No. _________

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

CHRISTOPHER BARBOUR, TONY BARKSDALE, *et. al.*,

Petitioners,

v.

RICHARD ALLEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et. al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Alabama refuses to provide any form of legal aid to assist indigent death-sentenced inmates to prepare postconviction petitions for review of their convictions and sentences. At the same time, it enforces technical rules of postconviction procedure that make it almost impossible to obtain judicial consideration of potentially meritorious postconviction contentions without a lawyer's aid. Is this set of practices consistent with the federal Constitution?

Specifically, did the Court of Appeals for the Eleventh Circuit err in rejecting the claims of impecunious, unrepresented death-row inmates that:

(1) Alabama is obliged by the Sixth, Eighth and Fourteenth Amendments to provide them with attorneys to assist in preparing and presenting petitions for postconviction review; or

(2) Under the conditions currently prevailing in the Alabama postconviction process and distinguishing the situation presented in *Murray v. Giarratano*,[1] indigent condemned inmates who are "unable to obtain counsel to represent . . . [them] in postconviction proceedings"[2] are being sent to death in violation of the Due Process right of access to the courts; or, at the least,

(3) The Due Process right of access to the courts requires that Alabama provide these inmates with some form of legal assistance, albeit less than individual representation by counsel, that will enable them to obtain postconviction judicial consideration of potentially meritorious postconviction claims of constitutional error in their convictions and sentences?

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[1] 492 U.S. 1 (1989).

[2] *Id.* at 14 (concurring opinion of Justice Kennedy).

LIST OF PARTIES TO THE PROCEEDING

In this class action, the district court certified the plaintiff class as: "All persons (1) who have been, are or will be in [Alabama] state custody, (2) who are under a sentence of death, (3) who are unable to afford counsel and have been, are, or will be unrepresented by counsel in connection with the investigation, initiation or prosecution of state postconviction remedies, (4) whose convictions have become final under state law, (5) who have not completed the postconviction, collateral review process provided under the laws of Alabama, and (6) for whom the State refuses to provide counsel for the investigation, initiation and prosecution of state postconviction remedies."

The named plaintiffs and present petitioners are Alabama death-row inmates Christopher Barber, Tony Barksdale, James Callahan, Eugene Clemons, Glenn Holladay, and Anthony Tyson.

Former death-row inmates James Borden and Gary Hart were also named plaintiffs.

In the District Court, these Alabama officials were named as defendants: Stephen Bullard, former Warden of Donaldson Prison; Michael Haley, former Commissioner of the Department of Corrections; Charles Jones, former Warden of Holman Prison; Billy Mitchem, former Warden of Donaldson Prison; and Don Siegelman, former Governor of Alabama.

Successors to those defendants while the case was pending in the 11th Circuit and at present are: Richard Allen, Commissioner of the Alabama Department of Corrections; Grantt Culliver, Warden of Holman Prison; Kenneth Jones, Warden of Donaldson Prison; and Bob Riley, Governor of Alabama.

While the case was pending in the 11th Circuit, Donal Campbell was for a time successor to Michael Haley as Commissioner of the Alabama Department of Corrections.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Barbour v. Haley*, 471 F.3d 1222 (11th Cir. 2006), and is reproduced in the Appendix, pp. A1-A11. The memorandum opinion of the United States District Court for the Middle District of Alabama, also styled *Barbour v. Haley*, is reported at 410 F. Supp.2d 1120 (M.D. Ala. 2006), and is reproduced in the Appendix, pp. A43 - A60. An earlier opinion of the District Court that resolved some issues of substantive significance is unreported and is set out in the Appendix, pp. A12-A29.

JURISDICTION

The judgment of the Court of Appeals was entered on December 8, 2006. On February 22, 2007, Justice Thomas extended the time for filing this petition for *certiorari* until April 9, 2007. The Court's jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and portions of Rules 32.1, 32.2, 32.6 and 32.7 of the Alabama Rules of Criminal Procedure. The relevant texts are set out in the Appendix, pp. B1 - B10.

STATEMENT OF THE CASE

Introduction

Alabama, with the fastest-growing death row in the Nation, is the only State that makes no provision for any sort of legal assistance to enable its death-sentenced prisoners to prepare and present petitions for postconviction relief. It is the only State where condemned prisoners can and do go to

their deaths "unable to obtain counsel to represent . . . [them] in postconviction proceedings" (*Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (concurring opinion of Justice Kennedy)). In this case, the Eleventh Circuit foreclosed all possibility of federal constitutional relief for this situation. Underlying the three specific constitutional Questions Presented is the deeper question of whether the situation should be permitted to continue and to worsen as Alabama's death-row population multiplies.

Eighteen years ago this Court held in *Giarratano* that Virginia's death-row inmates were not constitutionally entitled to increased legal assistance in state postconviction proceedings. Chief Justice Rehnquist's plurality opinion said that nothing in the federal Constitution "required the State to appoint counsel for indigent prisoners seeking state postconviction relief." (492 U.S. at 7.) It said that this rule "should apply no differently in capital cases than in noncapital cases." (*Id.* at 10.) The 5-to-4 decision in *Giarratano* did not, however, turn on these categorical pronouncements. It turned on Justice Kennedy's concurring vote, which he rested on a more nuanced, fact-sensitive view of constitutional protections for condemned inmates. Justice Kennedy examined the record in *Giarratano* and found that "Virginia's prison system . . . [was] staffed with institutional lawyers to assist [prisoners] in preparing petitions for postconviction relief." (*Id.* at 14 – 15.) He also found that "no prisoner on death row in Virginia . . . [had] been unable to obtain counsel to represent him in postconviction proceedings." (*Id.* at 14.) Those findings led Justice Kennedy to conclude that, although "collateral relief proceedings are a central part of the review process for prisoners sentenced to death" (*id.* at 14) and although "Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States" (*id.*), he did not believe that

Virginia was required to do more, "[o]n the facts and record of this case" (*id.* at 15).[3]

Ignoring the carefully qualified reasoning of this determinative concurrence, the Eleventh Circuit below has canonized and extended the plurality opinion in *Giarratano* to create an absolute, inflexible bar against any constitutional claim to any state-provided legal assistance for condemned inmates attempting to file state postconviction petitions. The court below wrote:

> If we lived in a perfect world, which we do not, we would like to see the inmates obtain the relief they seek in this case. However, we are bound by United States Supreme Court precedent, as well as our own precedent, which clearly establish that the United States Constitution does not afford appointed counsel on collateral review. For these reasons, we affirm the district court's judgment of dismissal and hold that the inmates have no federal constitutional right to counsel for the preparation and presentation of postconviction petitions. (Appendix, p. A11.)

Under this inflexible rule, it does not matter that Alabama, unlike Virginia at the time of *Giarratano*, provides no "institutional lawyers to assist [death-row inmates] in preparing petitions for postconviction relief."[4] It does not matter that Alabama makes no provision of *any* sort for *any* kind of legal assistance to death-row inmates in preparing such petitions. It does not matter that Alabama postconviction procedure insists upon technical forms of pleading that these inmates are unable to prepare without legal assistance. It does not matter that, since the time of *Giarratano*, federal habeas corpus practice has been modified so as to make state postconviction proceedings the primary forum for the presentation of federal constitutional claims that could save these inmates' lives.[5] It does not matter that both state and federal postconviction statutes of limitations have developed in such a way that Alabama state postconviction procedure has become a deadly trap for unrepresented death-row

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[3] *Giarratano*, 492 U.S. at 15 (Justice Kennedy, concurring).

[4] *Giarratano*, 492 U.S. at 14 – 15 (Justice Kennedy, concurring).

[5] *See* page 21 *infra*.

inmates, in which their lack of legal assistance causes them to forfeit all judicial review of potentially meritorious federal constitutional claims against their convictions and death sentences.[6] It does not matter that *this* record, unlike *Giarratano*, shows that death-row prisoners in Alabama *have* "been unable to obtain counsel to represent . . . [them] in postconviction proceedings"[7] and have been executed with no substantive postconviction review by any court as a result.

The root question raised by the present petition for *certiorari* is whether the Court of Appeals correctly concluded that none of these things matters in the least. It is whether the plurality opinion in *Giarratano*, which could not command a majority of the Court in 1989, should now be (1) treated as a rigidly controlling precedent, and then (2) extended to the very different conditions facing Alabama death-row inmates in 2007, and then (3) still further extended so as to deny those inmates any sort of state-provided legal assistance – even forms of assistance that stop short of the appointment of counsel for each condemned inmate.

Proceedings Below and Facts Material to the Questions Presented

Proceedings Below

In December 2001, Alabama death-sentenced inmates filed this civil-rights class action in the District Court. Suing under 42 U.S.C. § 1983, they invoked the federal jurisdiction conferred by 28 U.S.C. §§ 1331 and 1343 (a)(3) and (4). Their complaint alleged that the conditions under which they are compelled to litigate postconviction claims in the Alabama courts violate their federal constitutional rights of access to the courts and to counsel. They presented three specific alternative claims for relief: (1) that Alabama violates the Sixth and Eighth Amendment rights of indigent death-

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[6] *See* pages 21-23 *infra*.

[7] *Giarratano*, 492 U.S. at 14 (Justice Kennedy, concurring)

row inmates by refusing to provide counsel to represent them in state postconviction proceedings; (2) that Alabama violates their Fourteenth Amendment Due Process right of meaningful access to the courts by refusing to provide lawyers to assist them in preparing state postconviction petitions even though a lawyer's aid is necessary to compose a petition that will satisfy Alabama's technical pleading rules and obtain judicial consideration of potentially meritorious claims; and (3) that even if the Due Process right of meaningful access does not require Alabama to provide each death-row inmate with the aid of an attorney, it does require the State to provide indigent condemned inmates with some sort of legal assistance that will enable them to present potentially meritorious postconviction claims in a form sufficient to obtain judicial consideration – but Alabama refuses to give them even this minimum measure of legal assistance.[8]

The suit was brought as a class action because there were then more than 40 indigent death-row inmates who had no lawyers and no ability to recruit volunteer lawyers. The state and federal statutes of limitations for filing postconviction proceedings were running, and counsel for the plaintiff class could not represent all of these inmates individually. Thus, numerous unrepresented death-sentenced prisoners were at risk of being executed with no postconviction review when their respective limitations periods expired while they remained without legal assistance. The District

[8] The complaint also alleged that prison officials were enforcing restrictive visitation rules which hampered private efforts to enlist *pro bono* attorneys for unrepresented condemned inmates and obstructed communication between the few inmates who had such attorneys and those attorneys. These aspects of the case were settled in 2004 and are no longer in contention.

Court[9] accordingly certified a plaintiff class of indigent condemned inmates[10] but – after receiving affidavits filed by both parties in connection with various motions[11] – it rejected all of the inmates' claims[12] and entered final judgment in favor of the defendants.[13]

On the inmates' timely appeal, the Court of Appeals for the Eleventh Circuit affirmed. It considered and rejected each of the inmates' three claims for relief on the merits. It ruled that "the precise question at issue in this case was decided by the Supreme Court in *Murray v. Giarratano*," which it described as holding "that death-sentenced inmates have no federal constitutional right to counsel for purposes of seeking postconviction relief." (Appendix, p. A7.) It noted that *Giarratano*

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[9] The parties consented to have a magistrate judge conduct all proceedings and enter judgment under 28 U.S.C. § 636(c), and this civil jurisdiction was duly assigned to Chief Magistrate Judge Charles Coody by an order dated April 3, 2002.

[10] The inmates' motion for class certification was granted by an order of April 26, 2005. (Appendix, pp. A30-A40.) The definition of the plaintiff class was slightly modified by a later order entered on January 23, 2006 in conjunction with the court's entry of final judgment. (See Appendix, pp. A41-A42.) The modified definition appears at page ii *supra*.

[11] These included several motions by the class plaintiffs for preliminary relief, the class plaintiffs' repeated motions for final judgment (filed in an effort to speed a ruling on the central constitutional issues as months passed without a decision on the merits or the granting of any preliminary relief) and the defendants' motion for summary judgment. Also, early in the case an evidentiary hearing was held on the first of the plaintiffs' motions for preliminary relief.

[12] In an order of March 24, 2003, the District Court dismissed the inmates' Sixth Amendment claim for lack of subject-matter jurisdiction, on the theory that "the law is well settled that there is no constitutional right to state-appointed counsel in postconviction proceedings," and "plaintiffs lack standing to assert a claim based on . . . a positive right to counsel where one does not exist." (Appendix, p. A21.) The inmates' remaining claims were rejected on the merits in the court's memorandum opinion of January 23, 2006 (Appendix, pp. A43-A60), explaining the reasons for its entry of final judgment (Appendix, p. A61) in favor of the defendants.

[13] The defendants, sued in their official capacity, were the Commissioner of the Alabama Department of Corrections, the wardens of Donaldson and Holman Prisons, and the Governor. *See* page ii *supra*.

had relied upon the earlier decisions in *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (*id.*); it said that "*Giarratano* extended the rule of *Finley* to include postconviction proceedings initiated by death-sentenced inmates" (*id.*); and it concluded from statements in post-*Giarratano* opinions of this Court[14] that "there is no question that the rule of *Finley* applies equally to death-sentenced inmates" (Appendix, p. A8).

The Court of Appeals rejected the inmates' argument that *Giarratano* "is distinguishable from the present case because Virginia's postconviction proceedings at the time the Supreme Court decided *Giarratano* were notably different than current Alabama postconviction proceedings." (Appendix, p. A8.) Fact-sensitive adjudication of this issue is foreclosed, it said, because "the Supreme Court in *Giarratano*" both "established a categorical rule that there is no federal constitutional right to postconviction counsel" and "made clear its dissatisfaction with a case-by-case approach to determining whether such a right exists." (Appendix, p. A8, citing the *Giarratano* plurality opinion, 392 U.S. at 11-12.) Addressing the inmates' alternative argument that, "if they have no federal constitutional right to counsel for the preparation and presentation of their postconviction claims, the right of access to the courts nonetheless entitles them to some lesser form of legal assistance," the Court of Appeals rejected that contention on the ground that "[t]he inmates' failure to identify a [specific] lesser form of legal assistance is fatal to . . .[this] claim." (Appendix, p. A9.)

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[14] *McCleskey v. Zant*, 499 U.S. 467 (1991), and *Coleman v. Thompson*, 501 U.S. 722 (1991).

Facts Material to the Questions Presented

Except for Alabama, every State that puts people on death row now recognizes "that collateral relief proceedings are a central part of the review process for prisoners sentenced to death" and a phase in which they need "the assistance of persons learned in the law."[15] The States vary widely in the ways they provide this assistance.[16] Some automatically assign postconviction counsel within a prescribed period of time after the end of direct appeal proceedings; some automatically assign counsel after a condemned prisoner files an application for appointment or a notice of intent to seek postconviction relief; others automatically assign counsel after the prisoner files a *pro se* postconviction petition, and then allow counsel to amend that petition. Some States appoint private attorneys; others appoint public defenders or non-profit legal resource centers; others have created specialized defender offices to handle capital postconviction proceedings. Some States impose statutory fee caps for postconviction legal work (which vary in amount and in the degree to which exceptions are permitted on a case-by-case basis); others impose caps on state funds for legal fees but do not impose such caps on local funds; still others have no caps at all for capital postconviction legal fees. The range of models is extensive. But no State with anybody on death row does *nothing* to provide indigent death-sentenced defendants with legal assistance in commencing collateral-relief proceedings – except for Alabama.

Alabama does nothing. It has no postconviction public defender system or capital resource

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[15] *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (concurring opinion of Justice Kennedy).

[16] *See* Appendices C-1 and C-2 for a compilation of the capital postconviction rules and procedures of the death-penalty States other than Alabama. Appendix C-1 provides a detailed description of capital postconviction procedures on a state-by-state basis. Appendix C-2 distills this information into a more condensed form for rapid apperception.

center. It makes no provision for appointment of counsel to any condemned inmate until after the inmate has managed to file a postconviction pleading that both (1) is substantively and technically sufficient to escape summary dismissal, and (2) convinces a judge that counsel is necessary to assert or protect the inmate's rights.[17] (The record shows that since 1997, ninety-five condemned inmates have filed state postconviction petitions; counsel was appointed for only one of them prior to the filing of the petition; and that was to assist an inmate who was requesting that he be permitted to forgo any legal proceedings and be executed as a volunteer.) Alabama does not have any institutional lawyers or even paralegals in its prisons to help condemned inmates investigate, research or frame viable postconviction claims, collect the extra-record factual information necessary to support such claims, or draft the claims in a form that is technically sufficient to escape summary dismissal. Alabama has no public agency that tracks the progress of condemned inmates' cases and advises them of filing requirements and deadlines. It does not recruit volunteer private counsel for condemned inmates or provide any funding to private organizations that attempt to recruit volunteer private counsel for condemned inmates.

There used to be an Alabama Capital Representation Resource Center that tracked the

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[17] Rule 32.7 (c) provides:

> **(c) Appointment of Counsel.** If the court does not summarily dismiss the petition, and if it appears that the petitioner is indigent or otherwise unable to obtain the assistance of counsel and desires the assistance of counsel, and it further appears that counsel is necessary to assert or protect the rights of the petitioner, the court shall appoint counsel.

Rule 32.7(d) authorizes summary dismissal if the court "determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings." (For the full text of Rule 32.7, *see* the Appendix, p. B10.)

progress of condemned inmates' cases, advised them of filing deadlines and filing requirements, and helped them to recruit volunteer counsel. The Center opened in 1989. Although federal grants were available to pay for the Center if the State provided matching finds, Alabama never did. From 1989 to 1995, the Center raised enough private money to leverage a federal grant, but this funding was eliminated by Congress in 1995, and the Center closed. Since then, the work of recruiting volunteer attorneys for Alabama's death-sentenced inmates has been done by private *pro bono* organizations, principally the Equal Justice Initiative ["EJI"] of Alabama (which is located in the State) and the American Bar Association's Death Penalty Representation Project (which operates at the national level and has nationwide responsibilities). Alabama does nothing to assist these organizations, and its postconviction rules make their recruiting efforts – which are inherently difficult[18] – more difficult still. For example, Alabama's one-year statute of limitations for commencing postconviction proceedings means that, by the time a volunteer lawyer can be brought into a case, the period remaining for investigating, researching, drafting and filing a petition is quite short – a significant disincentive to volunteer counsel.[19] And Alabama's extremely low fee cap for representing a death-

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[18] As Robin M. Maher, Director of the American Bar Association Death Penalty Representation Project, attested in an affidavit filed in the District Court below:

> While it is clearly the state of greatest need, Alabama is also the most difficult jurisdiction to place cases with volunteer lawyers. We [the American Bar Association Death Penalty Representation Project] have not successfully recruited any lawyers from the state of Alabama and therefore must rely on out of state lawyers for this work. The time and cost involved in traveling to Alabama is often burdensome. We have had difficulty finding local counsel in Alabama to work with out of state lawyers and assist them with *pro hac vice* admission and local filing.

(Vol. 3, Doc. 91, Tab 13, at 3-4.)

[19] *See* note 30 *infra*.

sentenced inmate in all proceedings after the petition has been filed (if the petition is not summarily dismissed and if the judge then decides to appoint counsel and if the judge also decides to give the appointment to an attorney who assisted in the preparation of the inmate's petition as an uncompensated volunteer) is another major disincentive.[20]

Despite these handicaps, EJI and the ABA were able for a while to find volunteer attorneys to represent most of Alabama's condemned prisoners.[21] But Alabama now has the highest *per capita* death-sentencing rate in the Nation. Since 1990, the State's death-row population has doubled. There are currently 195 people under sentence of death in Alabama[22] – the country's seventh largest death row. Given this rapid growth and the economic realities of the legal profession, EJI and the ABA are

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[20] If and after a state postconviction judge does appoint counsel to represent a condemned inmate who has filed *pro se* and survived a motion for summary dismissal, Alabama caps compensation for appointed counsel at $1000. This means that there is no financial incentive for a lawyer to do voluntary, uncompensated work assisting a condemned inmate to draft and file a postconviction pleading with the expectation of subsequent appointment to do compensated work in the case. To the contrary, lawyers who volunteer to represent Alabama death-row inmates in state postconviction proceedings are compelled to work at less than the federal minimum wage or – if they do the kind of job that capital postconviction representation requires – to make a heavy financial sacrifice.

To provide adequate legal assistance, postconviction counsel must read the trial transcript, confer with his or her client, conduct a factual investigation – a task which includes interviewing witnesses and gathering, reading, organizing, and evaluating records – and do legal research and drafting. All told, the preparation of an adequate postconviction capital case will typically require hundreds of hours of work. One court-appointed attorney attested in an affidavit filed in the District Court below that, after subtracting expenses not reimbursed by the State, he was paid $5.84 per hour for his 109 hours of work representing a death-sentenced inmate in state postconviction proceedings. Taking into account overhead expenses, he calculated that he had a net loss of $14,078.44 stemming from his representation of his client. Quite a few attorneys work many more than 109 hours and suffer correspondingly larger losses.

[21] The record contains affidavits documenting that volunteer counsel for Alabama death-row inmates have been obtained in the past only through extensive recruiting and support efforts on the part of EJI and the ABA.

[22] This updated information is publicly available from the Death Penalty Information Center, at www.deathpenaltyinfo.org/article.php?scid=9&did=188#state, visited March 30, 2007.

no longer able to obtain enough volunteer lawyers to represent Alabama's death-row prisoners.[23]

Without counsel to assist them in investigating, drafting, and filing postconviction petitions, Alabama's death-row prisoners are critically handicapped. The complexity of the substantive state and federal constitutional law bearing on the validity of a capital conviction and death sentence would, under any circumstances, pose a daunting problem for a condemned inmate who is required to identify and plead postconviction claims unaided. But the problem is intensified in Alabama by

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[23] EJI staff attorney Randall Susskind averred in an affidavit below:

> In the last year, the recruitment of counsel has become even more difficult. The growing unease regarding the economic stability of many law firms has made lawyers increasingly reluctant to even consider volunteering to represent a death row inmate. EJI also has fewer resources to allocate to recruitment efforts. These developments have made it less likely that we will be able to find law firms willing to represent inmates who are currently without counsel.

(Vol. 2, Doc. 82, Tab 1, at 2.) And Robin M. Maher (identified in note 18 *supra*) averred:

> Our ability to recruit firms, which has always been limited, has become increasingly difficult in recent months. Law firms have always been hesitant to take death penalty cases because doing so means a commitment of an unknown number of years, "lost" billable hours, and an investment of out-of-pocket costs that cannot be easily estimated. There is also the unfamiliarity of death penalty work and the emotional cost of handling a case with life and death consequences. These factors are often intimidating to civil lawyers who have no experience with criminal law.
>
> . . . In recent months, our declining success recruiting law firms has also been affected by other factors. Generally, billing and marketing pressures within law firms make it difficult for many lawyers to take on time-consuming *pro bono* projects like death penalty work. As a consequence, when the firm is very busy, lawyers are unlikely to have the time to take on significant *pro bono* matters. Conversely, when the economy declines or reflects uncertainty, as it did after September 11, 2001, law firms react conservatively and are much more reluctant to invest resources in a death penalty case. It takes a perfect confluence of availability, interest, and a willingness to invest resources to successfully recruit a law firm to take a death penalty case.

(Vol. 3, Doc. 91, Tab 13, at 2-3.)

the states courts' insistence on maintaining rigorously technical rules of postconviction pleading and practice that an unrepresented condemned inmate cannot typically comply with.[24] These rules are applied to *pro se* postconviction petitions and invoked as a basis for dismissing them on account of defects that could have been avoided with a lawyer's aid.

Alabama postconviction procedure is prescribed by Rule 32 of the Alabama Rules of Criminal Procedure. It features elaborate preclusion doctrines, strict pleading requirements, inflexible filing deadlines, and other procedural pitfalls. Initially, Rule 32.2 provides that postconviction petitions cannot raise any claim that: (1) can "still be raised on direct appeal . . . or by posttrial motion" (under another Rule); (2) "was raised or addressed at trial"; (3) "could have been but was not raised at trial" (with one exception); (4) "was raised or addressed on appeal or in any previous collateral proceeding . . . "; (5) "could have been but was not raised on appeal" (with one exception); and (6) is not "raised as soon as practical" in the case of a claim of ineffective assistance of counsel. These provisions mean that the only claims which a Rule 32 petitioner can raise are claims that have never been identified or shaped by an attorney.[25] A death-row inmate without counsel must not only identify and

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[24] The record reflects that all of the last seven Alabama death-sentenced inmates who filed postconviction petitions *pro se* had their cases dismissed or claims precluded for failure to comply with procedural requirements. Even requirements that Alabama has in common with other States produce a different effect in Alabama, because elsewhere condemned inmates have some legal assistance in complying with the rules. For example, in Louisiana – a State in which indigent death-row prisoners have a statutory right to state postconviction counsel – the Louisiana Supreme Court has held that a postconviction petition filed by an indigent death-row prisoner cannot be summarily denied or dismissed for failure to meet pleading requirements until the petitioner has had counsel appointed and until counsel has had a reasonable opportunity to prepare the petition. *See State ex rel. Hampton v. State*, 795 So. 2d 1198 (La. 2001); *State v. Hoffman*, 768 So. 2d 592 (La. 2000).

[25] *Compare Ross v. Moffitt*, 417 U.S. 600, 614-615 (1974):

> The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and

shape such claims unassisted but understand and explain how each claim escapes the bars of Rule 32.2's six issue-preclusion provisions. This typically involves documenting and arguing how trial or appellate counsel's failure to raise the claim constituted ineffective assistance of counsel under the intricate doctrines of *Strickland v. Washington*, 466 U.S. 668 (1984) – a task far beyond the capability of incarcerated, unassisted, legally uneducated inmates.

But even if these inmates are able to identify a claim and justify why it is not precluded by Rule 32.2, they must then cope with Rule 32.6(b)'s requirement that they plead "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Unrepresented death-sentenced prisoners routinely have their claims dismissed under Rule 32.6(b) because – without an attorney, locked down on death row, with no ability to interview witnesses, gather records, or investigate factual questions – they cannot ascertain the facts necessary to craft pleadings with the specificity demanded to avoid a Rule 32.6(b) dismissal. For example, when condemned inmate Donald Dallas filed a *pro se* postconviction petition, the State of Alabama moved to dismiss several claims, including his claim of juror misconduct, for failure to comply with the specificity requirements of Rule 32.6(b). The judge gave Mr. Dallas fourteen days to amend the

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> in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had 'once been presented by a lawyer and passed upon by an appellate court.' [citation omitted] We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

juror misconduct claim with additional facts. Lacking the ability to interview witnesses or gather records from his cell on death row, Mr. Dallas was unable to amend his petition, and the claim was thereupon dismissed.

The most common claims cognizable in Alabama postconviction proceedings – ineffective assistance of counsel, violations of *Brady v. Maryland*,[26] and juror misconduct – all require the discovery, analysis, pleading, and proof of facts not contained in the trial or appellate record.[27] In the context of a juror misconduct claim, for example, Alabama courts have held that a petitioner cannot meet Rule 32.6(b)'s factual specificity requirement with a pleading that simply identifies the kind of misconduct complained of. S/he must go further and "identify the specific jurors who failed to [behave properly]." *Trawick v. State*, CR-00-1494, slip.op. at 8-9 (Ala. Crim. App. Jan. 25, 2002) (mem.) This construction of the factual specificity requirement makes it very difficult for unrepresented inmates to avoid summary dismissal of their claims in Rule 32 proceedings.

Strict enforcement of filing deadlines – and sometimes of deadlines that require complex legal analysis to ascertain – is yet another hurdle that death-row inmates are ill-equipped to surmount without counsel's assistance. (*See, e.g.*, *Smith v. State*, No. CR-04-1491, slip. op. (Ala. Crim. App., June 1, 2005) (raising *sua sponte* and relying on a rule of civil procedure to hold that Mr. Smith's notice of appeal was untimely, and dismissing the appeal).) For example, condemned inmate Joseph Smith was unable to find a volunteer lawyer to represent him in Rule 32 proceedings and he therefore

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[26] 373 U.S. 83 (1963).

[27] As an example of the type of investigation necessary, volunteer attorneys successfully arguing for Tommy Hamilton reported that to prepare the case they "interviewed scores of witnesses, took numerous depositions," "gathered and examined Mr. Hamilton's school, medical and employment records and had new MRI and EEG testing done." (Declaration of Donald Clark, Vol. 3, Doc. 91, Tab 10, at 2-3.)

filed a Rule 32 petition *pro se*. The State moved to dismiss the petition as untimely and advised a judge of the circuit court that it was unnecessary to appoint counsel for Mr. Smith because his petition was out of time and there was nothing a lawyer could do about that. The judge agreed and dismissed the petition without appointing a lawyer for Mr. Smith.[28] At this juncture, counsel for EJI intervened on Mr. Smith's behalf and agreed to represent him in appealing the order of dismissal. EJI counsel subsequently won a reversal by the Alabama Supreme Court on the ground that the circuit court's construction of the Rule 32 statute of limitations had been erroneous as a matter of law.[29]

More generally, the short, inflexible statute of limitations prescribed by Rule 32.2(c) – in combination with the equally short but differently measured federal habeas corpus statute of limitations inaugurated by the Antiterrorism and Effective Death Penalty Act of 1996 (codified as 28 U.S.C. § 2244(d)) – have gravely exacerbated the perils of Alabama's unrepresented condemned inmates. In 2002, the Alabama Supreme Court amended Rule 32.2(c) to impose a mandatory one-year limitations period on state postconviction filings. This statute of limitations runs from the date of conclusion of the direct appeal – specifically, the date of issuance of a certificate of judgment by the Alabama Court of Criminal Appeals. It is not tolled to permit death-row inmates to seek certiorari review of their convictions or sentences in this Court. And Alabama terminates the appointment of counsel for indigent death-sentenced appellants upon issuance of the certificate of judgment in their appeals. Consequently, a condemned prisoner now has only 365 days to obtain volunteer postconviction counsel while simultaneously seeking certiorari. Finding and recruiting

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[28] Order Dismissing The Rule 32 Petition As Untimely Filed, *Smith v. State* (Mobile Co. Cir. Ct. Oct. 9, 2002) (No. CC-98-2064.60), filed as an exhibit in the District Court below.

[29] *Ex parte Smith*, 891 So.2d 286 (Ala. 2004).

volunteer counsel under these conditions is often impossible.[30]

Another aspect of the Alabama postconviction process adds to the dangers that face a condemned inmate who commences Rule 32 proceedings without the assistance of a lawyer to frame his or her pleadings and positions carefully and to monitor the process assiduously from the outset. As a practical matter, Rule 32 proceedings are dominated by Alabama's Assistant Attorneys General. They typically draft orders dismissing death-sentenced prisoners' postconviction pleadings, which the state judges sign exactly as the State's lawyers have written them. (The record contains an analysis of postconviction judges' orders at the trial level in the last twenty capital postconviction cases reviewed by the Alabama Court of Criminal Appeals before the time when the analysis was submitted to the District Court. It shows that in 17 of the 20 cases, the Rule 32 judge adopted the State's dispositive order word for word, without modification.) Assistant Attorneys General use this

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[30] As Robin M. Maher (identified in note 18 *supra*), explained by affidavit below:

> Law firms rarely initially agree to handle a death penalty case as *pro bono* counsel. Negotiations often last many months during which time I send case summaries of additional information about the logistics of handling a case, or discussing the issues in a specific case. I recently spent 18 months negotiating with a firm and proposing a number of specific cases. The firm declined to take the case.

(Vol. 3, Doc. 91, Tab 13, at 3-4.) And the Executive Director of EJI averred by declaration that:

> Increased numbers of death row prisoners in other states, the economy, less interest in the private bar, increased complexity surrounding the litigation and access to death row prisoners at Holman State prison have combined to make it very, very difficult to find lawyers for Alabama prisoners. These problems have been exacerbated by state and federally created statutes of limitation which have reduced the time period in which a successful recruitment effort can be made and intimidated many attorneys who feel that they need more time than is available to review, consider and commit to representation of a death row prisoner.

(Vol. 3, Doc. 91, Tab 23, at 10.)

opportunity to produce orders that preclude subsequent federal habeas review by resting decisions on alternative grounds including procedural default and other bases for issue preclusion. Unless a condemned inmate has counsel's aid in drafting federal constitutional claims impeccably and in calling to the state judge's attention that the claims cannot properly be rejected on procedural grounds tendered by the State, this practice effectively thwarts merits consideration of potentially viable claims in both state court and any federal habeas proceedings. Also, the State's Assistant Attorneys General largely determine whether the state judges will appoint counsel for an inmate who has filed a Rule 32 petition *pro se* and, if so, whether the appointment will be made early enough in the process to conduct investigation before the State has talked with potential witnesses and other information sources. In general, post-filing appointments of counsel for indigent condemned inmates are made to serve the State's litigation interests, not the inmate's.[31]

On the other hand, when condemned inmates enter the Rule 32 process with attorneys who are prepared and able to make the adversary system work, the inmates often are able to obtain serious consideration of their claims and sometimes the invalidation of their convictions or death sentences

[31] For example, in a case documented by affidavit in the record, named plaintiff Anthony Tyson filed a Rule 32 petition *pro se* on May 17, 2002, with a motion for appointment of counsel. The state postconviction judge failed to appoint counsel for more than eleven months, even after Mr. Tyson asked a federal district court to permit him to proceed in federal habeas without further exhaustion of state remedies. The federal district court denied permission. On April 8, 2003, a judge of the Eleventh Circuit granted Mr. Tyson leave to appeal. On April 16, 2003, an Assistant Attorney General urged the state judge to appoint counsel for Mr. Tyson. On April 18, 2003, the state judge did so. On April 24, 2003 – before Mr. Tyson had heard anything from either the state court or the lawyer appointed by the state court – the Attorney General's Office filed a motion in the Eleventh Circuit asking that Mr. Tyson's appeal be dismissed and attaching, in support of that motion, the Assistant Attorney General's April 16 written communication to the state judge and the state judge's April 18 appointment order. In less than 48 hours, the Assistant Attorney General's tactically-motivated request for the appointment of counsel to represent Mr. Tyson had accomplished what Mr. Tyson's own motion for counsel failed to accomplish in 48 weeks.

on the merits.[32] For example, Tommy Hamilton's conviction and death sentence were set aside because his volunteer lawyers were able to demonstrate that "the state's principal witness perjured himself, that the state withheld exculpatory evidence, and that trial counsel were ineffective."[33] Similarly, Scott Cothren's murder conviction and capital sentence were vacated because his volunteer lawyers convinced the court that Mr. Cothren's trial attorneys had provided ineffective assistance when they "failed to effectively litigate the motion to suppress Mr. Cothren's statements."[34]

In addition, Alabama death-row inmates who were assisted by volunteer counsel to preserve federal constitutional claims throughout the state postconviction process have sometimes succeeded

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[32] *See, e.g., Hamilton v State*, 677 So. 2d 1254 (Ala. Crim. App.1995); *Cothren v. State*, CC-94-1167.60 (Shelby Cir. Dec. 14, 2000) (order received as an exhibit in the District Court below). The record contains declaration testimony from the Executive Director of EJI identifying and documenting 50 cases between 1988 and 2003 in which Alabama condemned inmates were able to win relief in Rule 32 proceedings with the assistance of EJI. He further avers that now:

> EJI's ability to provide services to death row prisoners has been seriously compromised by both limited funding and the ever increasing number of death row prisoners in need of counsel. EJI is no longer capable of providing support assistance to death row prisoners and recruited counsel. EJI is similarly unable to continue the recruitment effort for so many death row prisoners, to adequately monitor their cases or to provide legal assistance which is critical to protecting the constitutional rights of indigent prisoners facing execution.

(Vol. 1, Doc. 30, Tab 1, at 13.)

[33] Declaration of Donald Clark, Vol. 3, Doc. 91, Tab 10, at 1-2.

[34] Affidavit of Stephen S. Walters, Vol. 3, Doc. 91, Tab 11, at 2.

in winning merits relief in subsequent federal habeas corpus proceedings.[35] But inmates who are unrepresented in the state process have always been, and still are, gravely at risk that procedural failings which they cannot avoid without counsel's assistance will result in procedural defaults[36] that cause them to forfeit not only state court relief but also federal habeas review.[37] And in the wake of the Antiterrorism and Effective Death Penalty Act of 1996, condemned inmates who do not have the aid of counsel very early in the state postconviction process are at still greater risk that federal habeas review will not provide them relief from convictions and sentences marred by federal constitutional error. This is so for two principal reasons.

First, AEDPA fundamentally altered the relationship between the state postconviction process and federal habeas corpus by restricting the scope of review in federal habeas to whether state-court decisions on the merits of federal claims (1) are "contrary to" or (2) involve an "unreasonable application of" this Court's precedents or are based upon "an unreasonable determination of the facts

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[35] *See, e.g., Bui v. Haley*, 321 F.3d 1304 (11th Cir. 2003); *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002); *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995); *Nelson v. Nagle*, 995 F.3d 1549 (11th Cir. 1993); *Wood v. Allen*, 465 F. Supp. 2d 1211 (M.D. Ala. 2006); *Holladay v. Campbell*, 463 F. Supp. 2d 1324 (N.D. Ala. 2006); *Lawhorn v. Haley*, 323 F. Supp. 2d 1158 (N.D. Ala. 2004); *Morrison v. Jones*, 952 F. Supp. 729 (M.D. Ala. 1996); *Daniel v. Thigpen*, 742 F. Supp. 1535 (M.D. Ala. 1990).

[36] See, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Coleman v. Thompson*, 501 U.S. 722 (1991).

[37] Many Alabama condemned prisoners have been executed without their claims being heard on the merits in federal habeas as a result of forfeitures suffered in the state postconviction process. *See, e.g., Peoples v. Campbell*, 377 F.3d (11th Cir. 2004); *Sibley v.Culliver*, 377 F.3d 1196 (11th Cir. 2004); *Henderson v. Campbell*, 353 F.3d 880 (11th Cir. 2003); *Fortenberry v. Haley*, 297 F.3d 1213 (11th Cir. 2002); *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999); *Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999); *Kennedy v. Hopper*, 156 F.3d 1143 (11th Cir. 1998); *Baldwin v. Johnson*, 152 F.3d 1304, 1318-19 (11th Cir. 1998); *Waldrop v. Jones*, 77 F.3d 1308 (11th Cir. 1996); *Weeks v. Jones*, 26 F.3d 1030 (11th Cir. 1994); *Hutcherson v. Culliver*, 2005 WL 3348856 (S.D.Ala. Dec 08, 2005) (NO. CIV.A.04-0514-CG-C).

in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). Federal habeas can therefore no longer serve as a cure-all for mistakes of law and fact that happen in state postconviction proceedings – the role that federal habeas played at the time of *Giarratano*. Now, when a state postconviction court gets the law or the facts wrong because an unrepresented state prisoner is unable to present his or her case effectively to the state judiciary, that error will remain uncorrected and will kill a death-sentenced inmate in the end, whatever the quality of the legal assistance that the federal courts may later give him or her.

Second, AEDPA created a one-year statute of limitations for federal habeas filings. (*See* 28 U.S.C. § 2244(d).) There was, of course, no limitations period in federal habeas practice when *Giarratano* was decided. We have previously noted that the effect of the new federal statute of limitations – in combination with the one-year statute of limitations now prescribed by Alabama's state Rule 32.2(c) – has been both to truncate the time available for recruiting volunteer counsel to represent death-sentenced inmates and to discourage attorneys from volunteering. (*See* page 10 above.) If an inmate spends twelve months searching for a lawyer willing to prepare and present a postconviction petition on his or her behalf and is unsuccessful in finding one, he or she will be put to death with no postconviction review by any court.[38] But the one-year federal limitations period exacerbates the jeopardy of unrepresented Alabama death-row inmates in other ways as well.

Even when EJI or the ABA is able to recruit volunteer counsel for an inmate, they can often accomplish this only after a substantial part of the federal limitations period has elapsed. Though the period is tolled while a Rule 32 petition is "pending" in the state courts (28 U.S.C. § 2244(d)(2)), it

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[38] *See Arthur v. State*, 820 So. 2d 886 (Ala. Crim App. 2001), and *Arthur v. Allen*, 452 F.3d 1234 (11th Cir. 2006).

runs throughout the time while that petition is being prepared for filing, and it starts running again immediately upon entry of a final adverse judgment in the Rule 32 proceeding. This means that volunteer counsel must either rush through research, investigation and drafting of the Rule 32 pleading – putting their client in danger of procedurally defaulting claims under Rule 32's exacting pleading requirements – or file the client's Rule 32 petition so late in the federal limitations period that almost none of that period remains after final judgment by the state courts. (A study in the record below identified twenty-one death-row inmates who had filed their Rule 32 petitions at a time when less than one week remained of their federal limitations period. Ten of the twenty-one had less than two days remaining of their federal statutory time.)

These tight tolerances make the preparation of an effective federal habeas petition difficult at best, particularly if the initial Rule 32 pleading was not skillfully drafted.[39] And, when the time remaining in the federal limitations period is only a few days, unavoidable flukes – such as counsel being out of town for a couple of days, sick, or in an intensive trial in another case – can result in the loss of all federal review for all of the inmate's federal claims. In these situations, the inmate loses even claims that had been fully exhausted on direct appeal and did not depend on state Rule 32 proceedings for their preservation. Because of the unavailability of timely appointment of counsel in the Rule 32 process, indigent condemned inmates in Alabama end up worse off at the end of the process than if Alabama had no postconviction process at all.

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[39] Although volunteer counsel can begin drafting the federal habeas petition while the state petition is pending, he or she cannot tailor it to the demands of procedural-default and other issue-preclusion doctrines until the state-court opinion or order denying relief has been received and analyzed.

REASONS FOR GRANTING THE WRIT

The general proposition that there is "no underlying constitutional right to appointed counsel in state postconviction proceedings" (*Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)), is settled, and these petitioners do not contest it. The further proposition that this rule "should apply no differently in capital cases than in noncapital cases" (*Giarratano*, 492 U.S. at 10) is another matter.

Giarratano can be said to have so held, but in two different senses enjoying different measures of authority as precedent. Chief Justice Rehnquist's plurality opinion in *Giarratano* explicitly rejected the contentions that death-sentenced inmates have a right to state-provided counsel by force of the Sixth or Eighth Amendments, Due Process in its fundamental-fairness aspect, or Equal Protection. Since Justice Kennedy's concurring opinion did not take issue with those rulings, they should fairly be regarded as entitled to respect not much less than that which attaches to a Court holding. Petitioners nonetheless venture to urge that their reconsideration is ripe because of the dramatic changes in state and federal postconviction process for death-row inmates that have occurred since *Giarratano* was decided. *See* Part I below.

The second sense in which *Giarratano* can be said to have rejected the claims of death-sentenced inmates to postconviction counsel is that, on the factual record in that case, a majority of the Justices found that the Due Process right of access to the courts did not require Virginia to provide more legal assistance to its death-row inmates than it was then providing. Pursuant to settled principles[40] Justice Kennedy's concurring opinion, which reaches this result upon narrower grounds than the plurality's, represents the most that *Giarratano* can be said to have held on the right-of-

[40] *O'Dell v. Netherland*, 521 U.S. 151, 162 (1997); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *City of Lakewood v. Plain Dealer Publishing Co*, 486 U.S. 750, 764 n.9 (1988); *Marks v. United States*, 430 U.S. 188, 193 (1977).

access point. Under that holding, the present petitioners are entitled to state-provided counsel on the present record. The Eleventh Circuit below reached the contrary result only by a doubly indiscriminate reading of *Giarratano*: not only disregarding Justice Kennedy's concurrence and treating the plurality opinion as authoritatively establishing "a categorical rule that there is no federal constitutional right to postconviction counsel" (Appendix, p. A8) but also saying that "[t]he Supreme Court in *Giarratano* made clear its dissatisfaction with a case-by-case approach to determining whether such a right exists" (Appendix, p. A8). This "dissatisfaction" was, of course, the precise point on which Justice Kennedy expressly disagreed with the plurality. And the Eleventh Circuit's heedless extension of *Giarratano* is made all the more extreme by its application to the peculiarly disabling conditions under which Alabama insists that its unrepresented death-row inmates plead their entitlement to postconviction relief or forfeit postconviction review. Such an extension makes a travesty of the very notion that Due Process includes a right of access to the courts, and warrants this Court's examination and correction on *certiorari*. *See* Part II below.

But the Eleventh Circuit's evisceration of the Due Process right of access went still further. Throughout this litigation, Alabama's indigent death-sentenced inmates have contended that, if they are not entitled to representation by counsel in connection with the preparation of petitions for postconviction relief, they are entitled at the least to *some* form of legal assistance, to make the right of access meaningful. The Court of Appeals' rejection of that contention leaves them stranded literally helpless outside the courthouse door. And the reason for its rejection – that "[t]he inmates' failure to identify a [specific] lesser form of legal assistance [which they should be given] is fatal to . . .[this] claim" (Appendix, p. A9) is indefensible on two distinct scores. First, it conflicts with the square holding of *Lewis v. Casey*, 518 U.S. 343, 362-63 (1996), that when a denial of the Due Process

right of access is potentially corrigible through alternative means, it is the right and obligation of the State – not the persons seeking access – to shoulder "“"the task of devising a Constitutionally sound program" to assure inmate access to the courts.'" (518 U.S. at 362.) *See also Hill v. McDonough*, 126 S. Ct. 2096, 2103 (2006). Second, the potential forms of such programs are not so mysterious as to require that they be pleaded specially or remain unknowable by the Court. Prison law offices staffed by attorneys and paralegals who do not represent inmates individually but do assist them to identify claims, draft pleadings, keep track of deadlines, and so forth, take numerous specific forms but simply represent variations on an altogether obvious theme. The Eleventh Circuit's disregard of *Lewis* and of the obvious also warrants *certiorari* review. *See* Part III below.

I. Developments in the Past Two Decades Warrant Reconsideration of **Giarratano**

The requirements of the Sixth,[41] Eighth,[42] and Fourteenth Amendments[43] do evolve as times and conditions change. And much has changed since *Giarratano* was decided in 1989.

The relevant changes fall into two large categories. First, the rules of postconviction procedure have undergone substantial modifications that heighten the importance of the state postconviction process and intensify the difficulties and dangers confronting death-sentenced inmates who are required to navigate that process without assistance of counsel. We discuss these modifications in more detail in the following Part. Summarily, they include AEDPA's drastic restriction of federal habeas review of state postconviction decisions rejecting an inmate's federal

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[41] *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

[42] *See Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion of Chief Justice Warren), quoted in *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005).

[43] *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 492-93 (1954); *Duncan v. Louisiana*, 391 U.S. 145, 149-150 n.14 (1968).

constitutional claims; the establishment of short, overlapping statutes of limitations for state and federal postconviction petitions; and an increasing complexity in the rules and potential pitfalls of state and federal postconviction practice and their interaction. All together, these developments greatly increase the peril and the helplessness of condemned prisoners who are forced to take the critical first step in the postconviction process without a lawyer's aid.

Second, since *Giarratano* an overwhelming national consensus has emerged recognizing this truism and responding to it by providing counsel for indigent condemned inmates at the critical stage of investigating, researching, drafting and filing state postconviction pleadings.[44] This Court has regarded the evolution of such a consensus about the appropriate procedures for administering the sentence of death as a key indicator of "the evolving standards of decency that mark the progress of a maturing society"[45] for Eighth Amendment purposes.[46] Here, the evolution since *Giarratano* is at

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[44] *See* Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 Cornell L. Rev. 1079, 1094 (2006) ("The virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings amply testifies to the fact that the assistance of counsel is critical in making those proceedings meaningful.").

[45] *Roper* quoting *Trop*; *see* note 42 *supra*.

[46] For example, in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court relied upon the emergence of such a consensus in invalidating mandatory death sentences and holding that the procedural safeguard of individualized sentencing is "a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304. "It is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'. . . [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." *Id.* at 301. *See* the extended analysis in *id.* at 289-98, supporting the Court's conclusion that "[t]he history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid" (*id.* at 292-93).

least as dramatic in every respect – volume of change, rapidity of change, consistency in direction of change, and ultimate volume of the resulting accord among state legislatures and courts – as on any other Eighth Amendment issue as to which this Court has recently found a national consensus.[47] Such a remarkable shift in so short a period of time, producing such an overwhelming agreement that the situation permitted by *Giarratano* requires correction, warrants this Court's reexamination of a two-decades-old decision which no longer enjoys acceptance as a method for administering postconviction justice before putting people to death anywhere in the United States except in Alabama.

II. The Decision Below, Treating the **Giarratano** *Plurality Opinion as the Law of the Land and Extending It by Disregarding the Explicit Limitations that the Concurring Opinion Imposed on Its Authority – as well as by Applying It to the Extreme Situation Now Presented in Alabama – Should Not Go Unreviewed by this Court*

The two principal lines of reasoning by which the Eleventh Circuit incorrectly elevates the *Giarratano* plurality opinion to precedential status on the issue of the Due Process right of access are particularly insidious and demand this Court's strong disapproval. First, the Eleventh Circuit declares that although "[p]lurality opinions are not binding on this court . . . they are persuasive authority" and

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[47] At the time of *Giarratano*, eighteen States routinely appointed counsel for indigent death-row prisoners in state postconviction proceedings. (492 U.S. at 10 n.5 (plurality opinion).) Since *Giarratano*, not a single one of these States has changed its position (except that Vermont has abolished the death penalty), while the number of States making such an appointment has increased to a total of 35 out of America's 37 death-penalty States. *See* Appendix C-2, pp. 11- 14. [Vermont is not shown on that chart because it no longer has the death penalty. The chart indicates by an asterisk the other 17 States that provided for the automatic appointment of capital postconviction counsel in 1989. The one death-penalty State other than Alabama that does not so provide today is New Hampshire. New Hampshire has no one on death row and has not sentenced anyone to die under its current capital-sentencing laws; its rules regarding the appointment of postconviction counsel for indigent prisoners – which are discretionary – have been designed and are administered with non-capital cases in view.]. All told, the number of States that have changed their positions in a single direction here is eighteen, as compared with the five that had changed their positions between *Stanford v. Kentucky*, 492 U.S. 361 (1989), and *Roper v. Simmons*, 543 U.S. 551 (2005), or the sixteen that had changed their positions between *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Atkins v. Virginia*, 536 U.S. 304 (2002).

thus "preclude[ ] lower courts from reaching results at odds with a narrow reading of the *question* before the [C]ourt." (Appendix, p. A8., citing *Horton v. Zant*, 941 F.2d1449, 1464 n.32 (11th Cir. 1991) (emphasis added).) This Eleventh Circuit rule conspicuously renders *functus ex officio* and senseless this Court's own rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'" (*Marks v. United States*, 430 U.S. 188, 193 (1977)).[48] Second, the Eleventh Circuit not only refuses to treat Justice Kennedy's concurring opinion in *Giarratano* as limiting the holding of that case but reads the *Giarratano* plurality opinion as establishing the very proposition which provoked Justice Kennedy's disagreement and led him to write separately. "The Supreme Court in *Giarratano*," says the Court of Appeals – citing the plurality opinion without indicating that that is what it is citing – "made clear its dissatisfaction with a case-by-case approach to determining whether [the Due Process right of access to the courts sometimes requires recognition of an ancillary right to the appointment of counsel]." (Appendix, p. A8.) But the whole point of Justice Kennedy's concurrence was that, in his view, a case-by-case approach to that question is necessary. *See* 392 U.S. at 14-15.[49]

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[48] *See also* the other cases cited with *Marks* in note 40 *supra*.

[49] In addition to the unsound arguments discussed in the text, the Eleventh Circuit offers two more reasons for treating the *Giarratano* plurality opinion as authoritative:

First, the Eleventh Circuit observes that *Giarratano* relied upon the earlier opinions in *Ross v. Moffitt*, 417 U.S. 600 (1974), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987). That is true but irrelevant to the fact-specific contention of Alabama's death-sentenced inmates that they need the assistance of counsel to obtain access to Alabama's postconviction process. Even apart from the circumstance that *Ross* nor *Finley* were not capital cases, neither Ross nor Finley attempted to make any fact-based showing that he could not obtain judicial consideration of potentially meritorious claims without a lawyer's aid. Both Ross and Finley simply contended that they had a *per se* entitlement to appointed counsel; and that was the contention which this Court rejected.

And under any fact-sensitive approach, the present case stands in stark contrast to *Giarratano*:

- Neither of the two circumstances that Justice Kennedy's concurring opinion in *Giarratano* specifically identified as crucial to the outcome of that case is true in Alabama today.

  - "Virginia's prison system . . . [was] staffed with institutional lawyers to assist in preparing petitions for postconviction relief." (392 U.S. at 14–15.) Conversely, Alabama provides no institutional lawyers – nor, indeed, any other form of aid, legal or paralegal – to assist in preparing petitions for postconviction relief.

  - "[N]o prisoner on death row in Virginia . . . [was] unable to obtain counsel to represent him in postconviction proceedings." (*Id.* at 14.) Conversely, as the Court of Appeals below acknowledged, Alabama's condemned inmates are unable to obtain postconviction representation; they have "cite[d] cases in which [unrepresented] death-sentenced inmates' postconviction petitions were dismissed on procedural or limitations grounds as proof of actual injury." (Appendix, p. A5.)[50]

Second, the Eleventh Circuit observes that *Finley* – and, in one instance, *Giarratano* itself – have been cited with approval by later majority opinions of the Court in capital cases: *McCleskey v. Zant*, 499 U.S. 467 (1991), and *Coleman v. Thompson*, 501 U.S. 722 (1991). This, too, is true but irrelevant to the present Alabama petitioners' right-of-access-to-the-courts claim. Like Ross and Finley, McCleskey and Coleman advanced no fact-specific contention that the conditions under which they were required to present claims to state postconviction courts made it practically impossible for them to receive consideration of the claims without a lawyer's aid. So, in *McCleskey* and *Coleman* the Court cited *Finley* and *Giarratano* for nothing more than the general proposition that, in the absence of any such contention, there is no *inherent* right to postconviction counsel even in a capital case. The Court has recently cited *Coleman* for that same proposition. *Lawrence v. Forida*, 127 S. Ct. 1079, 1085 (2007).

[50] *See also American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 159 (June 2006), available at www.abanet.org/moratorium/assessmentproject/alabama/html, visited March 30, 2007.

- Wholesale changes in the nature of postconviction litigation in the years since *Giarratano* have made it crucial for condemned inmates to have the timely aid of a lawyer in preparing postconviction claims in order to obtain judicial consideration of potentially meritorious challenges to their convictions and sentences.

  - As a result of the Antiterrorism and Effective Death Penalty Act of 1996, federal habeas corpus review of state postconviction decisions rejecting a prisoner's federal constitutional claims is now limited to determining whether the state court decision is "contrary to" or involved an "unreasonable application of" this Court's precedents. 28 U.S.C. § 2254(d)(1). State-court decisions that have "applied clearly established federal law erroneously or incorrectly" in a death case are irremediable unless the error is "also . . . unreasonable." [*Terry*] *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *Bell v. Cone*, 535 U.S. 685, 694 (2002). This means that a condemned inmate's ability to present federal claims in a state postconviction forum in a way most likely to avoid their erroneous rejection has become, quite literally, a matter of life and death.[51]

  - The creation of one-year statutes of limitations for both state and federal postconviction proceedings has drastically exacerbated the plight of indigent,

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[51] *See* American Bar Association Section of Individual Rights, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, 63 Ohio St. L.J. 487, 506-07 (2002) [hereafter, "*ABA Protocols*"]; Freedman, *supra* note 44, at 1098; Brad Snyder, *Disparate Impact on Death Row:* M.L.B. *and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 Yale L.J. 2211, 2233 (1998); Alexander Rundlet, *Comment, Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-conviction Counsel*, 1 U. Pa. J. Con. Law 661, 675-677 (1999).

unrepresented death-row inmates.[52] Even if the pool of lawyers willing to represent these inmates *pro bono* remained inexhaustible as Alabama's death row rapidly multiplies – which is not the case[53] – the difficulty of recruiting counsel for any particular inmate in time to investigate, research, document, and draft timely and adequate state and federal postconviction pleadings makes it virtually certain that potentially valid claims will go undeveloped in some cases and that in other cases all postconviction review will be forfeited as a result of missed deadlines. (The confusing divergence of starting dates for the federal and state limitations periods exacerbates the problem, as does Alabama's failure to do anything even to assist unrepresented inmates to calculate and keep track of their deadlines.)

- State and federal postconviction practice has become increasingly bound by a complex set of elaborate, arcane rules utterly incomprehensible to lay persons. To frame adequate pleadings in the light of these rules, legal assistance is essential.[54]

❒ And Alabama's postconviction rules, practices and conditions make it all the more difficult for indigent condemned inmates to obtain the assistance of volunteer lawyers in the absence of any system for court appointment and compensation, and all the more perilous for such inmates who attempt to initiate postconviction proceedings without a lawyer.

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[52] Ronald J. Tabak, *Striving to Eliminate Unjust Executions: Why the ABA's Individual Rights & Responsibilities Section Has Issued Protocols on Unfair Implementation of Capital Punishment*, 63 Ohio St. L.J. 475, 480 (2002); Freedman, *supra* note 44, at 1090; *ABA Protocols* at 505-06; Snyder, *supra* note 51, at 2233.

[53] *See* the sources cited in note 55 *infra*

[54] *See* Freedman, *supra* note 44 at 1096-97.

- Alabama's burgeoning death-row population has exhausted the available sources of volunteer, *pro bono* lawyers, instate or outstate.[55]
- The exacting technical requirements of Alabama's postconviction pleading rules – coupled with the avidity with which Alabama's Assistant Attorneys General invoke those rules and the strictness with which Alabama courts interpret and enforce them as a bar to consideration of claims on the merits – disable unrepresented condemned inmates from obtaining judicial consideration of claims that could be made cognizable under the rules with a lawyer's assistance. And dismissals of *pro se* petitions for defective pleading operate as procedural bars in federal habeas.
- Alabama's Assistant Attorneys General systematically manipulate this postconviction process by submitting draft orders dismissing state postconviction petitions on procedural grounds that will bar subsequent merits review in federal habeas, and also by requesting that state judges make post-filing appointments of counsel for condemned inmates in cases where the State's interest is best served by such appointments. The state judges, for their part, almost always enter the Assistant Attorneys General's draft orders *verbatim*, and they commonly await a request by the State before appointing counsel for inmates who have filed a petition *pro se*. Without timely appointment of counsel to assist an inmate to prepare an adequate petition and to advocate the inmate's position in the inmate's interest during subsequent proceedings, the inmate's chances of obtaining genuine consideration of potentially meritorious postconviction claims by any court – state or federal – are radically

[55] *See* pages 11-12 and page 17 n. 30 *supra*.

undercut.

There were not five votes in *Giarratano* to say that a postconviction process like this one satisfies a death-sentenced prisoner's Due Process right of access to the courts. The Eleventh Circuit's treatment of *Giarratano* as resolving "[t]he precise question at issue in this case" (Appendix, A7) expands *Giarratano* immeasurably. It should not go unreviewed by this Court.

III. The Court Should Not Countenance the Further Extension of the **Giarratano** *Plurality Opinion Worked by the Decision Below, Which Holds that Indigent Death-Sentenced Prisoners Are Not Entitled to any Kind of Legal Assistance at All in Preparing State Postconviction Petitions Although, Without such Assistance, the Prisoners Cannot Practicably Surmount the Technical Hurdles that Alabama Postconviction Practice Erects Against Judicial Consideration of Potentially Meritorious Constitutional Claims of Invalidity of Their Convictions and Sentences.*

The subject of petitioners' third specific Question Presented is their claim that, if the Due Process right of access does not require the appointment of a lawyer to represent each of them individually in preparing and filing a state postconviction petition, it requires at the least that Alabama provide some lesser form of legal assistance to its condemned inmates at the crucial pre-filing stage of the state postconviction process. The nature of this claim has been clear from the outset of the litigation. It is simply a more modest version of their right-of-access contention of entitlement to the aid of a lawyer. It says, "if not a lawyer, at least give us something" – like, for example, the prison law office mentioned in Justice Kennedy's *Giarratano* opinion (492 U.S. at 14-15), or the kind of resource center mentioned by the *Giarratano* plurality (492 U.S. at 10 n.5), or the help of some qualified paralegals.

So the nature of the claim is no mystery. But, with all respect, the Eleventh Circuit's ground for rejecting it – that "the inmates have not identified within their complaint or briefs to this court the lesser form of legal assistance to which they are entitled" (Appendix, p.A9) – is. The court cannot

be saying that in order to understand petitioners' contention it needed them to identify such obvious *ideas* as a prison law office with an attorney or two in residence and some adequately trained paralegals. So it must be saying that § 1983 plaintiffs are obliged to plead specifically not only their right to lesser, alternative forms of relief if their primary request for relief is not granted, but also the *detailed particulars* of such lesser relief. This is an indefensible requirement as a matter of federal practice (*see Hill v. McDonough*, 126 S. Ct. at 2103; Federal Rule of Civil Procedure 54(c)) and it is squarely inconsistent with the settled rule that the defendants, not the plaintiffs, in a right-of-access case have the prerogative and responsibility of initially devising any program necessary to satisfy the plaintiffs' right of access (*Lewis v. Casey*, 518 U.S. at 362-63).

In short, the Eleventh Circuit's disposition of this aspect of the case is simply another way of expanding the *Giarratano* plurality's no-right-to-postconviction-counsel rule into an absolute, inflexible, impenetrable barrier against the provision of any form of legal assistance to death-row inmates, even when they need such assistance to enable them to plead judicially cognizable claims that may save their lives. This Court should not permit an extreme result of this kind to be extrapolated from such a weak constitutional foundation without its considered review.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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