorable, illustration of the severity of Alabama's filing deadline. Even as the prisoner in that case was seeking an extension of time from the Court of Criminal Appeals, the Attorney General sought (and the Alabama Supreme Court issued) an order setting an execution date. See *Arthur v. Haley*, CV-01-N-00983-S (N.D. Ala. 2001)(granting a stay allowing the Court of Criminal Appeals to consider the prisoner's motion for additional time).
13. See also *Penry v. Johnson*, slip op. at 8 ("even if the federal habeas court concludes that the state court decision applied clearly established federal law incorrectly, relief is appropriate only if that application is also objectively unreasonable").