No. 10-63

IN THE

Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF ALABAMA AS *AMICI CURIAE* SUPPORTING PETITIONER

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STATEMENT OF INTEREST [1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL often files *amicus* briefs in this Court in capital and other cases that implicate its interest in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Alabama is one of its state affiliates. Since its founding in 1920, the ACLU has participated in numerous cases before this Court, including many involving state capital punishment systems. In 2005, the ACLU published a report concerning the Alabama death penalty system at issue in this case, titled *Broken Justice: The Death Penalty in Alabama.*

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

Amici have a substantial interest in ensuring that petitioner is not executed without federal review of serious constitutional claims under the circumstances of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Alabama seeks to execute petitioner without any federal court review of serious constitutional errors because of a missed filing deadline that everyone agrees was not his fault. While petitioner's state habeas petition was pending, petitioner's *pro bono* lawyers abandoned him. They left their New York law firm and moved on with their careers, without notifying the Alabama court, the court clerk's office, local counsel, or their client who was sitting on Alabama's death row. When the Alabama court denied the petition, the clerk's office sent the orders to petitioner's New York counsel of record, but the orders were sent back to the clerk unopened, marked "Return to Sender—Left Firm." While the clock on the appeal deadline ticked away, the clerk did not pick up the telephone and call petitioner's counsel of record, even though the clerk had their home phone numbers. Nor did the clerk contact the lawyers' former law firm or attempt to notify petitioner directly. Instead, the clerk inexplicably did nothing. By the time the State's attorney finally notified petitioner of the court's orders, the deadline to appeal had expired. The State then successfully used the missed deadline as the basis to deny petitioner all federal court habeas review.

Petitioner thus was deprived of the opportunity to challenge in federal court the facially ineffective assistance of counsel he received at trial. Petitioner was represented at trial by court-appointed lawyers

who each were paid a cap of $1,000 for all of their preparation and who lodged an anemic defense that lasted only a few hours. Like so many appointed lawyers in Alabama capital cases, they were in over their heads and aptly told the jury that they were "stumbling around in the dark." Pet. Br. 8.

Petitioner correctly asserts that the inexplicable failures of the Alabama clerk's office constitute "cause" to excuse any procedural default. The clerk's conduct, however, is not an isolated incident of indifference by the State. Rather, it is symptomatic of the broader culture of callousness and unfairness that permeates Alabama's death penalty system.

Alabama's woefully deficient death penalty system has been criticized by former Alabama judges, Alabama lawyers, Alabama law professors, Alabama legislators, and leaders of the Alabama Bar. A report by *amicus* ACLU found that the system is "broken" in numerous respects, including the State's failure to provide counsel to death row inmates in state post-conviction proceedings. A 265-page American Bar Association ("ABA") study found the Alabama death penalty system so deficient that "fairness and accuracy breakdowns in capital cases are virtually inevitable," specifically highlighting Alabama's failure to provide qualified trial counsel to indigent capital defendants. And just last month, a major Alabama newspaper called for a state-wide moratorium on all death sentences and executions for three years to give the State time to address "the flagrant flaws in Alabama's system of capital punishment."

Despite these substantial and sustained critiques, Alabama has shown a "shocking lack of urgency with regard to the need to reform glaring criminal justice system flaws." State officials have been "strikingly

indifferent to the risk of executing innocent people and have a range of standard responses, most of which are characterized by a refusal to engage with the facts." The State's then-Attorney General, for instance, attacked the ABA as "a liberal, activist organization," rather than respond to the criticisms of Alabama's capital system on the merits.

In light of the record of systemic failures, it is hardly surprising that a local court clerk did not make a simple phone call to notify petitioner or his counsel of a decision that could lead to his execution. No legitimate system of capital punishment could put a person to death in these circumstances. Reversal of the decision below is needed as a check on Alabama's broken capital punishment system.

ARGUMENT

ALABAMA'S DEATH PENALTY SYSTEM SUFFERS FROM NUMEROUS REINFORCING DEFICIENCIES THAT BREED INDIFFERENCE FOR THE RIGHTS OF CAPITAL DEFENDANTS AND WERE THE CAUSE OF THE PROCEDURAL DEFAULT

Petitioner correctly asserts that the Alabama court clerk's failures in this case are "cause" to excuse any procedural default. Pet. Br. 22-34. The clerk's conduct reflects the culture of indifference and unfairness that pervades Alabama's capital system. This case should be evaluated against the backdrop of that system.

A. Alabama's Death Penalty System Has Been Broadly Condemned As "Broken"

Alabama's death penalty system repeatedly has been singled out for failing to provide defendants

with the most basic of trial and post-conviction protections in capital cases.

A coalition of former Justices of the Alabama Supreme Court and the Alabama Court of Criminal Appeals, joined by former Alabama State Bar Presidents, previously advised this Court that "[o]ur capital system in Alabama is in disarray." Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petition for a Writ of Certiorari at 19, *Barbour v. Allen*, No. 06-10605 (May 10, 2007) [hereinafter *Barbour* Justice-*amici*]. These former Alabama jurists and leading practitioners, who have seen the problems firsthand, called Alabama a "compromised system . . . that renders many verdicts and sentences unreliable." *Id.* at 5.

Amicus ACLU has studied Alabama's capital processes and concluded that the "structure of the state's criminal justice system and the power given to its trial and appellate judges compromise and limit the ability of capital defendants to get a fair trial and appropriate sentencing." Am. Civil Liberties Union, *Broken Justice: The Death Penalty in Alabama* 1 (2005) [hereinafter ACLU Report]. The ACLU's study concluded that Alabama "does not provide adequate indigent defense"; that the State has wrongfully convicted, and possibly executed, innocent people; that "[p]rosecutorial misconduct in death penalty cases is a major problem"; and that race often plays an improper role in death penalty prosecutions. *Id.* at 4-22.

In a comprehensive study, the ABA found Alabama's capital system so deficient that it called on the State to impose a moratorium on executions. Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty*

Assessment Report vi (2006) [hereinafter ABA Report]. The ABA's study resulted from a three-year review led by prominent Alabamans, including a state senator, a district attorney, a law school dean, and a former federal magistrate. This team measured Alabama's capital system against standardized protocols developed by the ABA to evaluate key aspects of death penalty administration. *Id.* at i-ii. Alabama's system complied with only four of eighty protocols. *See id.* at vii-xxviii. Indeed, Alabama failed more of the ABA protocols than any of the seven other state death penalty systems that the ABA has studied to date. *See* Am. Bar Ass'n, *Compliance with ABA Policies* 1-21 (2007), *available at* http://www.abanow.org/2007/10/aba-study-chart-state-by-state-analysis-of-death-penalty-systems.

Alabama's capital system also has garnered international disapproval. The United Nations Human Rights Council, whose investigator examined the system and interviewed State officials, found that Alabama processes are "simply not designed to uncover cases of innocence, however compelling they might be." Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum – Mission to the United States of America*, ¶ 8, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009) [hereinafter U.N. Report]. The U.N.'s study found that the election of judges in Alabama has a "significant impact" on capital cases and results in "politicizing death sentences"; that "existing programs for providing criminal defense counsel to indigent defendants are inadequate"; and that racial disparities were present in the application of the Alabama death penalty. *Id.* at ¶¶ 11-18.

Just last month, the *Birmingham News* editorial board called on Alabama lawmakers to adopt a three-year moratorium on imposing death sentences and carrying out executions to allow the State time to address "the flagrant flaws in Alabama's system of capital punishment." Editorial, *Our View: Alabama Lawmakers Should Pass Legislation to Put a Three-Year Halt to Imposing Death Sentences or Carrying Out Executions*, Birmingham News, Apr. 25, 2011. The outlook for this proposal is bleak. As the *Birmingham News* reported, "legislation to address flaws in Alabama's death penalty seems to be even more lifeless than usual." *Id.* In all events, the consensus is the same: the Alabama system is broken.

B. Alabama's Capital System Is Inadequate At Every Stage In The Process

1. Capital Trials: Inexperienced, Underpaid, And Ineffective Lawyers

a. Alabama has no statewide public defender system. Instead, each of the State's forty-one regional judicial circuits is responsible for setting up its own system to provide counsel to indigent defendants. That approach creates "a hodge-podge of systems that varies by judicial circuit in both type and quality." ABA Report, *supra*, at iii. Alabama law requires each judicial circuit to establish an advisory commission regarding the provision of indigent defense. Ala. Code § 15-12-4(a). Many circuits, however, have failed to set up any commission, and in other circuits, commissions exist in name only. ABA Report, *supra*, at 98. The ABA's study identified only one circuit that utilized a centralized public defender office to handle capital cases, while the majority of circuits relied on individual trial judges to appoint capital counsel on a case-by-case basis. *Id.* at 99.

Alabama requires only one qualification before a court may appoint a lawyer to represent a capital defendant at trial: five years of criminal practice experience. Ala. Code § 13A-5-54. There is no requirement of any experience or training in capital cases. *See id.* This bare-bone standard falls far short of the ABA Guidelines for capital representation, which require no fewer than two attorneys with comprehensive training in capital defense and demonstrated trial experience. ABA Report, *supra*, at 117-20; Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 5-10 (2003) [hereinafter ABA Guidelines], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/DPen0709.pdf/$file/DPen0709.pdf.

Even worse, as former Alabama judges have noted, the State's deficient standard is "not consistently followed; exceptions by lower courts are made." *Barbour* Justice-*amici*, *supra*, at 5. In one capital case, for instance, the Alabama trial court approved the appointment of an unqualified lawyer because none of the lawyers in the appointment pool had five years of experience. *McGowan v. State*, 990 So. 2d 931, 993-95 (Ala. Crim. App. 2003). By contrast, the ABA Guidelines require ongoing monitoring and evaluation of the quality of lawyers in the capital appointment pool, and lawyers must be removed from the pool when there is evidence that they "failed to provide high quality legal representation." ABA Guidelines, *supra*, at 8.

"Due in part to the lax appointment standards, the problem of ineffective assistance of counsel is real." ABA Report, *supra*, at 117. Federal and state courts repeatedly have found that appointed counsel

provided ineffective assistance to Alabama capital defendants in numerous respects, including:

- failing to investigate or present mitigating evidence. *Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008); *Brownlee v. Haley*, 306 F.3d 1043, 1074-75 (11th Cir. 2002); *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995); *State v. Smith*, No. CR-06-0898, 2010 WL 3834332, at *17 (Ala. Crim. App. Oct. 1, 2010); *State v. Gamble*, No. CR-06-2274, 2010 WL 3834280, at *12 (Ala. Crim. App. Oct. 1, 2010).
- failing to investigate impeachment evidence. *Ex parte Womback*, 541 So. 2d 47, 70-71 (Ala. 1988).
- failing to make a closing argument at sentencing "based on a gross misunderstanding of a clear rule of Alabama criminal procedure." *Lawhorn v. Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008), *cert. denied*, 131 S. Ct. 252 (2010).
- failing to raise a claim based on inappropriate witness contact with the jury. *Ex parte Pierce*, 851 So. 2d 618, 621 (Ala. 2002).

The lawyers appointed to represent petitioner at his death penalty trial are the paradigmatic example of what capital defendants in Alabama can expect: constitutionally inadequate and inexperienced lawyers who admittedly were "stumbling around in the dark." Pet. Br. 8; *accord id*. at 6-9 (describing petitioner's trial).

b. Beyond the exceedingly low qualification bar, lack of sufficient funding for indigent capital defense in Alabama breeds ineffective assistance. At the time

of petitioner's trial, "many current death row inmates were convicted when the state imposed *grossly inadequate* compensation caps on the attorneys appointed to represent them." *Barbour* Justice-*amici*, *supra*, at 5; *see also* ABA Report, *supra*, at 106-07, 126-29; U.N. Report, *supra*, at ¶¶ 14-16. Though this fee cap is no longer in place, petitioner's appointed trial counsel each were paid a total of $1,000 for all of their work preparing for the guilt and sentencing phases of his trial. Pet. Br. 6.

Because of the notoriously low pay and lack of sufficient funding to defend capital cases, Alabama lawyers historically have been loath to take a death penalty appointment. One lawyer reportedly said he would go to jail before accepting another appointment because the State provides insufficient pay and expenses to properly defend capital cases. Sara Rimer, *Questions of Death Row Justice for Poor People in Alabama*, N.Y. Times, Mar. 1, 2000; *see also* Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases After* Alabama v. Shelton, 63 Ala. Law. 370, 373 (2002) (discussing lack of funds to adequately defend cases).

It is unsurprising, then, that Alabama capital trials lack the indicia of a vigorous defense. In one study of indigent defense in Alabama, "the attorney of record did not file any motions in 72% of the capital and non-capital felony cases. In the cases where motions were filed, 71% of them were 'canned,' non-case specific motions." ABA Report, *supra*, at 119. The length of capital trials in Alabama also suggests a virtually non-existent defense. One study found that more than 75% of Alabama capital trials lasted less than a week. Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense*

Problems: It's a Dollars and Sense Thing, 44 Ala. L. Rev. 1, 37 n.185 (1992). The penalty phase of capital trials in the study lasted an average of one hour. *Id.* at 35. Petitioner's capital trial was no different; it lasted four days, most of which was dedicated to the State's case against petitioner. Pet. Br. 8-9. The defense put on roughly one hour of testimony. *Id.* And the sentencing phase was completed after a lunch break on the day of petitioner's conviction. *Id.*

By contrast, a study for the Judicial Conference of the United States found that federal defenders billed, on average, 1,889 hours in capital trials. *See* Subcomm. on Fed. Death Penalty Cases, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* 11 (1998). This included 409 "in court hours," or the equivalent of fifty-one eight-hour days in court. *Id.* "In states that have mandatory training or rigorous appointment standards for death penalty defense, trials average from three weeks to two months." Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 Harv. L. Rev. 1923, 1928 n.53 (1994). These figures are consistent with capital trial standards, and common sense, that "it should take several thousand hours to adequately prepare for a death penalty trial." ABA Report, *supra*, at 120.

2. The Jury: Confusion And Racial Disparities In The Application Of The Death Penalty

Compounding the problem of an appointment system that fosters inadequate trial counsel, Alabama also fails to ensure the reliability of the jury system. Alabama instructs judges not to provide the jury with written instructions as a general rule. Ala.

R. Crim. P. 21.1. That failure occurs despite studies demonstrating that written instructions "result in more efficient and worthwhile deliberations." ABA Report, *supra,* at 206. As a result, Alabama capital jurors "commonly have difficulty understanding jury instructions." *Id.* at 207. One study found that the majority of jurors did not understand several basic concepts governing the application of mitigating and aggravating factors, "an understanding which is absolutely necessary to properly recommend a sentence in a capital case." *Id.* at 208.

The failure adequately to instruct and inform jurors inevitably leads to verdicts and sentences based on impermissible considerations. Such issues may help to explain the racial disparities that exist in the application of Alabama's death penalty. *See* ACLU Report, *supra*, at 21-22; U.N. Report, *supra*, at ¶ 17 n.20. "In Alabama, 80% of all death sentences are imposed in cases with white victims even though 65% of all murder victims in the state are African American." Equal Justice Initiative, *The Death Penalty in Alabama* 2 (2011) [hereinafter EJI *Death Penalty*], *available at* http://eji.org/eji/files/02.03.11%20Death%20Penalty%20in%20Alabama%20Fact%20Sheet.pdf. "Similarly, although only six percent of all murders in Alabama involve black defendants and white victims, over sixty percent of black death-row inmates have been sentenced for killing someone white." ABA Report, *supra*, at 240. As of 2010, more than half of Alabama's death row—103 out of 204 inmates—were racial minorities, even though minorities comprise less than one-third of the State's population. *See* NAACP Legal Def. & Educ. Fund, Inc., *Death Row U.S.A.: Spring 2010*, at 38 (2010) [hereinafter NAACP Report], *available at* http://naacpldf.org/files/publications/DRUSA_Spring_2010.pdf.

State officials have recognized that "unwarranted sentencing disparity does exist in Alabama," and that the disparity is "problematic when such non-legal factors as location of the courtroom, race, wealth or sex are critical in determining the offender's sentence." Ala. Sentencing Comm'n, *Recommendations for Reform of Alabama's Criminal Justice System: 2003 Report* 27-28 (2003), *available at* http://sentencingcommission.alacourt.gov/Publications/ASC%202003%20Final%20Report.pdf. Yet, "there is no indication that [the State] has taken steps to develop new strategies that strive to eliminate the impact of racial discrimination in capital sentencing," including to provide written instructions to juries. ABA Report, *supra*, at 238.

3. Sentencing: Judicial "Overrides" And Elected Judges

a. Alabama is one of only three states that allow a trial judge to "override" a jury's sentence and impose a different one. *See* Ala. Code § 13A-5-47(d)-(e); Equal Justice Initiative, *Judicial Override in Alabama* 1 (2008), *available at* http://www.eji.org/eji/files/03.19.08%20Judicial%20Override%20Fact%20Sheet_0.pdf (listing Delaware and Florida as other states allowing overrides). In other words, even where the jury in an Alabama capital case unanimously imposes a sentence of life imprisonment, the trial judge can override the jury and order the defendant's execution.

Alabama trial judges exercise this power with striking regularity. In 2008, the Equal Justice Initiative reported that "[s]ince the death penalty was reinstated in 1976, Alabama judges have overridden 84 cases from life to death." *Id.* As of 2006, there were "at least ten cases in Alabama where a judge overrode a jury's unanimous, 12-0 recommendation

for a life without parole sentence." ABA Report, *supra*, at v.

Imposing a death sentence over a jury's recommendation of life is the most common use of the judicial override in Alabama. One study found that "90% of overrides in Alabama are used to impose sentences of death." *Id.*; *see also* ACLU Report, *supra*, at 15 (noting that roughly 95% of overrides used to impose death sentence); The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* 88-89 (2005) ("the vast majority of overrides have been to impose death"). As a result of these trends, roughly one-fourth of Alabama's death row inmates "were condemned to death by an elected judge after the jury decided that life was the appropriate sentence." EJI *Death Penalty, supra,* at 1.

In a recent example, the jury in a high-profile capital case involving the murder of an Alabama college student entered a unanimous sentence of life without parole for the defendant, a veteran who claimed that he suffered from post-traumatic stress disorder after serving in the Iraq war. At the State's urging, however, the Alabama trial judge overrode the jury's recommendation of life and sentenced the defendant to death on the theory that the defendant "was suspected in other crimes that the jury did not know about." Web Staff, *Judge Imposes Death Penalty, Outburst Delays the Trial*, Fox News (Mar. 4, 2011), http://www.myfoxal.com/story/14170559/2011/03/02/sentencing-underway-in-the-courtney-lockhart-trial; *see also* Bob Johnson, *Courtney Lockhart, Iraq Vet, Convicted in Slaying of Lauren Burk*, Huffington Post (Nov. 18, 2010), http://www.huffingtonpost.com/2010/11/18/courtney-lockhart-iraq-ve_n_785646.html.

b. "[C]omplicating the issue, Alabama is the only state with such override that selects its judges in partisan elections," and studies have linked overrides imposing death to election-year politics. ABA Report, *supra*, at v. "Systematic research finds that this political vulnerability of appellate judges takes a toll on their opinions and voting in capital cases." William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931, 984 (2006). "In particular, research shows that, in order to attract votes or campaign funds, judges are more likely to impose or refuse to reverse death sentences when: elections are nearing; elections are tightly contested; pro-capital punishment interest organizations are active within a district or state; and judges have electoral experience." U.N. Report, *supra*, at ¶ 10; *see also* Equal Justice Initiative, *Study Shows Money Influenced Judicial Elections With Alabama Spending At The Top* (Aug. 22, 2010), http://www.eji.org/eji/node/464 ("Fueled by 'tough on crime' rhetoric in partisan judicial elections, judicial override in Alabama is on the rise."). As Justice Stevens recognized, "Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III." *Harris v. Alabama*, 513 U.S. 504, 519-20 (1995) (Stevens, J., dissenting) (citations omitted).

Candidates for the Alabama bench regularly tout their pro-death penalty views. *See* ABA Report, *supra*, at 226-27 (discussing specific examples); *accord* U.N. Report, *supra*, at ¶ 10. "Almost all of Alabama's elected state appellate court judges campaign on

their strong support for the death penalty and many promise to facilitate and expedite executions in order to win votes." EJI *Death Penalty*, *supra*, at 1. For instance, one judicial campaign ad stated that in capital cases, the candidate was "fighting against minor technicalities that would let criminals off." Equal Justice Initiative, *Criminal Justice Reform in Alabama, Part Two: Judicial Selection in Alabama* 9 (2006), *available at* http://eji.org/eji/files/judicialselectionreportsm.pdf (discussing numerous examples). Another candidate promised "I will turn around death (penalty) cases in six months. . . . That's enough time." *Id*. In fact, one of the Alabama judges who declined to consider petitioner's state habeas appeal appeared in a campaign video stating that "I'm the only candidate for Chief Justice . . . who has sent hundreds of criminals back to death row." *Sue Bell Cobb for Chief Justice – Only*, YouTube (Sept. 27, 2006), http://www.youtube.com/watch?v=y2guyWS57OA.

According to the former presiding judge of the Alabama Court of Criminal Appeals who served two decades on the bench, "[j]udicial politics has gotten so dirty in this state that your opponent in an election simply has to say that you're soft on crime because you haven't imposed the death penalty enough." David Firestone, *Inmates on Alabama's Death Row Lack Lawyers*, N.Y. Times, June 16, 2001. "People run for re-election on that basis," he said, "because the popular opinion in the state is, Let's hang 'em." *Id.*

As a result of the political climate in Alabama, "most judges would prefer not to have this [override] power, because it heighten[s] the pressure to impose the death penalty." *Id.* Nevertheless, "a study of judicial override in Alabama found that trial judges

use life to death overrides more than twice as often in the twelve months before a judicial election than in the years between elections." ABA Report, *supra*, at 228. "In 2008, an election year, 30% of the death sentences were imposed by judicial override of jury life verdicts." Equal Justice Initiative, *Judge Override*, http://eji.org/eji/deathpenalty/override. By contrast, "in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life." ABA Report, *supra*, at v.

4. Direct Appeal And Post-Conviction: Underpaid And Ineffective Counsel, If Any

a. If an indigent defendant is convicted and sentenced to death, the trial court must appoint counsel to "represent and assist the defendant in the appeal." Ala. Code § 15-12-22(b). The lawyer's total fee for handling a capital direct appeal in Alabama is capped at $2,000. *Id*. § 15-12-22(d)(3). Stating the obvious, this fee cap is "far too low to ensure that lawyers have the funds necessary to present a vigorous defense or to attract the most experienced and qualified lawyers to these cases." ABA Report, *supra*, at xiv; *see also* ACLU Report, *supra*, at 5 ("These funding rates and caps are vastly insufficient for the amount of work required to properly represent an inmate's rights."). And the cap undoubtedly drags down the quality of appellate representation. The U.N.'s investigator, for instance, stated that he "read appellate legal briefs, submitted on behalf of defendants on [Alabama's] death row, that barely reached ten pages, did not request oral argument, or were largely a bare restatement of the facts." U.N. Report, *supra*, at ¶ 15.

b. Capital defendants in Alabama fare even worse in post-conviction proceedings. Along with Georgia, "Alabama stands alone in failing to guarantee counsel to indigent defendants sentenced to death in state post-conviction proceedings." ABA Report, *supra*, at iv.[2] Instead, Alabama habeas courts "*may* appoint counsel . . . if it appears to the court that the [petitioner] 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 . . . to assert or protect the right of the [petitioner]." Ala. Code § 15-12-23(a) (emphasis added). Even then, there are significant obstacles to discretionary appointments. For one, a court cannot appoint counsel unless the inmate files his own capital habeas petition and the court "does not summarily dismiss the petition." Ala. R. Crim. P. 32.7(c). "[B]y delaying the appointment determination until after the petition has been filed and survived summary dismissal, Alabama effectively eliminates counsel's key responsibilities and places them back in the hands of the petitioner." Celestine Richards McConville, *The Meaninglessness of Delayed Appointments and*

[2] Georgia is the only other state in the nation that does not guarantee counsel to death row inmates in state post-conviction proceedings. Am. Bar Ass'n, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report* xiv (2006) [hereinafter ABA Georgia Report] ("[I]ndigent death-sentenced inmates are not entitled to appointed counsel for state post-conviction or clemency proceedings."); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. App. Prac. & Process 347, 364 (2003) (noting that Alabama and Georgia alone do not guarantee post-conviction counsel for any class of inmates).

Discretionary Grants of Capital Postconviction Counsel, 42 Tulsa L. Rev. 253, 268 (2006).

Moreover, while Georgia fails to guarantee counsel, it provides some funding to an appellate resource center that "monitors capital litigation, represents inmates petitioning for state and federal habeas corpus, and seeks pro bono counsel to handle state and federal habeas cases." ABA Georgia Report, *supra*, at 147-48. Alabama, by contrast, "is the only state in the country without a state-funded program to provide legal assistance to death row prisoners to challenge wrongful convictions and death sentences in state postconviction proceedings." EJI *Death Penalty*, *supra*, at 2; *see also* Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 353 (2006) (Alabama "does nothing at all to provide its condemned inmates with timely legal assistance in preparing and presenting post-conviction claims."); Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1089-90 (2006) ("The current leading example is Alabama, which has no system at all for providing prefiling assistance to capital prisoners wishing to pursue postconviction actions, known locally as Rule 32 proceedings."). "Alabama has provided [post-conviction] counsel to just one of 95 death row inmates prior to filing; that inmate was actively seeking to be executed." Equal Justice Initiative, *Crisis of Counsel* 2 [hereinafter EJI *Crisis of Counsel*], *available at* http://www.eji.org/eji/files/crisisofcounsel.pdf.

If counsel is appointed for an indigent death row inmate in Alabama, the total fees for handling colla-

teral proceedings are capped at $1,000. Ala. Code § 15-12-23(d). Appointed lawyers in Alabama thus "are either skipping important steps in the representation, or working at rates below the federal minimum wage." EJI *Crisis of Counsel*, *supra*, at 2.

c. Alabama places death row inmates "at the mercy of whatever pro bono assistance they can scrape together and their own pro se efforts." Freedman, *supra*, at 1090. For cost and other reasons, however, "in-state organizations and attorneys are incapable of representing all death-sentenced individuals petitioning for state post-conviction relief." ABA Report, *supra*, at 112. Thus, as the State previously explained to this Court, it has created a system of indigent capital defense that relies "on the efforts of typically well-funded out-of-state volunteers." Brief in Opposition at 23, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). But there are not enough volunteers from other states to represent all of Alabama's death row. "[A]s of April 2006, approximately fifteen of Alabama's death row inmates in the final rounds of state appeals had no lawyer to represent them." ABA Report, *supra*, at 112; *see also* Firestone, *supra* (In 2001, "[t]hirty prisoners on Alabama's death row [had] no lawyers to pursue appeals, by far the largest such group in any state."). Today, there are 23 death row inmates in Alabama who are at the end of their direct appeals and need counsel to assist them in state post-conviction proceedings.

Indeed, the official indifference and traps for the unwary exposed in this case only further discourage *pro bono* participation in capital cases. This "cringe-inducing case is causing introspection and angst elsewhere in the legal community, especially among firms, which, like Sullivan, pour a lot of time and

effort into similar pro bono projects." Tony Mauro, *Brief of the Week: In a Capital Case, Trying to Correct a Law Firm's Mistake*, Nat'l L.J., Aug. 4, 2010.

The need for counsel in Alabama is amplified because complex procedural obstacles often thwart inmates' attempts to obtain post-conviction review. "Alabama's post-conviction process is governed by exceptionally complex procedural rules, including unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate this maze. Failure to meet all of the [state law] requirements seals the fate of a condemned inmate." *Barbour* Justices-*amici*, *supra*, at 15; *see also* John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 Cornell L. Rev. 435, 446-47 n.64 (2011) ("Alabama requires that any and all claims be pled with a specificity that few counseled, much less uncounseled, inmates can meet.").

In light of the complex procedures and the State's unwillingness to provide counsel to death row inmates, it is no surprise that Alabama courts rarely grant post-conviction relief in capital cases. The State's own statistics show that from 1995 to 2000, Alabama trial courts denied 32 of 33 habeas petitions; the Alabama Court of Criminal Appeals affirmed in 27 of 28 appeals; and the Alabama Supreme Court affirmed in 16 of 17 appeals. *See* Attorney General Bill Pryor, *Alabama Executes Only the Guilty* (July 2000), http://www.ago.state.al.us/issue/guilty.htm. Alabama habeas courts have been criticized for consistently adopting, word for word, draft opinions submitted by the State's lawyers denying post-conviction relief, often on multiple alternative grounds including state law procedural default. *See* Petition for a Writ of

Certiorari at 16-18, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).[3]

C. Alabama's Intransigence

Rather than reform its system in response to the extensive record of documented failures, the State historically has refused to engage on the merits. When asked about the ABA Report, for instance, Alabama's then-Attorney General responded that "[t]he ABA is a liberal, activist organization with an agenda they constantly push. That's why I'm not a member of the ABA." Phillip Rawls, *ABA: Stop the Executions*, Montgomery Advertiser, June 11, 2006 (quoting former Attorney General Troy King). And when asked about the U.N. investigation findings, the then-Attorney General replied, "[t]he United Nations has grievous injustices in its own building that it ought to address before it begins worrying about a speck in the eye of a state like Alabama." Stan Diel, *United Nations Report Calls Alabama's Death Penalty System Broken, Says Innocents May Have Been Executed,* Birmingham News, July 2, 2008 (quoting Mr. King).

Members of Alabama's judiciary have been similarly outspoken. Shortly after this Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), for instance, Justice Tom Parker of the Alabama Supreme Court publicly characterized the decision as "blatant judicial tyranny"

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[3] From 1973 to 1995, 9% of Alabama death penalty judgments were reversed in state post-conviction proceedings. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 53 tbl. 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. During the same period, federal habeas courts found reversible error in 45% of Alabama capital judgments. *Id*. at 62 tbl. 7.

by "the liberal activists on the U.S. Supreme Court." Justice Tom Parker, Op-Ed, *Alabama Justices Surrender to Judicial Activism*, Birmingham News, Jan. 1, 2006. Justice Parker also chastised his colleagues on the State's high court "because they chose to passively accommodate—rather than actively resist—the unconstitutional opinion of five liberal justices on the U.S. Supreme Court" in an Alabama capital case. *Id.* The proper response, Justice Parker wrote, would have been "to decline to follow *Roper* in [that] case." *Id.*

Consistent with these attitudes, the U.N.'s investigator found after meeting with Alabama officials that they "seem strikingly indifferent to the risk of executing innocent people." U.N. Report, *supra*, at ¶ 8. And State officials "have a range of standard responses to due process concerns (which are sometimes seen as 'technicalities'), most of which are characterized by a refusal to engage with the facts." *Id.* When confronted with cases in which death row inmates have been retried and acquitted, "officials explained that a 'not guilty' verdict does not mean the defendant was actually innocent and that most defendants 'played the system' and probably were guilty." *Id.*; *see also id.* at ¶ 16 ("[S]tate officials are considering half-measures they perceive to be money-saving, instead of the necessary establishment of state-wide, well-funded, independent public defender services."); *Barbour* Justices-*amici*, *supra*, at 4-5 (listing numerous failed attempts to reform the system).

One of the consequences of the State's systemic deficiencies and the official indifference is a disproportionately large death row population. Alabama has more death row inmates per capita than any

other state and has the fifth largest death row population of all the states. *See* Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2009 - Statistical Tables* 8 tbl. 4 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf; NAACP Report, *supra*, at 38-39. And "[i]n 2010, more people were sentenced to death in Alabama than in Georgia, Maryland, Virginia, Arkansas, South Carolina, Oklahoma, Kentucky, and Louisiana combined." Equal Justice Initiative, *Alabama's Death Sentencing and Execution Rates Continue to be Highest in the Country* (Feb. 3, 2011), http://www.eji.org/eji/node/503. Another tragic consequence is that the Alabama capital system likely has condemned innocent people to death. *See* U.N. Report, *supra*, at ¶¶ 5-9; ACLU Report, *supra*, at 7-13 (listing people who were wrongly convicted of capital offenses).

* * * * *

By virtually all accounts, Alabama's death penalty system is fatally flawed, and State officials charged with implementing the system have resisted change and responded to criticisms with callousness or outright hostility. It is no wonder, then, that when the court clerk in Morgan County received returned notices from petitioner's *pro bono* counsel of record, it took no action to ensure that petitioner learned of the state court's decision. This Court's intervention is needed to correct a manifest injustice to which the State is indifferent.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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