No. 10-24

Capital Case

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In the

SUPREME COURT OF THE UNITED STATES

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RICHARD F. ALLEN,
Comm. Of Alabama Dept. of Corrections, *et al.*,
*Petitioners,*

v.

JAMES CHARLES LAWHORN,
*Respondent*

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**On Petition for a Writ of Certiorari**
**To The Court of Appeals for**
**The Eleventh Circuit**

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**BRIEF IN OPPOSITION**

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Capital Case

## QUESTIONS PRESENTED FOR REVIEW

1. Should this court grant certiorari to review the State's claim that failure to make closing argument was not an effective assistance of counsel when trial counsel was unaware of the applicable law in Alabama and where the State opposed certiorari involving the identical issue in this case ten years ago?

## STATEMENT OF THE CASE

James Charles Lawhorn (Lawhorn) wishes to add the following to the state's discussion of post-conviction proceedings (see petition, pp. 11-12).

Hank Fannin (Fannin) was appointed counsel for Lawhorn on June 9, 1988, at the arraignment. (Tab R-43, p. 8; see also Ex. "2"). Fannin agreed that to provide effective assistance of counsel "he would investigate the case as much as possible." (Tab R-43, p. 13). This would include conferring with and discussing the law with the defendant, and working out a strategy with co-counsel. (Id.). Preparation would include both the guilt and penalty phase. (Id.). As part of his preparation he obtained information from the D.A.'s office, including Lawhorn's confession. (Id. at p. 14).

Fannin's fee declaration reveals that he spent a total of 14.5 hours in out-of-court preparation time. (Tab R-43,

Ex. "2"). Of these, eight were spent on October 10, 1988, "Reviewing the death scene and investigation as to which county the crime occurred in." (Id., 2d page; also see Ex. "4"). This resulted in Fannin's strategy on the first day of trial in cross-examining witnesses so as to suggest that the crime occurred in Clay county. (Tab R-43, Ex. "1" at R-127-30, 132-38, 142-43, 171-75, and 210-212). The factual basis for this defense fell apart late in the first day of trial when Dewayne Dunn, Talladega county engineer, testified that late that morning he went to Wiregrass Road off Highway 148, which still had some tape from the crime scene in the trees, and the tape was approximately 2,500 feet within the Talladega County line. (Id. at p. 1, R-318-320; also see R-321-22). At the Rule 32 hearing, Fannin conceded that the legal basis for this defense was nonexistent because his research had disclosed a statute permitting the D.A. to prosecute if the crime was within one mile outside the county line. (Tab R-43, p. 26). Fannin also conceded that the trial judge (Sullivan, J.) had a good reputation who looked into the law and that if he and the other two attorneys assisting him had found the statute, it was quite likely that either the trial judge (or D.A. Rumsey) would find the same statute. (Id. at p. 27).[1]

[1] As the Magistrate Judge observed:

The remaining six and one-half hours of Fannin's trial preparation were devoted to three meetings with Lawhorn; June 9, 1988 (two hours), August 11, 1988 (one and one-half hours), and November 10, 1988 (two hours); and "preparation of motion for psychiatrist and order appointed investigator" (one hour). (Tab R-43; Ex. "2", 2d page; also see Ex. "4"). Although Fannin filed this motion he never bothered to get it allowed. (Tab R-43, pp. 101-105 and 352-54; petition, appendix, p. 87a).

Fannin's lack of preparation was not made up by the two other attorneys assisting him. Steve Giddens, brother of Assistant D.A. Rod Giddens (Tab R-43, pp. 97-98), was appointed to represent Lawhorn on May 10, 1988, and withdrew on April 3, 1989, when he accepted a job at Legal Services Corporation. (Id., Ex. "3"). Mark Nelson ("Nelson") came into the case late. According to his fee declaration Nelson opened his file on April 17, 1989, one week before trial commenced. (Id., Ex. "9").

Fannin knew the two other defendants were being tried and that Walker's case was tried first ("we would have known the result"). (Tab R-43, p. 38). Fannin remembered a visit by Debra, Lawhorn' sister, and his mother, Hudson, who came to discuss the case. He did not recall the

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The time spent determining which County the crime occurred in turned out to be wasted time. Although the crime occurred close to the Clay County/Talledega County line, under Alabama law a County may prosecute crimes that occur within one mile of its borders.

(Petition, appendix, p. 86a.)

conversation. (Id. at pp. 42-43). Hudson explained that when she visited with Fannin she told him that the widow of the deceased, Mrs. Berry, came to visit Hudson where she was working and told her that she was very sorry that her ". . . two children got involved with that, . . . that it was all Maxine Walker's doings . . . ." (Id. at pp. 186-87; R-453; also see Tab 42, p. 19). According to Hudson, "Fannin said he thought it wasn't important." (Id. at p. 187). Roger Appell ("Appell"),[2] Lawhorn's expert witness, expressed a contrary opinion, that it was ineffective assistance of counsel not to bring to the attention of the jury, the judge, and the district attorney, the fact that the widow of the decedent believed that Walker was the principal culprit. (Id. at pp. 332-33; petition, appendix, p. 88a).

Jerry Lawhorn, Lawhorn's' brother, testified that their mother divorced Donald Lawhorn and married Gene Bates ("Bates"), who he remembered "very well". (Tab R-43, p. 138). Bates "was a real mean fellow" (Id.), was abusive to anyone who came across his path, including Lawhorn, and drank hard liquor heavily. (Id. at p. 139-140). In October, 1972, when Lawhorn was six and one-half years old, he went to a turkey shoot with Bates, who was shot and

[2] Appell is a Birmingham attorney who concentrates in criminal law and who had defended 10 capital cases as of Lawhorn's Rule 32 hearing. (Tab R-43, pp. 309-11).

killed by Hilton Maddox. Lawhorn personally observed the shooting. (Id. at pp. 228-29). Within a year Lawhorn's mother married Howard Maddox, Hilton's brother. (Id. at pp. 141, 143). Howard was also a chronic alcoholic who also abused his stepchildren. (Id. at pp. 143-45). After she divorced Howard, Lawhorn's mother began dating Randall Hudson, whom she married in 1977. (Id. at p. 146). She dated him for two years; she would leave Debra in charge for the weekend. (Id.). The grandmother lived down the road and told the Lawhorn children not to tell anyone that they were being left alone because ". . . the child welfare people would come and get us." (Id. at p. 147). When a report card or note would come home from school, "we would just give it to our sister Debra to sign . . . she would sign my mother's name to it." (Id. at p. 148). After Randall Hudson married Lawhorn's mother he also beat Lawhorn. (Id. at pp. 148, 149, and 230).

Although at the penalty phase Lawrence testified that Lawhorn was ". . . an average student. He had potential" (Tab R-18; R-514), Fannin offered no evidence as to what happened to Lawhorn after the 1979-80 academic year, the last time Lawrence saw Lawhorn. (Id. at R-517). During the eighth grade, Lawhorn left for Texas because he was tired of his stepfather and wanted to stay with his real father to get to know him. (Tab R-43, p. 151). Lawhorn

went with his brother, Mac, after their mother and stepfather, Randall, bought bus tickets and sent them to Texas. (Id. at 152). (Mac soon came back without Lawhorn because their dad was not able to take care of him.) (Id.).

Instead of finishing the eighth grade Lawhorn enrolled at the Robert E. Lee Middle School in Grand Prairie, Texas on April 8, 1980. (Tab R-43, p. 192, Ex. 14). He did not graduate from the eighth grade at the Robert E. Lee Middle School because his father divorced his then wife, Helen, and moved to Allen, Texas. (Tab R-43, p. 193). Shortly thereafter his father was arrested and jailed for DUI. (Id. at 194, 195). Lawhorn was taken in by O.B. and Sandra McClure and stayed approximately six months to a year with them. (Id.). In the fall of 1981, when he was supposed to be going into the ninth grade, he did not go because his father was in jail and the people he was living with did not send him to school. (Id. at p. 196). When his father got out of jail, he got a job in Allen, Texas as a security guard and Lawhorn went to the Allen school for six weeks, January 12, 1981 to March 3, 1981. (Id. at p. 197). The State of Texas gave Lawhorn a test in February, 1981, to assess basic skills, mathematics, reading and writing. The results showed that Lawhorn's handwriting was acceptable

but that basic skills in mathematics, reading, and writing were "not mastered." (Tab 43; Exs. 15 and 16.)

Lawhorn left Texas for Georgia because his father was a chronic alcoholic who could not hold down a job; "so he and I decided that he and I could no longer survive in the State of Texas." (Tab R-43, p. 199). Lawhorn then went to stay with his aunt Datherlene and uncle Billy in the spring of 1981 in Lagrange, Georgia. At that time he did not go to school. He then returned to Alexander City and went to the Horseshoe Bend School from August 31 to November 30, 1981. (Id. at p. 200; also see Ex. 17). He dropped out on November 30, 1981 when he left his mother and stepfather to return to Lagrange, Georgia. (Id.).

He next went to the Valley High School in Alabama from December 4, 1981 to January 12, 1982. This included a two week vacation for Christmas. (Tab R-43; Ex. 18). He left Valley High School because at the time he was staying with his cousin, Melody Batey, and her husband, his father was again arrested for DUI. (Tab R-43, p. 202). He then went to live with his father on January 12, 1982, and started with the Troop County High School in Lagrange, Georgia. (Id. at p. 202; also see Ex. 19.) The last time he enrolled in school was at the Troop County High School in the ninth grade from January 12 to April 6, 1982. He left

when he was 16 years old, never having completed the ninth grade. (Id. at p. 203).

At the time of his arrest Lawhorn was employed by Russell Pipe and Foundry making $3.90 an hour. On March 31, 1988 he cashed his paycheck and gave $30.00 to his mother to have his income tax forms filled out. (Tab R-43, p. 207). He was entitled to a $586 refund for 1987. (Id. at p. 208; Ex. 13).

Lawhorn presented expert testimony by Attorney Appell. (Tab R-43, pp. 309-49). According to Appell, the most egregious mistake was that Fannin should have given a closing argument at the end of the penalty phase. (Id. at p. 315). Appell has never waived closing argument and has never heard of anybody waiving closing argument on a capital case. (Id. at p. 324). Appell also stated that Fannin "absolutely" should have pressed motions for funds for psychiatrists. (Id. at p. 318; also see p. 325). Fannin's statement on November 2, 1988 to the trial judge, that he did not need a psychologist (Id., Ex. 1, Vol. I, R-18) was not consistent with providing effective assistance of counsel. (Tab 43, p. 319). In Appell's opinion the failure to offer evidence of drug use was ineffective assistance of counsel because if the issue were presented Lawhorn would be entitled to a jury charge on the issue of voluntary intoxication. (Id. at p. 331). Appell further

found fault with Fannin in not preparing and not bringing forth evidence that the widow of the decedent did not wish Lawhorn to be put to death. (Id. at pp. 348-49). Appell also stated that Fannin's direct examination of Lawhorn at the penalty hearing was deficient. (Id. at p. 321). It was also ineffective assistance of counsel not to rebut unfavorable statements in the pre-sentence report before the Judge pronounced sentence. (Id. at p. 332). Finally, Appell found fault with Fannin in never asking anybody in any manner not to put his client to death. (Id.).

Fannin waived the penalty phase closing argument "to cut Mr. Rumsey off at the pass" (R. 32, Tr. 50) because it was his understanding under Alabama law that if Fannin did not argue the D.A. would not have an opportunity to make a closing argument. Fannin explained that he had done some legal research as to whether he could prevent Rumsey from arguing if he rested at the penalty phase: ". . . we understood that to be the rules of evidence in Alabama." Id. at p. 51.

Q. And you reached the conclusion that if you rested without arguing that as a matter of law Mr. Rumsey could not argue?

A. That's what we understood. Yes Sir.

Q. That's what you told Judge Sullivan?

A. Yes sir.

Id.

Fannin then agreed that D.A. Rumsey stated that that was the rule in civil cases and that he had a case directly on point the other way and that Fannin was not able to bring Judge Sullivan's attention to any case law that supported this position. (Id. at p. 52).("not at that time, no sir.")[3] (Also see Tab R-21). Fannin acknowledged that this was "a very critical juncture of the trial." The court permitted the D.A. to make further argument. (Tab R-22; R-585-92).

At the Rule 32 hearing, Fannin did not recall that on appeal the State pointed out that the Rule regarding closing arguments cited in his appellate brief became effective as of January 1, 1991 and Lawhorn's case had been tried in 1989. (Tab-R-43; pp. 53-54; also see Tab R-31, p. 94). He also did not recall the State citing three cases which held that in a criminal case if the defendant does not argue, it is purely up to the judge's discretion to permit the prosecution to close the argument. (Tab R-43, p. 54). Faced with this record, the Court of Criminal Appeals stated, in a part of its opinion not reproduced in the appendix to the State's certiorari petition:

[3] In fact, at the time of Lawhorn's trial, it was within the trial court's discretion to permit the prosecution to close the argument even though the defendant had waived its closing. See Powell v. State, 224 Ala. 540, 549-550, 140 So. 201, reversed on other grounds. Powell v. Alabama, 287 U.S. 45 (1932); Sheppard v. State, 172 Ala. 363, 555 So. 514 (1911); Landrum v. State, 57 Ala. App. 485, 488, 329 So. 2d 173 (1976). See Lawhorn v. State, 581 So. 2d 1149, 1123 (Ala. Cr. App. 1990).

Lawhorn contends that the following findings and conclusions by the trial court were in error:

> "Lawhorn also asserts that trial counsel. failed to research pertinent law. The only evidence presented at the Rule 32 hearing about research concerned whether the district attorney could make a closing argument if the defense waived its closing argument. *[Trial counsel] testified that he found a case before trial that supported his position that the district attorney could not argue if the defense waived its closing argument.* Lawhorn contends that there were cases to the contrary which trial counsel should have found.
>
> "Trial counsel were not ineffective because they did not find the case the district attorney argued to the trial court. *Trial counsel found a case which supported their position and presented it to the trial court.* The fact that this Court ruled against counsel does not make them ineffective. Trial counsel's strategy was reasonable and *trial counsel had case law to support their position*, therefore, there was no deficient performance."
>
> (R-462-63.) (Emphasis added.)

Contrary to Lawhorn's assertion that trial counsel never found a case to support his position, the record indicates that counsel had found a case and had brought it to the trial court's attention. The record of the Rule 32 hearing reveals in pertinent part:

> "[Lawhorn's Rule 32 counsel]: Now, you as part of thinking about this had done some research, had

you not, about whether you could prevent [the prosecutor] from arguing if you rested at the penalty phase; isn't that right?

"[Lawhorn's trial counsel]: Yes, sir, we understood that to be the rules of evidence in Alabama.

"[Lawhorn's Rule 32 counsel]: And you would come across the Shepherd case.[4] There's a reference I think in your file somewhere that Shepherd is the case that discusses that issue?

"[Lawhorn's trial counsel]: Yes, sir.

"[Lawhorn's Rule 32 counsel]: And had you reached a conclusion that if you rested without arguing, that as a matter of law [the prosecutor] could not argue?

"[Lawhorn's trial counsel]: That's what we understood, yes, sir.

"[Lawhorn's Rule 32 counsel]: And that's what you told Judge Sullivan?

"[Lawhorn's trial counsel]: Yes, sir."

Our review of trial counsel's testimony at the hearing supports the findings of the trial court. Counsel testified that he did find a case that supported his position and that he presented it to the trial court. The trial court, however, ruled against his interpretation of the case and, acting within its discretion, allowed the prosecutor to resume his closing argument.

[4] The reference to "Sheperd" is to Sheppard v. State, 172 Ala. 363, 555 So. 514, 515 (1911), which held that it was a matter of the trial court's discretion to allow the prosecutor to close the argument even when the defendant had waived argument.

Lawhorn v. State, 756 So. 2d 971., 978 (Ala. Crim. App. 1999)(emphasis by the court); a copy of this page of the Court of Criminal Appeals decision, is attached as Ex. "1". Attached as Ex. "2" is a copy of the first seven pages of Lawhorn's petition for rehearing filed in the Alabama Court of Criminal Appeals on or about April 6, 1999 (the remaining pages deal with issues not relevant to the certiorari petition) which pointed out to that Court that immediately following Fannin's testimony quoted by it, the following testimony appears:

> Q. [Lawhorn's Rule 32 Counsel] And when you told Judge Sullivan that, Mr. Rumsey said, 'Oh no. That's the rule in civil cases. I have a case directly on point the other way.' And Judge Sullivan said, the record reflects in substance, 'Are you sure that's right, Mr. Rumsey?' And Mr. Rumsey said in substance, 'Yes, that is right.' And he went on to let Mr. Rumsey argue. Isn't that what happened in this case?
>
> A. [Lawhorn's Trial Counsel] As I recall, yes, sir.
>
> Q. [Lawhorn's Rule 32 Counsel] Now, you were not able to bring to Judge Sullivan's attention any case law that supported your position; isn't that correct?
>
> A. [Lawhorn's Trial Counsel] Not at that time, no, sir.
>
> Q. [Lawhorn's Rule 32 Counsel] And that was a very critical juncture of the trial, was it not?
>
> A. [Lawhorn's Trial Counsel] Yes, sir, it's critical." (R. 52).

2. The trial transcript at the first closing argument at the penalty phase also supports Fannin's admission that he did not bring any case law that supported his position to the attention of Judge Sullivan:

"'MR. FANNIN: The defendant waives closing argument in this phase of the trial, Your Honor. We object to the State making any further closing arguments.

MR. RUMSEY: We have the right -- Your Honor, we have one argument, and it's split from the front to the back, and we still have the right to argue. There is Alabama Supreme Court case on it. I don't have it at my fingertips, but we have a right, even if he does not argue, we have a right because ours is a split argument to open and to close and we have a right.

THE COURT: Is it a recent case?

MR. FANNIN: They opened and closed and if I I [sic] don't argue, Judge.

MR. RUMSEY: No sir. That is the law in a civil case, Your Honor, but it is not in a criminal case.

THE COURT: If you are sure about it.

MR. RUMSEY• Yes, sir.

MR. FANNIN: I object, Your Honor.

THE COURT: All right.' (Ex. 1, Vol. III, R-584-585).

3. At no time did Fannin present a case to the trial court that supported his decision not to make a closing argument based upon the argument that the State would be precluded for providing a closing argument.

> 4. Indeed, in this court (Ex. 30, p. 25), Fannin also did not cite a single case to support his position.
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> 5. In contrast, the State cited three cases directly on point. (Ex. 8, pp. 94-95).
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> 6. This court on direct review found that no error had been made:
>
> "It was within the trial court's discretion to allow the prosecutor to close the argument even where the defendant has waived argument. Powell v. State, 224 Ala. 540, 549-50, 141 So. 201, 209, rev'd on other grounds, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); Sheppard v. State, 172 Ala. 363, 55 So. 514, 515 (1911), Landrum v. State, 57 Ala. App. 485, 488, 329 So.2d 173, 176-77 (1976)." Lawhorn v. State, 581 So.2d 1159, 1173 (Ala. Cr. App. 1990).

(Ex. "2", pp. 3-5). Although the Court of Criminal Appeals was thus afforded an opportunity to correct its egregious error, in a one line order dated August 6, 1999, a copy of which is attached as Ex. "3", it denied the rehearing.

Lawhorn wishes to add the following to the State's discussion of Federal Court proceedings (petition, pp. 12-16).

D. **Federal Court Proceedings**

1. *The District Court*.

The state correctly notes that the district court adopted the magistrate judge's report and recommendation as to ineffectiveness concerning Fannin's waiver of the

penalty phase closing argument. The magistrate judge ruled that:

> The state court decision was an unreasonable application of the *Strickland standard* …First, Fannin presented no case law to the trial court nor did he even mention that he was aware of a case to the court during colloquy. Second, Fannin agreed at the Rule 32 hearing that his personal file contained a reference to the *Sheppard* case and it was the case that caused him to waive closing argument in order to prevent Mr. Rumsey's closing argument. In fact, the *Sheppard* case stands for the proposition that the trial court's decision to preclude the prosecution from completing its closing argument is discretionary, a far cry from mandatory. The distinction between such terms and their legal implications are clearly understood by any first year law student, much less an attorney who had been practicing approximately 25 years. Accordingly, the record clearly belies the state court's postulation that Fannin relied on a supportive case or presented same to the trial court. Trial counsel's interpretation of *Sheppard* if indeed he made one, is wrong, and so obviously and egregiously so that it is preposterous for the learned state court to assert that same could possibly support Fannin's supposed strategy. Trial counsel's performance in this areas was objectively deficient. Appendix to State's petition, pp. 187-189.
>
> Unlike the trial counsel in *Bell*, Fannin's opening argument consisted of naming four mitigating factors (age, lack of violent criminal history, acting under extreme duress or emotional disturbance, and background/character) he felt his

> evidence would show, telling the jury they were open to consider anything presented by the defendant as a mitigating circumstance, and finally stating, "I believe you'll hear sufficient evidence on the behalf of the Defendant, that you'll come back with a recommendation of life without parole, and that's what we're asking you to do at this point. Thank you very much." (R. 497-501).
>
> In short, counsel's antiseptic opening failed to set forth any proposed facts in a manner that summarized the defendant's position and humanized the defendant. Moreover, counsel never asked the jury for mercy or to spare his client's life. Such an opening is objectionable when counsel knew that he was not going to present a closing argument. This, combined with his failure to present a closing argument, substantially prejudiced Lawhorn.

(Appendix to petition for a writ of certiorari, pp. 189-90a).

## ARGUMENT

Preliminary Observation

In responding to Lawhorn's certiorari petition filed in this court following the state court post-conviction proceedings, the State of Alabama in a brief filed on June 9, 2000 stated that:

> **Certiorari Should Be Denied Because The Underlying Issue Is Not Worth Of Certiorari Review.**
>
> The underlying issue involves whether Lawhorn's attorneys were ineffective because they failed to make a closing argument. This claim involves a simple

> application on this Court's decision in Strickland v. Washington, 466 U.S. 68 (1984) to the facts of this case. This Court is well aware of the great demands on its time to decide issues of far-reaching impact. The ineffective assistance of counsel claim raised by Lawhorn will only apply to his case and is simply of such narrow and limited presidential value that it is not worthy of certiorari consideration.

(**RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI**, p. 15). Apparently this Court agreed since it denied certiorari. Lawhorn v. State, 531 U.S. 835 (2000). In its June 29, 2010 petition the State does not explain why it has apparently changed its view as to the legal significance of this issue.

I. The Court Of Appeals Prejudice Analysis Did Not Conflict With AEDPA Or This Court's Precedent.

The state heavily relies upon Bell v. Cone, 535 U.S. 685 (2002). (see petition, pp. 1, 2, 3, 15, 18, 25, 26, and 27). The principal distinctions between what happened here and what happened in Bell is that (1) the defense counsel in Bell knew the applicable rule and Fannin did not, and (2) in Tennessee (unlike Alabama at the time) the defendant's waiver of closing argument prevents ". . . the other prosecuting attorney from making closing argument." Cone v. State, 747 S.W. 2d 353, 357 (Tenn. Cr. App. 1987); Manning v. Jarnigan, 501 F. 2d 408, 412 (6th Cir. 1974); and

Hines v. State of Tennessee, 2004 Tenn. Crim. App. Lexis 45, at 27.

The egregious error by Fannin was especially prejudicial to Lawhorn because Fannin had given an antiseptic opening statement at the penalty phase and offered affirmative testimony from several witnesses. (Tabs R-17 and R-18; R-497-578, appendix to petition, p. 190a). Lawhorn was deprived of a closing argument which could have articulated the mitigating circumstances warranting a recommendation for life imprisonment without parole. It is useful to note that Mac, who was prosecuted by the same district attorney before the same judge (Hon. William Sullivan) did not receive a death sentence, even though, as the state correctly notes, a trial judge is not bound by the jury's recommendation (petition, p. 19). Judge Sullivan specifically stated during the sentencing of Mac that:

> The jury deliberated many hours, more than 12, in the guilty stage of your trial before finding you guilty of capital murder, and after hearing the evidence in the sentence stage of the trial, recommended by a vote of 11 to 1 that your punishment be fixed at life without parole. Under the circumstances of this case, their recommendation was extremely merciful, and your attorneys did you a great job, so therefore, I am not going to go against the jury's recommendation. It is therefore the judgement of the Court that your punishment be fixed at life

> imprisonment in the penitentiary, State of Alabama….” (Transcript of sentencing hearing, Mac O’Neil Lawhorn v. State of Alabama, Circuit Court Talladega County, Case No. CC88-210-A-1, July 6, 1989, p. R-794)(emphasis added).

It is also worth observing that although Maxine Walker was initially sentenced to death after her first trial, her second trial resulted in a conviction of only ordinary, not capital murder. Walker v. State, 989 So. 2d 1235 (Ala. Cr. App. 2004), cert. den. 920 So. 2d 235 (Ala. 2004), cert. den. 544 U.S. 925 (2005).

The Court of Appeals did nor overestimate the effect of a closing argument. If closing argument meant so little to the result why did the State insist on two closing arguments at the penalty phase in Lawhorn’s case instead of one? See Herring v. New York, 422 U.S. 852, 858 (1975) (“there can be no doubt that a closing argument for the defense is a basic element of the adversary fact finding procedure in a criminal trial. Accordingly, it has been universally held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge”) (footnote and numerous citations omitted).

If there are situations in which waiving a closing argument in a capital case does not constitute ineffective

assistance of counsel, this was not one of them. There are two principal reasons why this is the case: (1) the reason why Fannin waived closing argument was based on a gross misunderstanding of the law concerning closing arguments in criminal cases, and (2) Fannin had presented evidence during the penalty phase and, as he testified, it is important to make a closing argument about why the jury should recommend life imprisonment without parole. (Tab R-43, p. 50). Unlike trial counsel in Bell v. Cone, Fannin's "antiseptical" opening consisted of naming four mitigating factors and concluded with some general statements. Lawhorn was deprived of a closing argument which could have articulated the mitigating circumstances warranting a recommendation for life imprisonment without parole. The failure to make a closing argument in this case was also prejudicial because Fannin "never asked a jury for mercy or to spare his client's life." (Petition, appendix, p. 190a). The State's argument that there was no prejudice to Lawhorn because of "the aggravated nature of Lawhorn's crime" (petition, p. 23) overlooks the results in Mac's and Walker's cases in which both of those defendants were represented by competent counsel.

Finally, there is nothing to the State's assertion the Court of Appeals erred because it "never mentioned, … § 2254(d)(1)(s) additional layer of deference during its

prejudice analysis. (Petition, p. 24). This Court has never required any magical incantation of the terms of §2254(d)(1) in habeas corpus appeals. Indeed only a few years ago, this Court vacated a capital murder conviction on habeas grounds in an extensive analysis that hardly mentioned §2254(d). Miller-El v. Dretke, 545 U.S. 231, 244-66 (2005). A significant portion of the Eleventh Circuit docket consisted of reviewing habeas petitions in capital cases arising not only from Alabama but also Georgia and Florida. It is unreasonable as a matter of law to suggest that that circuit (or this Court in Miller-El) is unfamiliar with or did not apply §2254(d).

**CONCLUSION**

The petition should be denied.

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