No. 10-63

AUG 11 2010

In The
Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

RICHARD F. ALLEN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI* ALABAMA APPELLATE COURT JUSTICES AND BAR PRESIDENTS IN SUPPORT OF PETITIONER

BERNARD E. HARCOURT
Julius Kreeger Professor of
Law and Criminology
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637
(773) 834-4068

LISA W. BORDEN*
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803
lborden@bakerdonelson.com

Counsel for Amici

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT REGARDING INTEREST OF *AMICI*[1]

The *amici* are former members of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Ernest Hornsby is a former Chief Justice of the Alabama Supreme Court and a former President of the Alabama State Bar. Ralph Cook is a former Justice of the Alabama Supreme Court. William Bowen is a former Presiding Judge of the Alabama Court of Criminal Appeals. William Clark and Robert Segall have previously served as Presidents of the Alabama State Bar. In the positions in which they served, each has had an exceptional opportunity to observe, participate in, and be affected by the administration of Alabama's system of capital postconviction proceedings. The *amici* are perhaps better situated than any party in this litigation to inform this Court concerning the state of the capital postconviction litigation process in Alabama. As a result of their participation in the process, they have a compelling interest in urging the Court to grant the

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[1] Pursuant to Rule 37.2(a), Sup. Ct. R., all parties were timely notified and have granted written consent for the filing of this Brief. Letters of consent are being submitted to the Clerk of Court contemporaneously herewith. Pursuant to Rule 37.6, Sup. Ct. R., the *amici* state that no person or entity, other than themselves and their counsel, authored any portion of this brief. The *amici* further state that no person or entity, other than themselves and their counsel, made any financial contribution toward the preparation and filing of this brief.

relief required to bring some measure of fairness to this procedure.

SUMMARY OF THE ARGUMENT

Alabama's capital punishment system is deeply flawed. Among the many dire failings of that system is its failure to adequately provide for competent counsel for indigent defendants charged with capital offenses, either at trial or on direct appeal. As a result of this and other failures, many of the convictions and sentences rendered by the process are inherently unreliable, and the proper functioning of the postconviction review process is therefore critical.

Unfortunately, Alabama's system of postconviction review in capital cases is exceedingly complex and rife with pitfalls – so much so that even attorneys and judges often must struggle to understand and comply with its procedures – and Alabama stands alone in failing to provide counsel for indigent death-sentenced inmates in postconviction proceedings. As a result, those who are fortunate enough to have attorneys must rely on pro bono counsel, most of whom practice far from Alabama. Although the *amici*, along with many others, have made numerous efforts to reform this system, it remains a labyrinth in which many a hapless inmate has become hopelessly lost, sometimes through no fault of his own.

In this case, the petitioner's crucial right to postconviction review has been unjustly extinguished. The

Eleventh Circuit's determination that there was a "firmly established and regularly followed" policy or practice of denying out-of-time appeals in circumstances such as these is clearly and fundamentally wrong. It is clear to us, contrary to the conclusion reached below, that the rules of procedure and the decisions of Alabama's appellate courts – extant at the time of Mr. Maples' effort to appeal and today – plainly show Alabama's "firmly established and regularly followed" practice, if any, is to *allow* such appeals. If Alabama's appellate decisions appear unsettled on this point, it is only with regard to the proper procedure to be followed in seeking an out-of-time appeal.

The petitioner here is the victim of a combination of circumstances that clearly establish sufficient cause for his default. While Mr. Maples was represented by pro bono counsel at the time his Rule 32 petition was filed, those attorneys both left their law firm and ceased representing Mr. Maples but failed to withdraw or notify the court of substitute counsel. When that event occurred, the petitioner became unrepresented, although he continued to believe that he was represented. When the order denying Mr. Maples' petition finally was issued, the law firm's mailroom returned the two copies it received unopened. The clerk of court took no further action, and Mr. Maples himself was not notified of the order until well after his time for appeal expired. Since Mr. Maples was unaware that he had been left unrepresented, he is without fault for the missed deadline.

ARGUMENT

Undersigned *amici*, in our former capacities as Justices of the Alabama Supreme Court and Alabama Court of Criminal Appeals, and Presidents of the Alabama State Bar, have had first-hand experience with the practice and procedures surrounding the administration of the death penalty in Alabama, and are in a unique position to be able to inform the United States Supreme Court of the state of that process in Alabama.

The complexities and pitfalls of the capital post-conviction process in Alabama cannot be overstated, nor can the importance of the proper functioning of that process, particularly as it applies to indigent defense. Alabama's system of providing for representation for indigent defendants during trial and direct appeals is deeply flawed. As a consequence of these problems, many of the verdicts and sentences rendered are inherently unreliable, and adequate post-conviction review is crucial.

One of the most glaring defects in Alabama's capital punishment system is the dearth of qualified counsel at all stages of the process. Over the course of decades, numerous efforts have been made to ensure that indigents sentenced to death receive the assistance of qualified counsel. The State Bar has made recommendations for the improvement of indigent

defense,[2] and numerous bills attempting to ensure counsel have been introduced in the Alabama legislature, many with our active support, but without success. Bills calling for a moratorium on executions, during which procedures would be implemented to ensure that the death penalty is administered fairly, were introduced without success during each of the last several years. *See, e.g.,* S.B. 18, 92, 2004 Leg., Reg. Sess. (Ala. 2004); S.B. 371, 2005 Leg., Reg. Sess. (Ala. 2005); S.B. 29, H.B. 432, 2006 Leg., Reg. Sess. (Ala. 2006); S.B. 125, H.B. 189, 2007 Leg., Reg. Sess. (Ala. 2007). If adopted, that legislation would have required, among other things, implementation of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[3] as well as additional due process protections in postconviction proceedings. *Id.*

Former Presidents of the Alabama State Bar and Judges of the State's appellate courts, including some of the *amici*, also have actively promoted legislation to provide appropriate representation for the indigent in postconviction litigation. House Bill 764, introduced in March 2000, would have created an "Office of the

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[2] William Clark, one of the *amici*, was appointed to a State Bar advisory committee on indigent defense in 1975.

[3] *American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003) [hereinafter, "*ABA Guidelines*"], available at http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf, visited August 9, 2010.

Alabama Appellate Defender," specifically to provide representation to the indigent in capital cases in which the death penalty had been imposed. H.B. 764, 2000 Leg., Reg. Sess. (Ala. 2000). It was never adopted. A later measure would have created an Indigent Defense Commission. Drafted by a task force appointed by then-Chief Justice Drayton Nabors and headed by Retired Associate Justice Gorman Houston,[4] it provided for the appointment of counsel for indigent persons in postconviction proceedings and established standards for the minimum experience, training, and qualifications of such counsel. The legislation was introduced in 2006 (S.B. 328, 2006 Leg., Reg. Sess. (Ala. 2006)), but failed to pass. *See, Minutes of the Alabama State Bar Board of Commissioners Meeting,* July 15, 2006, at 2,[5] *see also,* H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).

These are but a few examples of the many efforts that have been made to bring significant reform to Alabama's capital punishment processes. All such efforts have met with failure. Today most death-sentenced indigents who are fortunate enough to

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[4] The task force consisted of four judges and nine lawyers, including representatives from the Alabama Attorney General's office, and criminal defense attorneys. *See, Minutes of the Alabama State Bar Board of Commissioners Meeting,* February 3, 2006, at 3-4 (available at www.alabar.org/bbc/minutes/0203/bbc0203.pdf, visited August 9, 2010). William Clark, one of the *amici*, was a member of the task force.

[5] Available at www.alabar.org/bbc/minutes/0606/AM2006_July15_2006.pdf, visited August 5, 2010.

have counsel in their postconviction proceedings are forced to rely upon volunteer lawyers, the vast majority of whom, like Mr. Maples' counsel, reside in states far from Alabama. Given the convoluted labyrinth of procedures through which the inmate must pass in these circumstances, and the severity of the consequences which he must suffer for any failure to do so correctly, two things, at least, are absolutely imperative: the inmate's counsel must not abandon their post, and the State must not play a game of "gotcha" with the inmate's life hanging in the balance.[6] In Mr. Maples' case, through no fault of his own, both of these events occurred, with deadly consequence.

I. No "Firmly Established and Regularly Followed" Rule or Practice Supports the Denial of Maples' Out-of-Time Appeal.

Adding to the overwhelming complexity of the postconviction rules as written is the fact that their

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[6] The Attorney General's office contacted Mr. Maples directly *after* his time for appeal had expired and advised him that his petition had been dismissed and that his time to file a federal *habeas* petition would soon expire as well. App.253a. ("App." refers to the Appendix to the Petition for Writ of Certiorari submitted by the Petitioner in this case.) Although the State contended before the Alabama Supreme Court that Maples could "still present his postconviction claims" in federal court, App.18a., it then asserted to the federal court that Maples had defaulted on his claims of ineffective assistance of counsel due to his failure to file a timely appeal.

application in practice is often unsettled, at best. This Court has recognized that a state rule is "adequate" to bar federal review only when it is "firmly established and regularly followed" at the time the alleged default occurred. *Lee v. Kemna,* 534 U.S. 362, 376 (2002) (citations omitted). Adherence to this definition of adequacy is particularly imperative in the context of capital litigation, lest decisions that amount to life or death be made according to whim and without affording the death-sentenced inmate (or his counsel) notice of what the rules actually are and how they can be expected to be applied.

In determining whether a state procedural bar is "adequate" to evade federal review, one vital question that must be answered is "whether the state has put litigants on notice of the rule." *Lee,* 534 U.S. at 385-88; *Osborne v. Ohio,* 495 U.S. 103, 123-25 (1990); *Douglas v. Alabama,* 380 U.S. 415, 422-23 (1965). Let us begin where anyone wanting to understand how to proceed might be expected to begin -- with a review of the written rules extant at the time Mr. Maples began his quest to appeal the dismissal of his Rule 32 petition. Alabama Rule of Appellate Procedure 4(b)(1) provided then, as it does now, that the time to appeal an adverse decision in a criminal matter is 42 days. Rule 32.1(f) of the Alabama Rules of Criminal Procedure provided, however, that a valid ground for relief was that "[t]he petitioner failed to appeal within the prescribed time and that failure was without fault on petitioner's part." Ala. R. Crim. P. 32.1(f) (1990). This carries out the purpose and intent of

Rule 1.2, Ala. R. Crim. P., which mandates that the rules "shall be construed to secure . . . fairness in administration, . . . and to protect the rights of individuals while preserving the public welfare."

The cases addressing out-of-time appeals in similar circumstances, while admittedly somewhat schizophrenic as to proper procedure, also would have led one to believe that an out-of-time appeal would, in one way or another, likely be granted. *See, Fountain v. State,* 842 So. 2d 719, 721-22 (Ala. Crim. App. 2000), *aff'd*, 842 So. 2d 746 (Ala. 2000), holding, in a case of first impression, that where the petitioner failed to receive notice of the denial of his Rule 32 petition through no fault of his own, "to deny [him] the opportunity to seek an out-of-time appeal . . . would be to deny [his] right to procedural due process and would not be a fair administration of justice." *See also*, *Ex parte Johnson,* 806 So. 2d 1195, 1197 (Ala. 2001) ("[w]e cannot deny Johnson his day in court simply because the trial court has not notified him of the disposition of his Rule 32 petition;" order denying petition vacated and trial court directed to issue new order and provide prompt notice); *Ex parte Miles,* 841 So. 2d 242, 244-45 (Ala. 2002) (where petitioner, through no fault of his own, did not receive timely notice of denial of Rule 32 petition, to not allow him opportunity to appeal "would violate his clear legal right to procedural due process."); *Marshall v. State,* 884 So. 2d 898, 899 (Ala. Crim. App. 2002), *overruled on other grounds,* 884 So. 2d 900 (Ala. 2003) ("we find that regarding his out-of-time appeal claim, Marshall

is entitled to the relief requested in his second Rule 32 petition");[7] *Thompson v. State,* 860 So. 2d 907, 908-09 (Ala. Crim. App. 2002) ("[b]etween the actions of his appointed counsel and the actions of the circuit clerk, Thompson found himself mired in a class 'Catch 22' situation;" trial court directed to enter a new order on petitioner's successive Rule 32 petition and give prompt notice); *Robinson v. State,* 865 So. 2d 1250, 1251 (Ala. Crim. App. 2003) (Where petitioner, through no fault of his own, did not receive order denying Rule 32 petition until after time for appeal expired, petitioner entitled to writ of mandamus requiring trial court to vacate denial, issue new order, and provide prompt notice). As the dissent below explained, *Marshall* alone establishes that out-of-time appeals were allowed in analogous circumstances. *Maples v. Allen,* 586 F.3d 879, 897 (11th Cir. 2009) (Barkett, C.J., dissenting).

What is clear to us, contrary to the conclusion drawn by the Eleventh Circuit Court of Appeals in this case, *Maples v. Allen, supra*, is that there was no "firmly established and regularly followed" rule or practice that would have compelled the denial of

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[7] The decision of the Alabama Supreme Court in *Marshall,* which occurred only a few weeks after Mr. Maples learned that his petition had been denied, was not a determination by the Alabama Supreme Court that out-of-time appeals would be disfavored in such circumstances. Instead, the Alabama Supreme Court's decision in *Marshall* was meant to clarify the *procedure* through which such appeals must be sought. *See discussion infra* at 12-14.

Maples' out-of-time appeal. Indeed, it appears to us that the "regularly followed" practice at the time, if any could have been said to exist then or now, would have been to allow it.

The cases cited by the Eleventh Circuit panel in support of its conclusion that "Alabama's courts routinely have enforced the 42-day rule and denied out-of-time appeals" are simply inapplicable here. Only two of those cases had even been decided prior to Mr. Maples' attempt to appeal his case, and in each of them the courts found that the petitioners were not entitled to an out-of-time appeal for reasons that do not exist here. In *Shephard v. State,* 598 So. 2d 39 (Ala. Crim. App. 1992), the court held that, contrary to the petitioner's contention, he had been informed of his appellate rights. In *Alverson v. State,* 531 So. 2d 44 (Ala. Crim. App. 1988), the court rejected the petitioner's request for an out-of-time appeal because it found, after requiring an evidentiary hearing, that he had failed to show that he had notified his counsel of his wish to file an appeal or that the attorney had been negligent in any way. The later-decided case, *Melson v. State,* 902 So. 2d 715 (Ala. Crim. App. 2004), is also inapposite. There, the court found that the petitioner failed to follow the procedures mandated by *Marshall, supra*, and had waived all of his other arguments asserted on appeal because he failed to present them to the circuit court. None of these cases have any factual or legal bearing on the matter at hand, and the decisions involving similar circumstances, decided both before and after Mr. Maples'

effort to appeal his case, consistently allow out-of-time appeals.

Well *after* Mr. Maples sought a writ of mandamus to allow his out-of-time appeal, the Alabama Court of Criminal Appeals again confirmed that the course chosen by Mr. Maples was the proper course for seeking such relief. The Court of Criminal Appeals itself found that the law concerning procedure for out-of-time appeals from the denial of Rule 32 petitions was "uncertain, to say the least." *Loggins v. State,* 901 So. 2d 146, 150 (Ala. Crim. App. 2005). In a special concurrence in *Loggins,* Judge Shaw discussed the history of the law applicable to out-of-time appeals in the Rule 32 context, prefacing his discussion with the recognition that "the law regarding the proper procedure for seeking an out-of-time appeal from the denial of a Rule 32, Ala. R. Crim. P., petition for postconviction relief has been in a state of confusion for the last five years." *Loggins,* 901 So. 2d at 151 (Shaw, J., concurring specially). Judge Shaw then recounted how Alabama's courts had variously opined during that time that the correct procedure for seeking an out-of-time appeal was through the filing of a successive petition, *Fountain v. State,* 842 So. 2d 719 (Ala. Crim. App. 2000), *aff'd*, 842 So. 2d 746 (Ala. 2001), or through a petition for writ of mandamus, *Ex parte Johnson,* 806 So. 2d 1195 (Ala. 2001), or perhaps both, *Brooks v. State,* 892 So. 2d 969 (Ala. Crim. App. 2002), or perhaps not. *Marshall v. State,* 884 So. 2d 900 (Ala. 2003) (holding that mandamus was the sole avenue for seeking an out-of-time appeal in

Rule 32 proceedings). *See, Loggins,* 901 So. 2d at 151-52 (Shaw, J., concurring specially).

In January 2005, again reversing course on the procedural issue, the Alabama Supreme Court amended Rule 32.1(f) to expressly authorize a request for relief when "[t]he petitioner failed to appeal within the prescribed time *from the conviction or sentence itself or from the denial of a petition previously filed pursuant to this rule* and that failure was without fault on the petitioner's part."[8] (Emphasis added.) The Alabama Supreme Court also amended Rule 32.2(c) at the same time, providing for a six-month limitation period on the filing of a Rule 32 petition seeking an out-of-time appeal from the denial of a previous Rule 32 petition. *See, Loggins,* 901 So. 2d at 152 (Shaw, J., concurring specially).

A single consistent thread runs throughout the otherwise erratic history of the law concerning out-of-time appeals from Rule 32 petitions in circumstances such as those of Mr. Maples. From *Fountain,* decided before Mr. Maples sought to appeal his case in 2003,

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[8] Loggins himself became caught in the machinery, not having complied with the process of the moment. However, in his concurrence, Justice Shaw noted that even though the then-pending appeal had to be dismissed for lack of jurisdiction, Loggins could start over and could "obtain an out of time appeal under the authority of *Marshall* and its progeny," even though those cases were considered "doctrinally unsound" with respect to the procedure to be followed. *See, Loggins,* 901 So. 2d at 153-54 (Shaw, J., concurring specially).

to *Marshall*, decided that same year, to today's Rule 32.1(f) and 32.2(c), amended in 2005 – all of these decisions and amendments to the rules were designed, if not altogether successfully, to clarify how the courts were to *allow* out-of-time appeals by hapless inmates whose fates and, in cases such as Mr. Maples', whose very lives have been endangered by a default that was not their fault. As recently as December 2008, with the procedural confusion apparently finally resolved, the Alabama Court of Criminal Appeals held in *Jenkins v. State,* 12 So.3d 166 (Ala. Crim. App. 2008), that a petitioner who had shown that he was not served with an order denying his Rule 32 petition was entitled to relief on his second Rule 32 petition, in which he sought to be granted an out-of-time appeal. *Id.* at 166. The notion that Alabama's courts would regularly follow a practice of denying such out-of-time appeals is clearly and fundamentally wrong.

II. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT.

A. Rule 32 Proceedings Are Difficult for Most Attorneys to Navigate, Let Alone Pro Se Petitioners; Lack of Both Counsel and Proper Notice Can Be Fatal.

Alabama's postconviction process is, in general, governed by exceptionally complex procedural rules, including many unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate the maze. These rules are so

complex, and often so unyielding, that an inmate who is not being represented by competent counsel has little chance of survival. In addition, "[f]ederal post-conviction law is complex, and few prisoners understand it well." *Curry v. United States,* 507 F.3d 603, 604 (7th Cir. 2007).

The fact is that the death penalty postconviction litigation process is so complex that even attorneys and judges often struggle to understand its nuances, and the inability of an unrepresented inmate to comply with procedural requirements can surely result in potentially meritorious claims being barred. *See, e.g., Dallas v. Haley,* 228 F.Supp. 2d 1317, 1320 (M.D. Ala. 2002) ("[S]uffice it to say that the issue of whether Dallas' habeas petition was timely filed is a very complex question which turns on whether a certain Alabama procedural rule was firmly established and regularly followed. As mentioned above, this issue is complicated enough that the magistrate judge asked the parties to rebrief it").

Where, as here, the petitioner, through no fault of his own, suffers a complete failure of representation and does not receive notice of an order to be appealed, he is rendered completely unable to comply with the deadline for appeal. It is undisputed that Mr. Maples was not notified by anyone, neither his *former* counsel, the State, or the court, that his Rule 32 petition had been denied until after the time for appeal had expired. Since Mr. Maples quite understandably believed that his counsel would receive notice of any order and would notify him of that occurrence, he

could not be expected to try to personally monitor the status of his case. That is an arduous task, at best, for the incarcerated, but at least those who know they have no attorney are aware that they must undertake it. Under these circumstances, Mr. Maples cannot be held responsible for his failure to appeal an order of which he had no knowledge.

B. Maples was left unrepresented at a critical juncture.

Since this Court's decision in *Murray v. Giarratano*, 492 U.S. 1 (1989), there has been a "virtually unanimous decision of the death penalty states to provide lawyers for capital postconviction proceedings."[9] Most states' legislatures have recognized the critical role that postconviction counsel serve in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners as a matter of right, leaving indigent inmates to either fare for themselves or to rely upon the volunteer assistance of pro bono counsel in those increasingly rare instances when pro bono assistance is available.

As the State of Alabama noted in its brief to this Court in *Barbour v. Allen*, most of the lawyers providing pro bono assistance to indigent death-sentenced inmates in Alabama are operating at a significant

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[9] Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital PostConviction Proceedings*, 91 CORNELL L. REV. 1079, 1094 (2006).

distance, most often practicing in large law firms located in major northeastern cities. Br. in Opp. at 11, *Barbour v. Allen,* No. 06-10605 (May 10, 2007). We certainly applaud and appreciate the noble efforts of the many out-of-state attorneys who, over the years, have stepped into the regrettable void. It is thus neither surprising nor unusual that Mr. Maples placed his fate in the hands of pro bono counsel from another state. The attorneys who agreed to represent Mr. Maples on a pro bono basis practiced at Sullivan & Cromwell in New York, N.Y.[10] However noble their intentions, perhaps it was this remove, both physical and psychological, that somehow allowed Mr. Maples' pro bono counsel to simply walk away to other pursuits without notice to anyone concerned. Regardless of their reasons, Mr. Maples was left in the seemingly secure but terribly mistaken knowledge that he had the representation of competent counsel, when in fact he had no representation at all.

The two attorneys who had represented Mr. Maples also engaged an Alabama attorney, John Butler, to act as local counsel for the sole purpose of having them admitted *pro hac vice,* but Mr. Butler has made it clear that he never intended to provide any representation to Mr. Maples. App.255a-56a. This is not uncommon. While Alabama formally requires local counsel to "accept joint and several responsibility with

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[10] Pursuant to Sullivan and Cromwell's policy, the two attorneys represented Mr. Maples solely in their individual capacities, and did not use the firm's name in appearing or filing pleadings on Mr. Maples' behalf. App.257a.

the foreign attorney" to provide representation, it is an unfortunate fact of Alabama practice – certainly unknown to and not the fault of Mr. Maples – that trial courts have rarely enforced this rule. The fact is that local counsel for out-of-state attorneys in postconviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted, and Alabama's trial courts do not regularly require them to do more.

The errors of counsel generally do not form the basis of cause for a default in the postconviction context, so long as counsel remains the inmate's agent. But this Court has rightly recognized that counsel's abandonment of a client rises to a level of significance much greater than simple negligence, and must sever the inmate's responsibility for counsel's conduct. As Justice Alito explained in his concurrence in *Holland v. Florida,* 2010 WL 2346549 at *18 (Alito, J., concurring in part and concurring in the judgment), "[c]ommon sense dictates that a litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word."

Numerous federal and state courts have recognized that when a client has been abandoned by his counsel, the client cannot be held responsible for the consequences of that abandonment. *Rouse v. Lee,* 339 F.3d 238, 250 n.14 (4th Cir. 2003) (en banc), *cert. denied,* 541 U.S. 905 (2004) (procedural default caused by counsel's "utter abandonment" of petitioner "constituted extraordinary circumstances external to the party's conduct" and established cause.); *Manning*

v. Foster, 224 F.3d 1129, 1135 (9th Cir. 2000) (attorney's errors are not attributable to client when attorney "does not actually represent the client."); *Jamison v. Lockhart,* 975 F.2d 1377, 1380 (8th Cir. 1992) (attorney's conflict of interest would constitute external cause for default because attorney would have "effectively ceased to be [the client's] agent"); *Puckett v. State,* 834 So. 2d 676, 681 (Miss. 2002) (out-of-time appeal allowed where "actions of former counsel were such as to rise to the deprivation of fundamental due process"). The Supreme Courts of Arkansas and Tennessee, each addressing circumstances in which the petitioners believed they were being represented by counsel but were not, have recognized the fundamental unfairness of saddling the abandoned client with the sins of his counsel. *Porter v. State,* 2 S.W.3d 73, 74 (Ark. 1999) (finding cause to excuse petitioner's procedural default where attorney ceased representation but failed to withdraw, and recognizing fundamental unfairness of requiring "inmate on death row to abide by the stringent filing deadlines when he was under the impression he was represented by counsel"); *Williams v. State,* 834 S.W.3d 464, 469 (Tenn. 2001) ("If a defendant erroneously believes that counsel is continuing to represent him or her, then the defendant is essentially precluded from pursuing certain remedies independently").

Even those inmates who *know* they are proceeding *pro se* have little hope in our byzantine system. "Without a lawyer, these indigent defendants have no realistic chance of challenging their convictions and death sentences, even though obvious and

profound errors may have occurred during trial."[11] *See, e.g.*, *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005) ("Because most Rule 32 petitioners file their petitions without the assistance of legal counsel, they could encounter serious problems if the relation-back doctrine was applied to Rule 32 proceedings"). Having been left unrepresented without notice, Mr. Maples does not have a prayer. It is simply unacceptable to us that the State should be allowed to maintain a system in which the last hope of the condemned can be snatched away, though they are without fault, leaving them with no recourse.

C. The State's Own Conduct Also Constituted Cause for Mr. Maples' Default.

At some point before the denial of his Rule 32 petition on May 22, 2003, Mr. Maples became unrepresented, but received no notice of that fact. His attorneys left the firm of Sullivan & Cromwell, and failed to withdraw or to notify the court of substitute counsel. Once he had no attorneys representing him, Mr. Maples was helpless – particularly because he was not only unrepresented, but he did not know it. Any inmate proceeding pro se in postconviction litigation is at dire risk of not receiving vital notice of developments in his case. In his dissent in *Marshall*

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[11] *American Bar Association, ABA Death Penalty Representation Project* 3 (2006), available at www.abanet.org/deathpenalty/docs/brochure2006.pdf, visited August 9, 2010.

v. State, arguing that the Alabama court should have simply treated Marshall's successive Rule 32 petition as a petition for writ of mandamus rather than requiring him to begin anew, Justice Johnstone noted:

> "The big problem pertinent to the issue addressed by the main opinion is that, commonly in this state, a trial court will deny a convict's Rule 32, Ala. R. Crim. P., petition but will not notify the convict of the denial and the convict will not receive word of the denial until after his time to appeal the denial has expired. The convict typically cannot know when to expect a ruling, since trial judges sometimes deny such petitions immediately upon receipt, sometimes withhold rulings for weeks, months, or years, sometimes conduct hearings before ruling, and sometimes deny the petitions without a hearing. For all of the sanctimonious talk of the courts about a petitioner's duty to monitor the status of his Rule 32 petition, any notion that each of these poor devils can periodically obtain reliable information on whether the trial court has ruled, is stark fiction. If the convict is incarcerated, he is even more helpless to learn of any ruling."

Marshall v. State, 884 So. 2d 900, 905-06 (Ala. 2003) (Johnstone, J., dissenting).

In Mr. Maples' case, the typical inability of an incarcerated petitioner to obtain timely and accurate information was compounded by the fact that he wrongly believed he was still represented by counsel.

Although Mr. Maples had no way of knowing that his counsel had not received the trial court's order and were no longer representing him until he was contacted by the Attorney General's office in August 2003,[12] the circuit court clerk's office learned much earlier that something was amiss. The orders the clerk's office had mailed to Mr. Maples' attorneys in New York were returned to the clerk, stamped with notices that they were being returned because the recipients were not known. Even a cursory review of the court file would have revealed that no other attorney was participating in the case, but the court clerk took no further action to ensure that Mr. Maples received notice of the order dismissing all of his claims.

In *Jones v. Flowers,* 547 U.S. 220, 238 (2006), a case involving a tax sale of the petitioner's home, the official notice to the petitioner was returned because he had moved to a different address. In finding the State's notice insufficient, this Court noted that "someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned

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[12] For whatever reason, the State saw fit to contact Mr. Maples directly to let him know of his deadline for filing a federal *habeas* petition, but apparently saw no purpose in contacting him earlier, while he still had time to file a notice of appeal. One wonders why the State bothered to notify Mr. Maples of the latter deadline, since it would then argue that all of his claims were precluded by his failure to appeal in state court.

unclaimed, and there was more that reasonably could have been done." In the case of Mr. Maples, there was certainly no doubt about where to find him. It would have been a simple matter for the clerk to mail a copy of the order to him directly. Where the stakes were not a home, but a life, clearly "there was more that reasonably could have," and should have, been done.

CONCLUSION

For these reasons, we urge the United States Supreme Court to grant the petition for writ of certiorari.

Respectfully submitted,

BERNARD E. HARCOURT
Julius Kreeger Professor of
Law and Criminology
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637
(773) 834-4068

LISA W. BORDEN
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
1600 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
(205) 244-3803

Counsel for Amici

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