No. 06-10605

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petition For 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 PETITION FOR A WRIT OF CERTIORARI

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

**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 Justices of the Alabama Supreme Court and Alabama Court of Criminal Appeals, as well as former Presidents of the Alabama State Bar. Douglas Johnstone, Ernest Hornsby, and Ralph Cook are all former Justices of the Alabama Supreme Court. William Bowen is a former Judge of the Alabama Court of Criminal Appeals. Fred Gray, Sr., William Clark, and Robert Segall have all previously served as President 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 providing counsel to indigent defendants in capital proceedings, and its failure to provide either counsel or any other legal assistance to those same indigent persons during postconviction review. The *amici* are perhaps better situated than any party in this litigation to inform this Court concerning the factual circumstances extant in Alabama.

SUMMARY OF THE ARGUMENT

Alabama's legal system regarding the provision of counsel to indigent death row inmates in state postconviction is in a state of crisis. More than a dozen death row

[1] Pursuant to Rule 37.2(a), Sup. Ct. R., all parties 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.

inmates in Alabama at the state postconviction stage currently do *not* have counsel. Petitioners present an important legal question and it is imperative that this Court grant review.

The current situation in Alabama – especially the fact that indigent death row inmates receive no assistance of counsel in the crucial period *before* the expiration of the statute of limitations for filing a Rule 32 petition – must be understood against the backdrop of severe inadequacies in the provision of counsel to indigent persons at trial. The complexity of state postconviction procedure guarantees that some indigent death row inmates who do not have counsel will simply lose their opportunity for state and federal review of their capital convictions and sentences of death. The system in Alabama differs importantly from the system in place in Virginia at the time that this Court decided *Murray v. Giarratano*, 492 U.S. 1 (1989). The United States Supreme Court should grant certiorari to address whether, under the facts present in Alabama, the United States Constitution requires the timely appointment of post-conviction counsel for death-sentenced indigents.

ARGUMENT

The legal issues in this case turn on straightforward factual questions which we believe we are in the best position to discuss. Justice Kennedy's concurring opinion in *Murray v. Giarratano*, 492 U.S. 1 (1989), rested on the important factual assumption that the system of representation of death row inmates in Virginia was adequate to fulfill their needs. Justice Kennedy found that "Virginia's prison system . . . [was] staffed with institutional lawyers to assist [death row inmates] in preparing petitions for postconviction relief," and that "no prisoner on death row in Virginia . . . [had] been unable to obtain counsel to represent him in postconviction proceedings." *Id*. at 14-15. These factual conditions do not obtain in Alabama.

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 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 legal representation of indigent death row inmates in Alabama. We firmly believe that the factual predicates of Justice Kennedy's concurring opinion in *Giarratano* are *not* present in Alabama.

Many of us have tried, over the course of many years, to ensure that indigents sentenced to death receive the assistance of qualified counsel. The State Bar has studied and made recommendations for the improvement of indigent defense for more than thirty years.[2] Numerous bills attempting to ensure counsel have been introduced in the Alabama legislature, many with our active support, but they have not been successful. 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). If adopted, that legislation would have required, among other things, implementation of the American Bar Association [hereinafter "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.* Bills proposing other basic reforms in Alabama's death penalty statutes, including a prohibition

[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 www.abanet.org/legalservices/sclaid/defender/policy.html, visited May 8, 2007.

on the execution of minors, standards for determining who is mentally retarded for purposes of avoiding execution, and bills that would prohibit elected judges from overriding a jury's recommendation for life imprisonment without parole, have been introduced without success. *E.g.,* S.B. 18, 25, 2004 Leg., Reg. Sess. (Ala. 2004); S.B. 30, 2006 Leg., Reg. Sess. (Ala. 2006).

Former Presidents of the Alabama State Bar and Judges of the State's appellate courts, including some of the *amici*, 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 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).

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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 May 9, 2007). 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 May 9, 2007.

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 and today death-sentenced indigents sit on death row *without counsel*. These are some of the facts that distinguish the instant case from *Giarratano*, and require that the United States Supreme Court address the question whether, under the Alabama facts, the United States Constitution requires the timely appointment of postconviction counsel for death-sentenced indigents.

I. Problems With The Trial Process

The indispensability of representation at the postconviction stage must be understood against the backdrop of a compromised system of representation at the trial level that renders many verdicts and sentences unreliable. In the majority of counties, attorneys are appointed to represent capital defendants, but there are only two requirements of appointed counsel. They must be licensed members of the Alabama Bar and they must have five years of criminal experience. Even these minimal requirements are not consistently followed; exceptions by lower courts are made. Alabama does not require any special training *at all* for attorneys appointed to represent indigent defendants. As a result, many are not skilled in the complex demands of a capital trial. In addition, many current death row inmates were convicted when the state imposed *grossly inadequate* compensation caps on the attorneys appointed to represent them. Each of these identified deficiencies viewed in isolation may not sound the alarm bells. But together, these weaknesses suggest that postconviction review is increasingly important, because the trial process produces unreliable verdicts and sentences.

A. No State-Wide Indigent Defense System

Despite the efforts discussed above, there is no statewide indigent defense system in Alabama.[6] Each of Alabama's judicial circuits is left to create its own system for providing counsel to indigent defendants. Funding is generated through the Fair Trial Tax, but there is no statewide oversight of indigent defense spending. Under this scheme, the circuits employ one of three general methods: public defender offices, court appointment systems, or contract defender systems.

Of the forty-one judicial circuits, only four have a centralized public defenders office; *only one* of those four public defenders offices represents capital defendants.[7] This means that capital defendants in only one judicial circuit have public defenders as their appointed counsel.

Ten circuits contract with attorneys for a set monthly fee regardless of the volume of cases. *Assessment Report*, at 99. An ABA Committee found that "contract defenders in Alabama provide constitutionally inadequate representation by 'basically doing nothing' but processing defendants to a guilty plea in as expeditious a manner as possible."[8] An Alabama Appleseed Center review of four

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[6] Declaration of Bryan A. Stevenson, Appendix to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, filed April 3, 2002, Appendix Tab 1 at ¶ 21 (filed in the District Court); *see* also Motion for Final Judgment (filed in the District Court on May 8, 2003) at 9.

[7] *American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report*, at 99 (June 2006) [hereinafter, "*Assessment Report*"], available at www.abanet.org/moratorium/assessmentproject/alabama.html, visited May 8, 2007, *citing* Telephone Interview with Bobby Woolridge, Public Defender, Tuscaloosa County (May 3, 2006).

[8] *Assessment Report*, at 119, *citing American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Alabama* (2005) [hereinafter, "*Standing Committee*"], available at http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf, visited on May 8, 2007.

circuits' contract defender systems found that, in those circuits, "the attorney of record did not file any motions in 72% of the capital and non-capital felony cases."[9] Further, "in the cases where motions were filed, 71% of them were "canned," non-case specific motions . . . [and] no motions were filed for experts or funds for investigatory assistance in 99.4% of the cases."[10]

The most common method, utilized by twenty-seven circuits, is for the judge to appoint an attorney for an hourly fee. *Assessment Report*, at 100. We are troubled by the ABA's assessment of our system:

> "Compounding the difficulties that go along with maintaining such a diffuse indigent defense system is the fact that '[t]he state's indigent defense systems are not fully independent from undue political and judicial influence.'[11] Elected judges are responsible for deciding upon the type of indigent defense system each judicial circuit will use.[12] In addition, the presiding judge of each judicial circuit is responsible for appointing the members of its indigent defense commission.[13] Furthermore, in the twenty-seven judicial circuits that use court-appointment systems, judges are responsible for making appointments in individual cases. *All of this highlights the reality that the State of Alabama's indigent defense system*

[9] *Id.*, *citing* Testimony of John Pickens, Executive Director, Alabama Appleseed, Hearing of the ABA Standing Committee on Legal Aid and Indigent Defendants (Oct. 31, 2003)).

[10] *Id.*

[11] *Assessment Report*, at 121 (citing *Standing Committee*).

[12] ALA. CODE § 15-12-2(a)(1) (2007); ALA. CODE § 15-12-2(a)(2) (2007); ALA. CODE § 15-12-3 (2006); ALA. R. JUD. ADMIN. 8(a) (2007).

[13] ALA. CODE § 15-12-4(a) (2007).

not only fails to be independent of the judiciary, but is wholly dependent on it."[14]

B. Past And Current Fees Are Inadequate

Prior to 1999, appointed attorneys were compensated at $40 an hour for time spent in court and $20 per hour for work done outside of the courtroom. ALA. CODE § 15-12-21 cmt. (2007). Additionally, appointed counsel in death penalty cases "could not be compensated more than $1,000 for out-of-court work for each phase of the capital trial, based on a $20 hourly rate." *Hyde v. State*, 950 So.2d 344, 359-60 (Ala. Crim. App. 2006). To be sure, in 1999, the Alabama legislature amended the Code to "remove the cap on the total fee an attorney representing an indigent defendant could recover." *Id*. at 359. It also raised the in-court rate to $60 per hour, and the out-of-court rate to $40 per hour. ALA. CODE § 15-12-21(d) (2007). But, according to a June 2006 ABA report, seventy percent of Alabama death row inmates were convicted when defense lawyers were limited to $1,000 for their out-of-court work. *See, Assessment Report*, at 126 (*citing* Editorial, *A Death Penalty Conversion*, THE BIRMINGHAM NEWS, Nov. 6, 2005)).

The demands on counsel representing indigent defendants in capital cases are great, and significantly more time consuming than a typical criminal trial. "[R]ecent studies indicate that *several thousand hours are typically required to provide appropriate representation*. An in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889."[15] Counsel representing those

[14] *Assessment Report*, at 121 [emphasis added].

[15] *ABA Guidelines* 40, *citing* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations*

(Continued on following page)

inmates in Alabama either had to foot the bill themselves once they reached the cap, or they had to stop vigorously defending their clients. Many attorneys simply cannot afford to handle capital trials without income. Once their compensation reached the limits, many likely dedicated their attentions to income producing work. In no way do we mean to suggest that this is due to laziness or some other unjustified reason; rather, it is caused by the sheer financial constraints imposed by the system.

In amending Sec. 15-12-21, the Alabama legislature eliminated the compensation cap, but maintained hourly rates at a very low level. ALA. CODE § 15-12-21(d)(1) (2007). As noted earlier, though, only thirty percent of death-sentenced indigents benefited from this change. Moreover, "even with recent increases in hourly rates for indigent attorneys' fees, the lawyers who represent indigent defendants in criminal cases throughout Alabama do so at a great discount from what they would otherwise receive as either retained criminal defense lawyers or even as an hourly rate in most civil defense matters."[16] The ABA notes that "low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require." *ABA Guidelines*, at 52.

C. Many Appointed Attorneys Receive Inadequate Training To Prepare For Capital Cases

Death penalty cases require a repertoire of knowledge unique to the capital context, and "have become so specialized that defense counsel have duties and functions

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Concerning the Cost and Quality of Defense Representation, at 14 (1998) [emphasis added].

[16] *Assessment Report*, at 126, *citing* Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases after Alabama v. Shelton*, ALA. LAWYER, Nov. 2002).

definably different from those of counsel in ordinary criminal cases."[17] Douglas Vick described these unique demands:

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[18]

One author described the demands of trying a capital case as "the legal equivalent of neurosurgery."[19] Given the high degree of specialization required in a capital case, it is critically important that those appointed to represent the indigent be adequately skilled and trained. In Alabama there are only two requirements of counsel appointed to handle death-penalty cases. The first is that counsel in a death penalty case be a licensed member of the Alabama State Bar Association. *Irvin v. State*, 203

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[17] *ABA Guidelines* at 3, *citing McFarland v. Scott*, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence); *see also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1991); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

[18] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995).

[19] Scott Sundby, *The Death Penalty's Future: Charting the Cross-currents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1945 (2006).

So. 2d 283 (Ala. Crim. App. 1967). The second requires that "each person indicted for [a capital offense] who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law." ALA. CODE § 13A-5-54 (2007). Nothing more is required.

According to the ABA Guidelines, "the defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,[20] an investigator, and a mitigation specialist." *ABA Guidelines*, at 28. Yet in *Whitehead v. State*, the Alabama Court of Criminal Appeals held that Whitehead was only entitled to one attorney with five years' experience in the active practice of criminal law, because § 13A-5-54 does not provide for the appointment of two attorneys. *Whitehead v. State*, 777 So. 2d 781, 851 (Ala. Crim. App. 1999). The court has consistently held that a capital defendant is only entitled to one attorney.

Not only does the statute only require one attorney (with only two minimal qualifications), but Alabama courts have sometimes waived the second requirement.

> In spite of these minimal requirements, judges are not required to certify these attorneys as qualified and may, in some circumstances, appoint lawyers who do not meet these requirements.[21] For example, as discussed previously,

[20] The *ABA Guidelines* indicate that attorneys appointed to represent a defendant in a capital case should have received substantial training in the conduct of capital representation.

[21] *Assessment Report*, at 122, *citing McGowan v. State*, 2003 WL 22928607, *54 (Ala. Crim. App. Dec. 12, 2003) ("Whenever a decision is made as to approving an attorney who does not technically meet the five-year-experience requirement, it *must* be made properly, carefully, and within the most narrowly tailored limitations."); *see also Gaddy v. State*, 2006 WL 511383, *4 (Ala. Crim. App. Mar. 3, 2006) ("As in *Lear,* counsel's alleged inexperience and lack of resources in the present case would be insufficient in itself to give rise to a sixth amendment violation. Rather, under *Strickland's* two-part test, defendant must establish specific errors by counsel and resultant prejudice.").

> the Court of Criminal Appeals in *McGowan v. State* excused the trial court's failure to appoint an attorney with the statutorily required five years of criminal law experience for a variety of reasons, including the fact that "*the pool of attorneys available did not contain even one available attorney that would optimally meet the requirement of the statute*." *Assessment Report*, at 122, *citing McGowan v. State*, 2003 WL 22928607, *53 (Ala. Crim. App. Dec. 12, 2003) [emphasis added].

Moreover, Alabama requires no additional CLE training for lawyers in death penalty cases above and beyond the twelve hours of CLE per year to maintain state bar licensure. ALA. CODE § 40-12-49 (2007). No formal or even informal training in capital defense is required. This lack of training has created a system where "capital defendants are often represented by attorneys who are unfamiliar with death penalty litigation, do not know how to prepare or present a capital case, and make numerous avoidable mistakes during the course of a trial."[22]

In addition to the complete lack of training, there is no independent oversight of this process. "No independent entity within the State of Alabama is responsible for drafting or publishing a roster of certified trial and appellate attorneys or for monitoring, investigating, and maintaining records concerning the performance of all attorneys handling death penalty cases." *Assessment Report*, at 124.

These inadequacies of legal representation at trial form a necessary backdrop to fully understanding the legal crisis at the postconviction stage.

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[22] Ruth Friedman & Bryan Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1, 5 (1992).

II. Constraints On Postconviction Counsel

Since *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."[23] Most states legislatures have recognized the critical role that postconviction counsel serves in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners as a matter of right.

A. Alabama Does Not Provide Counsel As A Matter Of Right During Postconviction

Alabama does not provide postconviction counsel as a matter of right. Our appointment system is entirely discretionary. The judge

> *may* appoint counsel to represent and assist those persons charged or convicted if it appears to the court that the person charged or convicted is unable financially or otherwise to obtain the assistance of counsel and desires the assistance of counsel and it further appears that counsel is necessary in the opinion of the judge to assert or protect the right of the person.

ALA. CODE § 15-12-23(a) (2007) [emphasis added].

"More than a dozen death-sentenced inmates currently seeking postconviction relief do not have *any* counsel . . . to help them properly prepare their petition to avoid summary disposition." *Assessment Report*, at 159.[24]

While the Alabama Code permits judges to appoint counsel, at their sole discretion, the petitioner must still navigate the complex legal system *alone* in asserting his

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

[24] *Citing* Editorial, *When Death is on the Line*, THE BIRMINGHAM NEWS, Nov. 8, 2005.

claims. ALA. R. CRIM. P. 32.7(c) (2007). The petitioner must file a *pro se* Rule 32 petition before he can even hope to receive appointed counsel. Those of us on the Alabama Supreme Court acknowledged these difficulties in our opinion in *Ex Parte Jenkins*, No. 1031313, 2005 WL 796809 at *5 (Ala. Apr. 8, 2005). Justice Lyons, writing for the court, explained:

> The Alabama Rules of Criminal Procedure permit a trial court to appoint counsel to represent an indigent petitioner in a postconviction proceeding if it 'appears that counsel is necessary to assert or protect the rights of the petitioner.' Rule 32.7(c), Ala. R. Crim. P. Such an appointment occurs only after a petition has been filed. Therefore, inmates who are unable to find counsel to represent them before the limitations period for filing a Rule 32 petition expires, including inmates who are mentally ill, illiterate, or mentally retarded, must determine the date by which they must file their Rule 32 petition and prepare and file a petition in the proper form with the proper claims in the proper court. In 2002, this Court amended Rule 32, Ala. R. Crim. P., to reduce the limitations period for filing a Rule 32 petition from two years to one year.

The vast majority of our death-row inmates have labored under the difficulties identified by Justice Lyons. "*Every active death penalty state today, with the exception of Alabama*, provides for the prefiling appointment of counsel to assist indigent death row inmates in the preparation of postconviction petitions challenging their convictions and sentences." Freedman, *supra* note 23, at 1081 [emphasis added].

In Alabama, many condemned inmates at the postconviction stage must either rely on volunteer counsel, an increasingly rare commodity, or proceed *pro se*. Proceeding *pro se* is really no option at all. "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."[25] The magnitude of this crisis is daunting. "More and more errors come to light each day. In recent years, more than 123 people [nationally] under sentence of death have been released from death row with evidence of innocence. Hundreds of other death sentences have been overturned because of serious constitutional errors at trial."[26]

B. The Complexities Of Rule 32 Proceedings Are Difficult For Most Attorneys To Navigate, Let Alone Pro Se Petitioners

Alabama's post-conviction process is governed by exceptionally complex procedural rules, including unyielding deadlines, demanding pleading requirements, and very short time periods during which to navigate this maze. Failure to meet all of the Rule 32 requirements seals the fate of a condemned inmate. As recently as 2006, the Alabama Court of Criminal Appeals held, "the procedural bars in Rule 32, Ala. R. Crim. P., apply to all cases, even those involving the death penalty." *Ingram v. State*, No. CR-03-1707, 2006 WL 2788984, at *1 (Ala. Crim. App. Sept. 29, 2006). This means that procedural bars operate as an absolute denial of relief. Consider the following illustration:

> After Donald Dallas filed a *pro se* postconviction petition, the State of Alabama filed a motion to dismiss several claims, including his claim of juror misconduct, for failure to comply with the specificity requirements of Rule 32.6 of the Alabama Rules of Criminal Procedure. The judge subsequently gave Mr. Dallas fourteen days to amend the juror misconduct claim with additional facts.

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[25] *American Bar Association, ABA Death Penalty Representation Project* 3 (2006), available at www.abanet.org/deathpenalty/docs/brochure2006.pdf, visited May 8, 2007.

[26] *Id.*

> 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 subsequently dismissed.[27]

Dallas' *pro se* postconviction petition had been filed after 352 days had run on the one-year federal limitations period for filing a habeas petition under 28 U.S.C.A. § 2244(d). *Dallas v. Haley*, 228 F.Supp.2d 1317, 1319 (M.D. Ala. 2002). In subsequent proceedings in federal court, the State sought dismissal of his habeas petition as untimely. In ordering a stay of execution to allow for further proceedings, the federal district judge noted the complexity of the timeliness issue:

> [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.

Id. at 1320. The fact is that the death penalty postconviction litigation process is so complex that even attorneys and judges often struggle to understand its nuances.

Even assuming that, with enough time and appropriate resources, the *pro se* petitioner could conduct adequate research into constitutional law (both state and federal), and jurisdictional requirements, to know whether he has a cognizable claim, his time to (1) research our jurisprudence and statutory law, (2) develop a workable knowledge of our rules and precedents, and (3) develop a procedurally sound claim is sharply constrained. "The death-row petitioner must file his/her Rule 32 petition within ***one year*** after the Court of Criminal Appeals issues the

[27] Brief of Petitioner-Appellant at 20 n.7, Christopher Barbour, *et al.* v. Michael Haley, *et al*., No. 06-10920-CC (11th Cir. Apr. 24, 2006) (*citing* Order, *Dallas v. State*, No. CC-92-2142 (Montgomery Cty. Cir. Ct. Feb. 16, 2000)).

certificate of judgment affirming his/her conviction and sentence on appeal." ALA. R. CRIM. P. 32.2(c) [emphasis added].

If the petitioner manages to file within one of these time periods, and his petition is subsequently denied, he has to know that a ruling has occurred. He also has to know that he has a right to appeal, without this knowledge coming from the court. In *Palmer v. State*, the Alabama Criminal Court of Appeals held "contrary to Palmer's contention, Rule 32 does not require a circuit court to inform a Rule 32 petitioner that he or she has the right to appeal the denial of a Rule 32 petition." *Palmer v. State*, 842 So. 2d 751, 752 (Ala. Crim. App. 2002).

Justice Johnstone is rightly troubled by this reality. In a dissenting opinion in *Marshall v. State*, he provided an illuminating account:

> 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 *Ex Parte Jenkins*, the Alabama Supreme Court addressed the challenges that many death-row inmates face. "Because most Rule 32 petitioners are imprisoned, those petitions are often based on a preliminary and restricted investigation of the claims asserted. Furthermore, an incarcerated inmate who does not have legal counsel is obviously hampered in his or her ability to interview witnesses, to gather records, to investigate factual questions, and to conduct legal research." *Ex Parte Jenkins*, No. 1031313 at *5.

Despite the foregoing recognition that indigent inmates, proceeding *pro se,* lack the ability to adequately understand, interpret, and act upon the complex procedural and substantive obstacles they must negotiate in seeking postconviction relief, the courts grant no dispensation from those requirements to the unrepresented. In order to establish cause to excuse a procedural default, a petitioner must demonstrate that the default resulted from some objective impediment that prevented him from properly raising the claim, and that cannot be attributed to his own conduct. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The fact that the inmate was without counsel when the default occurred does not excuse the default. *E.g., Culotta v. Mitchem,* 2006 WL 752947 (M.D. Ala. 2006), *citing Coleman v. Thompson,* 501 U.S. 722 (1991).

III. Judges Can Make Mistakes Too; Counsel Is Indispensable

The Alabama process is fraught with difficulties and challenges unique to Alabama. For our system to be successful, counsel is indispensable. While those of us who served on Alabama's courts would like to think that we, as judges, could closely monitor the proceedings and make sure that a defendant truly has his day in court, we recognize that "[e]ven the most talented and dedicated

judges surely commit occasional mistakes."[28] Dockets are full and time is limited. In 2005, Alabama sentenced more people to death than Georgia, Mississippi, Louisiana and Tennessee combined.[29] We agree with the ABA's assessment that "defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty." *Assessment Report*, at 97.

It is undeniable that "when death row prisoners are provided with legal assistance for appellate and postconviction litigation, many illegal convictions and unconstitutional death sentences are uncovered. There have been dozens of reversals and capital murder convictions and death sentences in Alabama in the last 15 years."[30] Bryan Stevenson with the Equal Justice Initiative notes that "[i]n some of these cases, such as the case of Walter McMillian, our work has established that innocent people have been convicted and sentenced to death."[31]

This is not acceptable to us, nor should it be acceptable to anyone else. Our capital system in Alabama is in disarray. Without counsel to vigorously represent death row inmates in state postconviction, we know that there have been instances where justice was not served. The current situation in Alabama is markedly distinguishable from the system in place in Virginia when the United States Supreme Court decided *Giarratano* and requires that this Court now address the important question whether, under the facts in Alabama, the United States

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[28] Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001).

[29] Thomas Spencer, *EU Ambassador Hails Alabama's Evolving Image*, THE BIRMINGHAM NEWS, Thursday, April 26, 2007.

[30] Declaration of Bryan A. Stevenson. Case No. 01-S-1530-N. August 28, 2003, at 8.

[31] *Id*.

Constitution requires the timely appointment of post-conviction counsel for indigent inmates sentenced to death.

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

Counsel for Amici