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In The
# Supreme Court of the United States

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CORY R. MAPLES,

*Petitioner,*

v.

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

*Respondent.*

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

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

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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 Curiae*

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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 post-conviction proceedings. The *amici* are perhaps better situated than any other party in this litigation to inform this Court concerning the state of the administration of the death penalty 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 have granted written consent for the filing of this Brief. Letters of consent have been submitted to the Clerk of Court. 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 many dire shortcomings of that system are its failure to adequately provide competent counsel for indigent defendants charged with capital offenses, either at trial or on direct appeal, and its heavy reliance for oversight on a necessarily inconsistent and sometimes biased hierarchy. As a result of these and other failures, many of the convictions and sentences rendered are inherently unreliable, and proper functioning of the postconviction review process is critical.

Many fundamental deficiencies of Alabama's capital punishment system were at issue in Mr. Maples' dismissed postconviction petition. From the overarching plague of ineffective assistance of counsel to allegations concerning prosecutorial misconduct, errors in the selection and instruction of jurors, and improper use of an aggravating circumstance, Mr. Maples presented a petition for postconviction review raising numerous instances of defects identified as substantial and widespread problems in Alabama's administration of death. All of his claims were summarily dismissed. Having been denied a full and fair postconviction review of those claims through no fault of his own, Mr. Maples now faces execution through a tragic combination of systematic injustice and arbitrary disregard.

Alabama's system of postconviction review in capital cases is exceedingly complex and rife with pitfalls – even attorneys and judges often must struggle to understand and comply with its procedures. Furthermore, Alabama stands alone in failing to provide counsel (or any legal assistance) 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*, and many others, have made numerous efforts to reform the system, it remains a labyrinth in which many a hapless inmate has become hopelessly lost, sometimes through no fault of his own.

Petitioner 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 left their law firm and ceased representing Mr. Maples, but failed to withdraw or notify the court of substitute counsel. At that point, Mr. Maples became unrepresented, but continued to believe he was represented. Although the trial court initially denied the State's motion to dismiss, it conducted no further proceedings until it summarily denied his petition 18 months later. 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 had expired. Since Mr. Maples was unaware that he had been left

without legal representation, 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 death penalty in Alabama, and are in a unique position to inform the United States Supreme Court of the state of that process in Alabama.

### I. ALABAMA'S CAPITAL PUNISHMENT SYSTEM IS BROKEN, MAKING ADEQUATE POSTCONVICTION REVIEW INDISPENSABLE.

The complexities and pitfalls of the capital postconviction process in Alabama cannot be overstated nor can the importance of the proper functioning of that process, particularly as applied to indigent defense. Alabama's death penalty processes in general, and its "system" of providing representation for indigent defendants during trial and direct appeals in particular, are deeply flawed. As a consequence, many verdicts and sentences are inherently unreliable, making adequate postconviction review crucial.

The myriad deficiencies in Alabama's administration of the death penalty have been well-documented, independently of the facts and competing interests

inherent in any particular case. In 2003, the American Bar Association's Section of Individual Rights and Responsibilities established teams to assess death penalty systems in sixteen jurisdictions, including Alabama. The Alabama Assessment team was made up of eight Alabamians, including defense attorneys experienced in capital litigation,[2] a state legislator, a district attorney, a law professor, and the dean of a law school. It undertook an exhaustive study and, in June 2006, issued an Assessment Report containing conclusions and recommendations concerning numerous failings of constitutional proportion in Alabama's capital punishment system.[3] A 2005 report by the *American Civil Liberties Union*, *Broken Justice: The Death Penalty in Alabama* (October 2005) ("*Broken Justice*"), similarly documented many glaring deficiencies in what passes for justice in the State's imposition of death.[4]

The Assessment Report detailed the analysis of key aspects of Alabama's death penalty administration, from defense services, jury instructions and

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[2] William N. Clark, one of *amici*, was a member of the assessment team.

[3] *American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) ("*Assessment Report*"), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/alabama/report.authcheckdam.pdf, last visited May 22, 2011.

[4] *Broken Justice*, available at www.aclualabama.org/whatwedo/brokenjustice_report.pdf, last visited May 22, 2011.

judicial independence to treatment of racial and ethnic minorities and those with mental illness and developmental disabilities. In numerous respects, the Assessment Report rightly concluded that Alabama "cannot ensure . . . fairness and accuracy" in cases in which death is sought or imposed,[5] and joined "over 450 other organizations, religious institutions, newspapers, and city/town/county councils" in calling for a moratorium on executions until the plethora of injustices it identified could be addressed.[6]

Not surprisingly, this call went unheeded, as have most recommendations contained in the document. Multiple failings in fundamental areas identified as needing significant reform leave us with a complete lack of confidence in the death penalty system, and in its results.

### A. Lack Of Qualified Counsel At All Stages.

While studies have identified numerous significant defects in Alabama's capital punishment system, all are magnified by the most glaring defect – the dearth of qualified counsel at all stages of the process. Of the ABA's ten principles for the provision of indigent defense, Alabama's "system," to the extent it has one, miserably fails to satisfy most, including (of particular relevance here):

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[5] *Assessment Report* at vi.

[6] *Id.*

> Defense counsel's ability, training and experience match the complexity of the case.
>
> There is parity between defense counsel and the prosecution with respect to resources. . . .
>
> Defense counsel is provided with and required to attend continuing legal education.
>
> Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.[7]

Over the course of decades, numerous efforts have been made to ensure that indigents sentenced to death receive representation by qualified counsel. All have been defeated by indifference or outright opposition.

The indispensability of representation at the post-conviction stage must be understood against the backdrop of a compromised system of representation at the trial level. 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 have five years of criminal experience. The requirement for experience in criminal law makes no distinction as to the kinds of cases handled. "An attorney

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[7] *American Bar Association*, *Ten Principles of a Public Defense Delivery System*, February 2002, available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.authcheckdam.pdf, last visited May 22, 2011.

who spends five years representing defendants facing minor criminal charges such as shoplifting or trespassing will satisfy Alabama's capital counsel requirement."[8] 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 appointed counsel. Each of these weaknesses viewed in isolation may not sound the alarm bells but together they make adequate postconviction review critically important, because the trial process produces unreliable verdicts and sentences:

> [Alabama's] patchwork indigent defense system, combined with the minimal qualifications and non-existent training required of attorneys representing capital defendants leads to a system where serious fairness and accuracy breakdowns in capital cases are virtually inevitable.[9]

**i. No Statewide Indigent Defense System.**

Despite the efforts of many, there is no statewide indigent defense system in Alabama. Each of forty-one judicial circuits is left to create its own system for

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[8] *Broken Justice* 5.

[9] *Assessment Report* at iii.

providing counsel to indigent defendants. Funding is generated through the Fair Trial Tax, but there is no statewide oversight of indigent defense spending. The circuits employ one of three general methods: public defender offices, court appointment, or contract defenders.

Only four have a centralized public defenders office; *only one* of those offices represents capital defendants. This means that capital defendants in only one judicial circuit have public defenders as appointed counsel. Ten circuits contract with attorneys for a set monthly fee regardless of the volume of cases. *Assessment Report* at 99. An American Bar Association ("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."[10] An Alabama Appleseed Center review of four circuits' contract defender systems found that "the attorney of record did not file any motions in 72% of the capital and non-capital felony cases."[11]

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[10] *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.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html, last visited May 22, 2011.

[11] *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).

The most common method, utilized by twenty-seven circuits, is for the judge to appoint an attorney for an hourly fee set by statute. *Id*. at 100. The appointment system raises concerns about judicial independence:

> 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.'[12] Elected judges are responsible for deciding upon the type of indigent defense system each judicial circuit will use. . . .[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 not only fails to be independent of the judiciary, but is wholly dependent on it.***[14]

As previously noted, Alabama law leaves trial judges free to appoint attorneys who lack even a modicum of experience in handling capital cases, and who are not required to engage in any training or other preparation for the life or death task at hand.

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

[13] 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).

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

Available data suggests that the difference in performance between counsel appointed for indigent defendants and those retained by defendants with more resources is striking. According to an analysis published in the Alabama Law Review,[15] "over half the time indigent defendants appear before a tribunal for a decision which will affect their liberty rights, what transpires is unfavorable for the defendant," while those with retained counsel fare much better. In 1998, the analysis revealed, appointed counsel obtained unfavorable results more than 62% of the time.[16] Little wonder that more than 95% of those occupying Alabama's death row are indigent.[17] The fact that poor people must assume a much higher risk of conviction in Alabama as a result of receiving lesser representation is certainly, in our view, violative of Judge Learned Hand's admonition that "thou shalt not ration justice."[18]

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[15] David A. Felice, *Justice Rationed: A Look At Alabama's Present Indigent Defense System With A Vision Towards Change*, 52 ALA. L. REV. 975 (2001).

[16] *Id.* at 997.

[17] *Broken Justice* at 1.

[18] Judge Learned Hand, Address at the 75th Anniversary of the Legal Aid Society of New York (Feb. 16, 1951), in Irving Dillard, The Spirit of Liberty XIX (1952).

#### ii. Past And Current Fees Are Inadequate.

Further rationing of justice in Alabama occurs because appointed counsel in capital cases are not adequately compensated for the prodigious task before them. Prior to 1999, appointed attorneys were compensated at $40 an hour for time in court and $20 per hour for work outside the courtroom, ALA. CODE § 15-12-21 cmt. (2006), and "could not be compensated more than $1000 for out-of-court work for each phase of the capital trial." *Hyde v. State*, 950 So.2d 344, 359-60 (Ala. Crim. App. 2006). In 1999 (too late to benefit Mr. Maples), the Alabama legislature "remove[d] 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, still a pittance compared with what counsel could charge a paying client. ALA. CODE § 15-12-21(d) (2006). But, according to a June 2006 ABA report, 70% of Alabama death row inmates were convicted when defense lawyers were limited to $1000 for out-of-court work.[19] Moreover, "[j]udges routinely do not pay lawyers the entire bill for work done in the case. One lawyer said the court paid him the equivalent of $4.98 per hour to defend his client's life."[20] Given the $1000 cap extant at the time of most of Alabama's death row convictions, including Mr. Maples', a defense attorney who

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[19] *See Assessment Report* at 126 (*citing* Editorial, *A Death Penalty Conversion*, BIRMINGHAM NEWS, Nov. 6, 2005).

[20] *Broken Justice* at 2.

expended the hours required to provide competent representation could reasonably expect to be paid $5 per hour or less. In an interview, the same lawyer declared that he would go to jail before handling another capital case.[21]

The demands on counsel representing indigent defendants in capital cases are significantly more time consuming than a typical felony 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 total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889."[22] Counsel representing those inmates in Alabama either had to foot the bill themselves after reaching the cap, or stop vigorously defending their clients. Many attorneys cannot afford to handle capital trials.

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[21] *Questions of Death Row Justice for Poor People in Alabama*, NEW YORK TIMES, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-inalbama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt, last visited May 20, 2011.

[22] *American Bar Association*, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Feb. 2003), *citing* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 14 (1998) [emphasis added].

Once compensation reached the limits, many likely dedicated their attentions to income producing work. We do not 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. A law office cannot be run for free.

#### iii. Many Appointed Attorneys Receive Inadequate Training, Or No Training At All, 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 definably different from those of counsel in ordinary criminal cases."[23]

> 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

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[23] *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).

> 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.[24]

One author described the demands of trying a capital case as "the legal equivalent of neurosurgery."[25] Given the high degree of specialization required, it is critically important that those appointed to represent the indigent be adequately skilled and trained. According to the ABA Guidelines, "the defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1,[26] an investigator, and a mitigation specialist." *ABA Guidelines* at 28.

Alabama requires no additional training for lawyers in death penalty cases beyond the twelve hours of CLE per year to maintain state bar licensure. ALA. CODE § 40-12-49 (2007). No training in capital defense is required. This has created a system where "capital defendants are often represented by attorneys who are unfamiliar with death penalty litigation, do not

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

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

[26] 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.

know how to prepare or present a capital case, and make numerous avoidable mistakes during the course of a trial."[27] In addition, "[n]o 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* 124.

We are saddened that the circumstances surrounding the representation of the poor in our state caused the leader of the ABA's Death Penalty Representation Project to declare that "Alabama is our top priority. . . . The need for competent lawyers there is desperate."[28] These desperate inadequacies of legal representation at trial form a necessary backdrop to fully understanding the crisis at the postconviction stage.

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

[28] *Questions of Death Row Justice for Poor People in Alabama*, NEW YORK TIMES, March 1, 2000, available at http://www.nytimes.com/2000/03/01/us/questions-of-death-row-justice-for-poor-people-in-Alabama.html?scp=3&sq=alabama+death+penalty+local+counsel&st=nyt, last visited May 20, 2011.

### B. Efforts To Reform Alabama's Capital Punishment System Have Not Succeeded.

Over the years, the Alabama State Bar has made recommendations for improvement of indigent defense,[29] and numerous bills 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 over 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); H.B. 468, 2008 Leg., Reg. Sess. (Ala. 2008); H.B. 280, 2010 Leg., Reg. Sess. (Ala. 2010); S.B. 245, H.B. 319, 2011 Leg., Reg. Sess. (Ala. 2011). If adopted, that legislation would have required implementation of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,[30] as well as additional due process protections in post-conviction proceedings. *Id.* While evidence mounts that the system doesn't work, and that innocent people

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

[30] *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.

may be put to death as a result, it seems that the chances for a moratorium are actually dwindling. As recently as April 2011, the editor of the Birmingham News lamented that "legislation to address flaws in Alabama's death penalty seems to be even more lifeless than usual."[31]

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 representation for the indigent in postconviction litigation. House Bill 764, introduced in March 2000, would have created an "Office of the Alabama Appellate Defender" 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,[32] it provided for appointment of

[31] *Our View: Alabama Lawmakers Should Pass Legislation To Put A Three-Year Halt To Imposing Death Sentences Or Carrying Out Executions*, BIRMINGHAM NEWS, April 25, 2011, available at http://blog.al.com/birmingham-news-commentary/2011/04/our_view_alabama_lawmakers_sho_7.html, last visited May 22, 2011.

[32] 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 22, 2011). William Clark, one of the *amici*, was a member.

counsel for indigent persons in postconviction proceedings and established minimum standards for 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,[33] *see also*, H.B. 490, 2006 Leg., Reg. Sess. (Ala. 2006).

These are but a few examples of many failed efforts to bring significant reform to Alabama's capital punishment processes. In the absence of such vitally needed reforms, Alabama falls far short of providing the basic fairness to its poor that is constitutionally required, and that we must demand. As this Court recognized in *Gideon v. Wainwright*,

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[34]

Neither can it be realized if the poor man is permitted only the grossly underfunded services of the inexperienced and the incompetent.

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[33] Available at www.alabar.org/bbc/minutes/0606/AM2006_July15_2006.pdf, visited May 22, 2011.

[34] *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

## II. MANY OF THE INJUSTICES IN ALABAMA'S SYSTEM OF CAPITAL PUNISHMENT WERE ON DISPLAY IN MR. MAPLES' POSTCONVICTION PETITION.

It was into this woefully deficient and unjust system that Mr. Maples was thrust – his trial occurred in 1997 – and many fundamental deficiencies addressed in the Assessment Report were at issue in his summarily dismissed Rule 32 petition. *Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Civil Procedure ("Petition").* While these deficiencies were far from being unique to Mr. Maples' case, failure to fairly address them in the postconviction process will have a direct and deadly impact upon him.

Mr. Maples' postconviction petition alleged several instances of prosecutorial misconduct. Joint Appendix 126-28.[35] Prosecutorial misconduct is a stark reality and a "major problem"[36] in the criminal justice system, both nationally and in Alabama: "Between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases."[37] In Alabama alone, there were 325

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[35] The Joint Appendix is hereinafter cited as "J.A."

[36] *Broken Justice* at 14.

[37] *Assessment Report* at 75, *citing* Steve Weinberg, Center for Public Integrity, *Breaking the Rules: Who Suffers When A*

(Continued on following page)

allegations of misconduct in criminal cases during that period, and decisions were reversed or remanded in 69 of those cases.[38]

Mr. Maples' postconviction petition alleged that the district attorney committed numerous acts of misconduct, including improper arguments at both the guilt and penalty phases of the trial. The prosecution's arguments contained statements about the D.A.'s personal belief in Mr. Maples' guilt, comments on his decision not to testify, encouragement to the jurors to "send a message" by sentencing him to death, and an assertion that the victim's family wanted a death sentence. *See Petition*, J.A. 77-78, 112-14. As noted in the Assessment Report, the Alabama Court of Criminal Appeals has held arguments such as these to be improper in many other cases.[39] This extinguished claim of Mr. Maples' is likely meritorious, and is but a glaring example of an all too common problem in Alabama.

Mr. Maples also alleged that the prosecution improperly relied upon an aggravating circumstance without giving statutorily required notice. *Petition*, J.A. 75-76, 114-15. The aggravator at issue was that "the capital offense was especially heinous, atrocious

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*Prosecutor Is Cited For Misconduct?* (2004), available at http://projects.publicintegrity.org/pm/default.aspx?act=main, last visited May 22, 2011.

[38] *Broken Justice* at 14.

[39] *Assessment Report* at 86-87, 200.

or cruel compared to other capital offenses." *Petition*, J.A. 114. It is troubling that reliance on this factor was allegedly done without proper notice. However, even absent this complication, Alabama's application of this aggravator has been frequently identified as a significant deficiency. The ABA's Alabama assessment team found that the statutory language:

> has not been interpreted in a manner that provides a basis for distinguishing between those cases in which the death penalty is properly applied and those cases in which the death penalty is not. Because Alabama courts have not systematically reviewed cases involving this aggravating circumstance, and have thus failed to fully enforce the statutory requirement that prosecutors establish the comparative atrocity of a given capital murder as compared to other capital murders, this aggravating factor is not subject to any meaningful or rational limitation. It thus has the potential to be improperly used as a mere catch-all provision.[40]

Indeed, the "especially heinous, atrocious or cruel" aggravator appears to be thrown in as a blanket factor in many capital cases. In our experience, it would be rare to find a case in which the prosecution actually presented evidence that would allow the fact-finder to compare the circumstances of the crime to those in other cases. Instead, this aggravating factor is

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[40] *Assessment Report* at v.

typically supported merely by the prosecution's forceful use of graphic language to describe the crime at hand. Given nothing else for comparison, a typical jury of laypersons will easily find that most any murder satisfies the requirement.

Mr. Maples' postconviction petition contained numerous allegations concerning improper selection and instruction of jurors. Once again, his allegations went directly to deficiencies in Alabama's capital punishment system identified by independent sources.

Mr. Maples alleged that the trial court erroneously failed to excuse for cause jurors who indicated they would automatically vote for death in the event of a conviction, *Petition*, J.A. 49-50, 129-30, and did excuse jurors who expressed doubts about the death penalty. *Petition*, J.A. 49. Jurors may be disqualified from service for probable prejudice, which includes their support for (or opposition to) the death penalty.[41]

The petition asserts that the trial court also erroneously failed to excuse a juror who was personally acquainted with a witness. *Petition*, J.A. 134. It also includes allegations concerning failure to conduct individual *voir dire* and statements made by some prospective jurors during group *voir dire* that were likely to have prejudiced others. *Petition*, J.A. 65-66. In addition, it alleged instances of juror misconduct and improper juror communications. *Petition*, J.A. 130-34.

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[41] *Assessment Report* at 178-79.

The petition asserts that improper instructions were given to the jury concerning the burden of proof and the finding of aggravating and mitigating factors, and that the jury was given improper verdict forms. *Petition*, J.A. 52-53, 121-22, 137-39. The Assessment Report concluded that juror confusion over their roles and responsibilities, whether and how to consider mitigating and aggravating factors and burdens of proof suggests "jurors are recommending death based on serious legal errors."[42] These deficiencies may very well have substantially affected Mr. Maples' case.

Mr. Maples would not have been sentenced to death had Alabama followed another policy that was a key recommendation of the ABA's assessment team by requiring that jurors be unanimous in recommending death.[43] Two of Mr. Maples' twelve jurors voted for life.

Lack of judicial independence in Alabama's administration of the death penalty also is a significant concern here. All of Alabama's state court judges are chosen through partisan elections, and those interested in being re-elected face fierce pressure to present a "tough on crime" reputation. Partisan judicial elections operate in tension with core principles of an independent judiciary: that a judge ought to behave with "probity, fairness, honesty, uprightness,

[42] *Assessment Report* at v.

[43] *Assessment Report* at vi.

and soundness of character,"[44] without regard to "inappropriate outside influences."[45] Such influences lead many to publicly trumpet hard-line credentials. One judge's campaign ad declared: "some think he's too tough on criminals, AND HE IS . . . We need him now more than ever." Committee to Re-Elect Judge Mike McCormick, BIRMINGHAM NEWS, November 4, 1994, at C4 (advertisement). In many Alabama judicial races, candidates' positions on the death penalty loom large as a hot button issue:

> "Everybody now understands that you can't talk too much about tort reform," said Bryan Stevenson, the executive director of Equal Justice Initiative of Alabama, a nonprofit law firm that represents poor people and prisoners, "The big business folks will run a candidate, but the candidate talks about how he wants to execute a bunch of folks or how he's for the Ten Commandments."[46]

That the need to campaign on being more of a "hanging judge" than the next guy can result in significant bias problems was recognized by the ABA when it recommended that Alabama take steps to examine and address the fairness of its judicial

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[44] ALA. CANON JUD. ETHICS 1 cmt.

[45] *Id.*

[46] *Judicial Races In Several States Become Partisan Battlegrounds*, NEW YORK TIMES, Oct. 24, 1994, available at http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html?_r=1&scp=5&sq=alabama+judicial+election&st=nyt, last visited May 20, 2011.

election system, which had been "called into question," and eliminate the ability of judges to override a jury's recommendation of life imprisonment and impose death instead:

> Alabama is the only state with such override that selects its judges in partisan elections. This combination can cause bias or the appearance of bias. For example, 90% of overrides in Alabama are used to impose sentences of death, but in Delaware, where judges are appointed, overrides are most often used to override recommendations of death sentences in favor of life.

The potential for bias in the imposition of death in Alabama doesn't first arise at sentencing – the appetite of elected prosecutors for bringing capital charges is just as problematic. Morgan County, where Mr. Maples was convicted, has a higher percentage of Alabama's death penalty cases than it has of Alabama's population, or of its murders.[47]

The foregoing failings in the conduct of Mr. Maples' trial[48] would have been greatly amplified by the overarching concern of lack of qualified and competent counsel – for without qualified and competent counsel these errors went unnoticed at trial. The significance of such claims cannot be overstated.

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[47] *Broken Justice* at 3, Table 2.

[48] Other failings also asserted in the petition are not discussed here.

In 2005, while Mr. Maples' appeal of the dismissal of his postconviction claims was making its way through the appellate courts, Alabama sentenced more people to death than Georgia, Mississippi, Louisiana and Tennessee combined.[49] None can disagree 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."[50]

Mr. Maples' postconviction claims contained numerous allegations of ineffective assistance of counsel, many of which mirror concerns raised in the Assessment Report and other studies. Among these are counsel's failure to make vital objections to the instances of judicial error and prosecutorial misconduct cited above. Mr. Maples also asserted that trial counsel made damning admissions concerning elements of the offense, including the element of intent, failed to pursue and present a crucial defense, failed to request important jury instructions, failed to request and use the assistance of experts, submitted verdict forms inconsistent with defense strategy, and failed to adequately investigate and present available evidence of mitigating circumstances. *Petition*, J.A. 32-33, 35-40, 58-62, 85-102. These failures by trial counsel, who admittedly were "stumbling around in

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

[50] *Assessment Report* at 97.

the dark," are directly related to Alabama's own failure to provide for representation of indigent defendants by qualified, competent and adequately compensated counsel.

At the time of Mr. Maples' trial, Alabama law provided for court-appointed attorneys in capital cases to be paid no more than $1000 for out-of-court work for each phase of the case, at a rate of $20 per hour (a total of 50 hours). Accordingly, in order to properly prepare for trial, Mr. Maples' counsel would have needed to spend hundreds of additional hours working for free.

It is entirely possible that Mr. Maples' counsel did not understand the substantial time and effort required to effectively represent him at trial. Shockingly, Mr. Maples asserts that "neither of [his] trial counsel had ***ever*** conducted a second stage in a capital trial."[51] Not having done so, trial counsel failed to meet minimum standards for investigation of mitigation evidence by failing to adequately discover, develop and present a wealth of available evidence concerning his family and social history, medical and educational background, and other aspects of his life that should have been considered in mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *see also ABA Guidelines* at 11.4.1(A)(2)(c).

[51] J.A. 55, 85-86.

## III. THE CIRCUMSTANCES HERE PROVIDE SUFFICIENT CAUSE FOR MAPLES' DEFAULT.

Where the inmate, 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 that his petition had been denied until after the time for appeal expired. Since Mr. Maples quite understandably believed his counsel would receive notice of any order and notify him of it, he could not be expected 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 failure to appeal an order of which he had no knowledge.

### 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 governed by exceptionally complex procedural rules, 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 represented by competent counsel has little chance of survival. The postconviction 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 results 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").

If the petitioner manages to file a timely petition, and his petition is denied, he has to know that a ruling has occurred. He also has to know that he has a right to appeal, of which the court is not required to inform him. *Palmer v. State*, 842 So.2d 751, 752 (Ala. Crim. App. 2002). At this critical juncture, the assistance of competent counsel is imperative. In his dissenting opinion in *Marshall v. State*, 884 So.2d 900 (Ala. 2003), former Alabama Supreme Court Justice Douglas Johnstone provided an illuminating account of why this is so:

> [C]ommonly 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.

*Id.* at 905-06 (Johnstone, J., dissenting).

These difficulties were compounded in Mr. Maples' case by at least two other recognized deficiencies in Alabama's arcane postconviction process. The trial court denied the State's motion to dismiss in December 2001, then proceeded to do nothing with respect to Mr. Maples' requests for discovery. For the next year and a half, nothing happened in the case at all. Then, the trial court summarily dismissed Mr. Maples' claims without having given him a hearing, or even an opportunity to develop his claims through discovery. Alabama's "procedures for summary disposal of post-conviction claims and no requirement that an evidentiary hearing be held inhibit full judicial consideration of all claims. . . ."[52] This sequence of events contributed to Mr. Maples failing to receive timely notice. After receiving an order denying the motion to dismiss his petition, both Mr. Maples and

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[52] *Assessment Report* at 155.

his then-counsel would have fairly assumed that the court would eventually rule on pending requests for discovery. Had the trial court done so, the activity in the case likely would have prompted other attorneys to enter appearances for Mr. Maples. Instead, during the 18 month lull, Mr. Maples' attorneys wandered off, leaving him completely unprotected.

Despite the recognition in *Marshall* that indigent inmates 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. 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 proceeding *pro se* when the default occurred generally 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). However where, as here, the inmate's counsel abandoned their representation of him without notice, leaving him unwittingly a *pro se* petitioner, it simply cannot be the case that our courts lay the default at his cell door.

**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."[53] Most state legislatures recognize the critical role postconviction counsel serve in capital cases. Alabama *stands alone* in providing absolutely no assistance to petitioners, leaving indigent inmates to either fare for themselves or rely upon volunteer assistance in those increasingly rare instances when pro bono counsel is available.

Today most of our death-sentenced indigents who are fortunate enough to have counsel in postconviction proceedings are forced to rely upon volunteers, the vast majority of whom, like Mr. Maples' counsel, reside in states far from Alabama. It is not by happenstance that this situation exists – Alabama forthrightly admits that, rather than provide for adequate postconviction counsel, it has chosen "to rely on the efforts of typically well-funded out-of-state volunteers." Brief in Opposition 23, *Barbour v. Allen*, No. 06-10605 (May 10, 2007). If these volunteers are "well-funded," it is because they choose to donate

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

their own resources in an effort to make up for some small portion of what Alabama denies its own poor.

Given that the "system" of reliance upon pro bono counsel exists of Alabama's own volition, the convoluted labyrinth of procedures through which the inmate must pass in these circumstances, and the severity of the consequences he will suffer for any failure to do so correctly, it is absolutely imperative that counsel in whose hands the inmate has placed his life not abandon their post. And it is absolutely unacceptable that the State should be permitted to play a game of "gotcha" with the inmate's life hanging in the balance.[54] In Mr. Maples' case, through no fault of his own, both of these events occurred with deadly consequence.

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

[54] The Attorney General's office contacted Mr. Maples directly *after* his time for appeal expired and advised him that his petition had been dismissed and his time to file a federal *habeas* petition would soon expire as well. Pet. App.253a. ("Pet. App." refers to the Appendix to the Petition for Writ of Certoriari 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.

major northeastern cities. Br. in Opp. at 11, *Barbour v. Allen*, No. 06-10605 (May 10, 2007).[55] The valiant efforts of the many out-of-state attorneys who, over the years, have stepped into the regrettable void must not be undervalued. It is 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. Perhaps it was this remove, both physical and psychological, that allowed Mr. Maples' pro bono counsel to simply walk away to other pursuits without withdrawing as required by the rules, ensuring new counsel were in place, or otherwise notifying the trial court that they were no longer representing him. That Mr. Maples was abandoned by his counsel cannot be denied. Both attorneys left their law firm without taking any of these steps. Each moved on to new positions – one at the European Union in Belgium and the other as a law clerk for a federal judge – that actually precluded them from continuing to provide any representation to Mr. Maples. Regardless of their reasons, Mr. Maples was left in the seemingly

[55] According to a January 2004 letter from William H. Pryor, Jr., then-Attorney General of the State of Alabama (and now a judge of the Eleventh Circuit Court of Appeals), of the 130 death row inmates in state postconviction or federal *habeas* proceedings as of June 2003, 92 had been represented by out-of-state law firms or public interest groups, and just seventeen had been represented by private practitioners within Alabama. *See* William H. Pryor, Jr., *Letter to the Editor*, Nat'l. L.J., Jan. 12, 2004.

secure but terribly mistaken knowledge that he had the representation of competent counsel, when in fact he had no representation at all.

The Sullivan & Cromwell attorneys who represented Mr. Maples engaged an Alabama attorney, John Butler, as local counsel for the sole purpose of having them admitted *pro hac vice*. Mr. Butler has made it clear that he never intended to provide any representation to Mr. Maples. Pet. App.255a-56a. This is not at all uncommon. Alabama formally requires local counsel to "accept joint and several responsibility with the foreign attorney" to provide representation and, in fact, to "personally appear and participate in all pretrial conferences, hearings, trials, and other proceedings conducted in open court. . . ." However, it is an unfortunate fact of Alabama practice – certainly unknown to and not the fault of Mr. Maples – that this rule is rarely if ever enforced, especially in criminal cases. The fact is that local counsel for out-of-state attorneys in post-conviction litigation most often do nothing other than provide the mechanism for foreign attorneys to be admitted. This reality was eventually formally recognized by the amendment of the rules to provide an exception for pro bono attorneys, who are no longer required to even have local counsel.

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 counsels' abandonment of their client rises to a level of significance

much greater than simple negligence, and severs 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 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 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 had "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 petitioners erroneously believed they were being represented by

counsel, have recognized the fundamental unfairness of saddling the abandoned client with the sins of 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."[56] *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

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[56] *American Bar Association, ABA Death Penalty Representation Project* 3 (2006), available at http://www.americanbar.org/content/dam/aba/migrated/DeathPenalty/RepresentationProject/PublicDocuments/DPRP_Year_End_Brochure_2010.authcheckdam.pdf, visited May 22, 2011.

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.

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 Mr. Maples' case, the typical inability of an inmate 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 were no longer representing him until he was contacted by the Attorney General's office in August 2003,[57] the court clerk's office learned much earlier that something was amiss. The orders mailed to Mr. Maples' attorneys in

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[57] 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.

New York were returned to the clerk, stamped with notices that the recipients were not known. Even a cursory review of the court file would have revealed that no other pro bono attorneys were participating in the case, and also would have yielded other avenues for contacting the attorneys. The court clerk's failure to make any further effort to ensure that Mr. Maples received notice of the order dismissing all of his claims is inexcusable, particularly in light of the fact that the original motions for *pro hac* admission filed by his departed counsel contained his attorneys' home addresses and personal telephone numbers. Certainly, the clerk's office should have invested the cost of two more postage stamps or a couple of long-distance phone calls to try to notify Mr. Maples of an order that could lead to his death.

This Court has recognized, in a case where the consequences were significantly less dire than in this case, that the State has a duty to make more than perfunctory efforts to provide notice. *Jones v. Flowers*, 547 U.S. 220, 238 (2006), involved a tax sale of the petitioner's home – no small matter, but certainly a less fundamental deprivation than the one at issue here. The official notice to the petitioner of the impending sale 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 unclaimed, and there was more that reasonably could have been done." In this case,

the State had alternative ways to provide notice. It could have perused its own file and used the personal addresses and telephone numbers provided by the Sullivan & Cromwell attorneys. Or, it could have notified Mr. Maples directly by sending him a copy of the order. There was certainly no doubt about where to find him. 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 reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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 Curiae*