No. 1051315

IN THE ALABAMA SUPREME COURT

JARROD TAYLOR,

Petitioner-Appellant,

v.

STATE OF ALABAMA,

Respondent-Appellee.

On Writ of Certiorari to the STATE OF ALABAMA, Court of Criminal Appeals (CR-05-0066)

BRIEF OF PETITIONER-APPELLANT JARROD TAYLOR

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October 5, 2006

ORAL ARGUMENT REQUESTED

Statement Regarding Oral Argument

Petitioner-Appellant Jarrod Taylor respectfully requests oral argument on this appeal pursuant to Alabama Rule of Appellate Procedure 34(a). Mr. Taylor respectfully submits that his appeal comes before this Court because of confusion below as to certain clear facts and legal principles. Accordingly, the decisional process will be significantly aided by oral argument because it will allow the parties and this Court to most effectively cut through and clarify a muddled record. Moreover, Mr. Taylor notes that he is challenging his conviction and sentence of death, and thus seeks to adjudicate the most weighty of issues faced by our legal system.

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Statement of the Case

This is a death penalty case. On April 17, 1998, Jarrod Taylor was indicted by a Mobile County grand jury on three counts of capital murder in violation of Alabama Code § 13A-5-40(a)(2), and one count of capital murder in violation of Alabama Code § 13A-5-40(a)(10). Five months later, on August 11, 1998, a petit jury in Mobile County convicted Mr. Taylor of the four counts in his indictment. The petit jury recommended that Mr. Taylor not be sentenced to death, but rather that he be sentenced to life without possibility of parole. On August 25, 1998, the trial judge overrode the jury's life verdict and imposed four sentences of death by electrocution.

Mr. Taylor appealed his conviction and sentence, which were affirmed on February 4, 2000, by the Court of Criminal Appeals, Taylor v. State, 808 So. 2d 1148 (Ala. Crim. App. 2000), and by this Court on March 9, 2001, Ex parte Taylor, 808 So. 2d 1215 (Ala. 2001), reh'g denied, July 6, 2001. On July 24, 2001, the Court of Criminal Appeals issued a certificate of judgment, and on January 7, 2002, the Supreme Court of the United States denied Mr.

Taylor's Petition for Writ of Certiorari, Taylor v. Alabama, 534 U.S. 1086 (2002).

On July 31, 2002, Mr. Taylor filed a Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure (the "Petition"), which was amended on May 5, 2003. The State moved to dismiss certain claims in the Petition on November 4, 2002; following extended motion practice, on October 23, 2003, the Circuit Court signed several proposed orders, drafted by the State, summarily dismissing some (but not all) claims in the Petition. At a hearing on February 11, 2004, the Circuit Court denied Mr. Taylor's motion for reconsideration of the dismissal of certain of his claims, but held that it would permit discovery on at least certain of the remaining claims.

On or about July 28, 2005, the State submitted to the Circuit Court a proposed Order stating that the Court's orders of partial dismissal issued in October 2003 had actually disposed of the entirety of Mr. Taylor's Petition. The Circuit Court signed that proposed Order four days later, on August 1, 2005.

On September 9, 2005, Mr. Taylor timely noticed his appeal of the August 1, 2005 dismissal order. On January 5, 2006, the State moved to dismiss Mr. Taylor's appeal on the purported ground that one of his attorneys was not properly admitted to practice pro hac vice in the Circuit Court. On May 10, 2006, following a remand to the Circuit Court, the Court of Criminal Appeals issued a Summary Order dismissing Mr. Taylor's appeal, and on May 31, 2006, denied reconsideration of its dismissal order. On June 14, 2006, Mr. Taylor timely petitioned this honorable Court for a writ of certiorari, which this Court granted on September 21, 2006.

Statement of the Issues

The Court of Criminal Appeals entirely foreclosed any substantive review of the summary denial of Mr. Taylor's Rule 32 petition in this capital case, on the grounds of a purported signature defect in Mr. Taylor's Notice of Appeal. The State moved to dismiss the appeal below on the purported ground that an out-of-state attorney for Mr. Taylor was not admitted pro hac vice. The decision of the court below to dismiss this appeal on the purported ground that Mr. Taylor's counsel was not properly admitted relies on an unreasonable and illogical interpretation of this Court's precedents and the Alabama Rules of Appellate Procedure.

This case presents the straightforward application of this Court's precedents interpreting Rules 3 and 25A of the Alabama Rules of Appellate Procedure. This case presents the question of whether, regardless of any purported signature defect on a Notice of Appeal, that Notice of Appeal is valid when: (1) it is submitted by both Alabama and out-of-state counsel, and (2) it is concededly timely and gives adequate notice to the adverse party of the matters being appealed.

This case presents the further question of whether the trial court committed clear error by a summary ruling that Mr. Taylor's out-of-state counsel was not admitted to practice pro hac vice, in light of clear record evidence that he was. It presents the further question of whether the Court of Criminal Appeals erred by adopting that ruling in its entirety, with no scrutiny of it whatsoever, notwithstanding that the Circuit Court employed flawed and unreliable procedures in making its determination.

Statement of the Facts

Trial and Direct Appeal

On May 17, 1998, Mr. Taylor pleaded not guilty to three counts of capital murder in violation of Alabama Code § 13A-5-40(a)(2), and one count of capital murder in violation of Alabama Code § 13A-5-40(a)(10). (C. 1.).

At trial, the State presented no physical evidence tying Mr. Taylor to the crimes and there were no eyewitnesses. In a deal with the government, Mr. Taylor's co-defendant - who Mr. Taylor argued committed the crimes at issue - testified against Mr. Taylor in exchange for a plea to life in prison without the possibility of parole. (C. 894-95.) This highly suspect testimony was the only evidence connecting Mr. Taylor to the crimes. Id.

In addition to numerous other severe constitutional infirmities that infected the trial, Mr. Taylor's trial counsel was ineffective and conflicted and venire members were struck solely on the basis of their race and gender. For example, Mr. Taylor's counsel failed to make a competent Batson challenge even though the State used seven of its first eight peremptory strikes to remove

African-American venire persons in exactly ascending sequential order. (R. 518-20.)

On August 11, 1998, a petit jury in Mobile County convicted Mr. Taylor but recommended that he not be sentenced to death. (C. 5.) On August 25, 1998, the trial judge, who was in the middle of a political campaign, overrode the jury's life verdict and imposed four sentences of death by electrocution. (C. 6.)

State Habeas Proceedings

On or about May 5, 2003, Mr. Taylor filed in the Circuit Court of Mobile County his Corrected First Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure (the "Petition"), which is the operative Rule 32 petition in this case, addressing serious and specific errors in the trial and sentencing below. On October 23, 2003, the Circuit Court signed several proposed orders, drafted entirely by the State, summarily dismissing certain (but not all) claims in the Petition (The "Initial Orders").

Over the subsequent months, the case proceeded and the State several times acknowledged that Mr. Taylor had

live claims pending before the Circuit Court. Indeed, Assistant Attorney General Regina F. Speagle wrote the Court on February 2, 2004 to inform the Court that, in light of the Alabama Supreme Court's decision in Ex Parte Gardner, 898 So. 2d 690 (Ala. 2004), two of the claims in the Petition "should not have been dismissed." In that letter, Speagle referred to the "the dismissal of most, but not all of Mr. Taylor's claims," and consented to Mr. Taylor's making discovery requests with respect to the remaining claims. Id. (emphasis added).

On February 11, 2004, the Circuit Court held a hearing on the outstanding claims and stated: "As it relates to [the claims implicated by Ex Parte Gardner], the Court set aside its previous order and will allow discovery take place on those two claims." (R-23:13-16.)

Notwithstanding its own statements on the record to the contrary, and despite the clear record in the Circuit Court, on or about July 28, 2005, the State suddenly submitted to the Circuit Court a proposed order stating that the Court's Initial Orders issued in October 2003 had actually disposed of the entirety of Mr. Taylor's Petition. On or about August 1, 2005, the Circuit Court

signed the State's proposed Order without modification (the "Final Order").

On September 9, 2005, Mr. Taylor timely noticed his appeal of the clearly erroneous order dismissing his Rule 32 petition, which incorrectly held that prior partial dismissal orders had dismissed the entirety of the petition. On January 5, 2006, the State moved to dismiss Mr. Taylor's appeal on the purported grounds that one of his attorneys was not admitted to the Circuit Court pro hac vice. The State moved for dismissal on these grounds notwithstanding clear record evidence, including a docket entry and statement by the Circuit Court judge, that Mr. Taylor's attorney was properly admitted. Without conceding the point, Mr. Taylor also cited controlling Alabama law for the fact that the pro hac vice issue was inapposite as the appeal had been co-submitted by local counsel of uncontested status.

On May 10, 2006, after substantial briefing and a remand to the Circuit Courts, the Court of Criminal Appeals issued a Summary Order dismissing Mr. Taylor's appeal and on May 31, 2006, the Court of Criminal Appeals denied reconsideration of its Order.

Statement of the Standard of Review

The questions of law that arise in the issues presented for review require independent reassessment by this Court. See Ex parte Graham, 702 So. 2d 1215, 1221 (Ala. 1997) (questions of law entail no presumption of correctness and require a de novo standard of review on appeal). The mixed questions of fact and law are reviewable de novo. See Ornelas v. United States, 517 U.S. 690 (1996); State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996).

Summary of the Argument

The appeal in this capital case was dismissed below on the grounds of a purported signature defect, even though the notice of appeal was submitted on behalf of two attorneys, and even though it is well settled law that a signature on a notice of appeal is not a jurisdictional requirement for a valid notice of appeal.

The State moved to dismiss the appeal below on the purported ground that Mr. Theodore V. Wells, Jr., out-of-state counsel for Mr. Taylor, was not properly admitted to practice pro hac vice. As we demonstrate herein, although Mr. Wells plainly was so admitted in September 2002, that issue is irrelevant, as a matter of law, to the validity of the notice of appeal.

First, the notice of appeal was submitted both by Mr. Wells and by an Alabama lawyer of uncontested status. That renders this case entirely different from the only case on which the court below relied in dismissing the appeal, Black v. Baptist Medical Center, et. al., 575 So. 2d 1087 (Ala. 1991), in which a pleading filed only by out-of-state counsel, with no Alabama co-counsel, was stricken.

Second, and just as importantly, it is settled law in Alabama that the only jurisdictional requirement for a notice of appeal is timeliness. Here, the State has conceded the timely filing of the Notice of Appeal, and the Court of Criminal Appeals has likewise recognized it. Moreover, it gave the State ample and timely notice of the fact that Mr. Taylor intended to appeal the Circuit Court's bizarre and erroneous dismissal of his Rule 32 Petition. The inquiry as to the validity of Mr. Taylor's Notice of Appeal should start and end with its uncontested timeliness and specificity.

Moreover, not only was the dismissal of Mr. Taylor's appeal below an erroneous application of legal principles, but also as a matter of fact, the record is clear that Mr. Wells's signature was, in the first instance, not at all defective. It was the signature of an attorney who was admitted to practice pro hac vice in this case. The Circuit Court's docket and hearing transcripts make that abundantly clear, and the State's attempts below to muddy the record are unavailing. The Circuit Court's adoption of a cursory proposed order prepared by the State that rules otherwise is contradicted by the plain record,

and deserves no deference. Finally, the Circuit Court order—and the Court of Criminal Appeals' uncritical adoption of it—deserves no deference because they were the product of flawed and unreliable procedures.

In short, Mr. Taylor is in danger of being foreclosed any state court collateral review of his conviction and death sentences because of an distorted interpretation of the factual record that the Court of Criminal Appeals did not closely examine, and the abandonment of this Court's settled legal principles governing notices of appeal. He respectfully submits that a careful review of the law and facts in this matter compels the reversal of the summary order below, and a remand for consideration of the substantial merits of his appeal.

Argument

I.

THE COURT OF CRIMINAL APPEALS ERRED BECAUSE MR. TAYLOR'S NOTICE OF THIS APPEAL WAS PROPER AS A MATTER OF LAW

The State moved to dismiss Mr. Taylor's appeal in this capital case, and the Court of Criminal Appeals so ordered, on the purported ground that one of Mr. Taylor's attorneys who submitted the notice of appeal, an out of state lawyer, Mr. Theodore V. Wells, Jr., was not properly admitted to practice pro hac vice. Even if Mr. Wells was not properly admitted, which Mr. Taylor emphatically does not concede, the State's motion to dismiss should still have been denied for two separate and independent reasons.

A. The Notice of Appeal Was Submitted by Alabama Counsel in Addition to Mr. Wells

The Notice of Appeal filed by Mr. Taylor in the Circuit Court contained a signature block stating that both Mr. Wells and then-local counsel Mr. Pennington were counsel for Mr. Taylor. (C. 1643.)[1] The State of Alabama has not challenged Mr. Pennington's good standing to

[1] Mr. Taylor will use the designation "C." for citations to the Record on Appeal, certified by the Circuit Clerk on January 6, 2006; "R." for citations to the Reporter's Transcript; and "C. Rem." for citations to the Record on Appeal after remand.

practice law in Alabama, nor can it. The State has otherwise conceded the timely filing of the Notice of Appeal, see State of Alabama's Motion to Dismiss Taylor's Appeal, "Motion to Dismiss" at 3, and the Court of Criminal Appeals too, in an Order dated March 1, 2006, has observed that Mr. Taylor's Notice of Appeal was timely filed. See Order Denying Petition for Writ of Mandamus (Attached hereto as Exhibit 1).

Those simple facts should have ended the Court of Criminal Appeals' inquiry and caused the denial of the State's motion to dismiss. Rule 25A(a) of the Alabama Rules of Appellate Procedure states that when a party is represented by two counsel in a case, it is not required for both of them to sign all pleadings: "When a party is represented by more than one counsel and counsel reside in different locations, it is not necessary to incur the expense of sending the brief, motion, or other paper from one person to another for multiple signatures." Ala. R. App. P. 25A(a). Accordingly, it was entirely appropriate for Mr. Wells to have signed the Notice of Appeal on behalf of both himself and Mr. Pennington.

Rule 25A(a) further states that, "The signature requirement is to be interpreted broadly, and the attorney of record may designate another attorney to sign the brief, motion, or other paper for him or her." Consistent with Rule 25A's directive that the signature requirement is "to be interpreted broadly," a pleading filed by Messrs. Wells and Pennington, signed by Mr. Wells, was plainly properly filed under Alabama law.[2] And not only is it explicit under the terms of Rule 25A that the signature requirement is to be broadly interpreted, but that directive is also even more significant in this, a capital case, where the State seeks to foreclose collateral review of Mr. Taylor's capital convictions and sentence on the basis of a purported defect in signature.

Accordingly, even if the Court of Criminal Appeals was correct to have adopted wholesale the Circuit Court's March 23 Order finding that Mr. Wells was not admitted pro

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[2] Mr. Taylor reiterates, as he stated below, that he stands ready, consistent with the provisions of Rule 25A(a) of the Alabama Rules of Appellate Procedure, to file a supplemental Notice of Appeal under local counsel's signature that would remedy any ostensible signature defect in the Notice of Appeal filed on September 9, 2005, by Messrs. Wells and Pennington, which was filed under Mr. Wells's signature on both their behalves.

hac vice (an Order that Mr. Taylor submits is patently erroneous and the product of flawed procedures, see infra Sections II and III) it remains the case that the Notice of Appeal was jointly filed on behalf of Mr. Taylor by Mr. Pennington, Mr. Taylor's then-local counsel, and was valid on that basis alone.

The only case cited by the Circuit Court of Appeals in its cursory dismissal order does not hold otherwise. To the contrary, in that case, Black v. Baptist Medical Center, et. al., 575 So. 2d 1087, 1089 (Ala. 1991), which was in all events not a capital case, this Court found invalid a Complaint filed solely by a foreign attorney and not jointly with Alabama counsel. The Black case in inapplicable here for two reasons: First, as noted, the complaint there was filed only by an out-of-state attorney without Alabama counsel. Second, the pleading at issue in Black was a complaint, and the question presented was whether a complaint not filed by properly admitted counsel complied with the statute of limitations. In stark contrast, here the pleading involved is a timely-filed notice of appeal that gave ample notice to the State of Mr. Taylor's intention to appeal; moreover, as discussed

further below, this Court has been abundantly clear that the only jurisdictional requirement for a notice of appeal is timeliness. Accordingly, the exclusive reliance on Black by the court below in its summary dismissal order was misplaced.

B. The Notice of Appeal Was Valid Because It Gave Timely And Ample Notice of the Appeal, and the State Has Suffered No Prejudice From Any Purported Defect

Not only does Rule 25A conclusively establish that the Notice of Appeal was valid because it was jointly filed by Alabama counsel and Mr. Wells, this Court's unambiguous jurisprudence makes plain that Mr. Taylor's notice of appeal was valid because it gave the State ample notice of Mr. Taylor's intention to appeal, and the State suffered no prejudice thereby.

1. The Notice of Appeal Satisfied All Jurisdictional Requirements under Rule 3

Under Rule 3 of the Alabama Rules of Appellate Procedure, the purpose of a Notice of Appeal "is to insure the just, speedy and inexpensive determination of every appellate proceeding on its merits. The only jurisdictional rule in the entire rules is the timely filing of the notice of appeal. Nothing in the rules is

designed to catch the unwary on technicalities." Edmondson v. Blakey, 341 So. 2d 481, 484 (Ala. 1976) (emphasis added).

As this Court made plain in Edmondson, and as it has repeatedly held since, a notice of appeal, even if in some way technically deficient (which Mr. Taylor does not concede here), shall be valid if "the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice." Id. at 483. Simply put, even if a notice of appeal features a signature defect, such a defect is not grounds for dismissal because a signature is not a jurisdictional requirement in order for the notice of appeal to be valid.

This Court has dealt with this issue at least three times in just the past three years, and in every instance has held that so long as a notice of appeal is timely filed, and gives adequate notice of a party's intention to appeal, it should be deemed valid. In Barrows v. Shields, 892 So. 2d 914 (Ala. 2004), even though the appellant noticed his appeal by filing a photocopy of his lower court pleading as his notice of appeal (and failed to include an original signature at all), this Court

held that the appellant's act was sufficient to preserve the appeal. In so concluding, this Court reiterated that "the Alabama Rules of Appellate Procedure were not designed to catch the unwary on technicalities," and held that "absent a showing that the alleged defect in a notice of appeal prejudiced the adverse party, an appeal will not be dismissed on the basis of that defect." Id. at 917 (citations omitted).

Similarly, in Ex Parte Soule, 892 So. 2d 879, 881 (Ala. 2004), the Court of Criminal Appeals summarily dismissed a Rule 32 appeal, there because the appellant filed a number of unsigned documents that did not fully comply with Rule 3 of the Rules of Appellate Procedure. This Court nevertheless granted certiorari and unanimously reversed, holding that the documents filed with the Court of Criminal Appeals were "sufficient to invoke appellate jurisdiction under Rule 3."

Finally, in Dunning et al. v. New England Life Insurance Co. et al., 890 So. 2d 92, 96 (Ala. 2003), the appellants filed a faxed copy of their notice of appeal, which lacked an original signature. This Court rejected arguments that the notice of appeal was consequently

invalid, holding that, "[n]either the Alabama Rules of Appellate Procedure nor the Alabama Rules of Civil Procedure requires that a notice of appeal bear an original, penned signature." Id. The same holds true for the Alabama Rules of Criminal Procedure. Of great relevance here, in Dunning, this Court went on to hold:

> In the absence of a statute prescribing the method of affixing a signature, it may be affixed in many different ways. It may be written by hand, and, generally, in the absence of a statute otherwise providing, it may be printed, stamped, typewritten, engraved, photographed or cut from one instrument and attached to another."

Id. at 96-97 (citations omitted). There can be no question, then, that here, given the inclusion of both Mr. Wells and Alabama counsel, Mr. Pennington, as counsel for Mr. Taylor on the Notice of Appeal should be deemed to be compliance with Rule 3.

Indeed, following this Court's admonition in Edmonson, the Court of Criminal Appeals itself has opined at length on the liberal standard applicable to notices of appeal under Rule 3. See McLin v. State, 840 So. 2d 937 (Ala. Crim. App. 2002). In McLin, the Court of Criminal Appeals received a form notice of appeal from the trial

court clerk that lacked any signature at all by McLin or his attorney. Id. at 938. Rejecting the State's motion to dismiss, the court found that McLin's appeal of the dismissal of his Rule 32 petition was absolutely valid. In so reasoning, the court held that "nothing in Rule 3, Ala.R.App.P., imposes a requirement, jurisdictional or otherwise, that a notice of appeal be signed by an appellant or his or her attorney." Id. at 939 (emphasis added). The McLin court further held that "Jurisdiction vests with this Court when a notice of appeal that substantially complies with the requirements of Rule 3(c), Ala. R. App. P., is timely filed." Id. at 942. In dismissing Mr. Taylor's appeal, the court below thus ignored not only this Court's precedents but its own as well.

2. The State Suffered No Prejudice from the Notice of Appeal Filed Below

It is critical that in this Court's precedents construing the signature requirement on a notice of appeal, the Court has focused on the question of prejudice to the appellee. "Absent a showing that the alleged defect in a notice of appeal prejudiced the adverse party, an appeal

will not be dismissed on the basis of that defect." Dunning, 890 So. 2d at 96 (emphasis added); Barrows, 892 So. 2d at 917 (same).

Here, the court below did not find - nor has the State ever asserted - any prejudice resulting from any purported signature defect. Nor can one even imagine any such prejudice given the timely filing of the Notice of Appeal and its detailed specification of the matters being appealed. Indeed, the State conceded that Mr. Taylor's Notice of Appeal was timely filed and, by its own account, did not discover the purported defect until almost four months later. See Motion to Dismiss at 3. It is clear on the face of its motion to dismiss below that the State did not move to dismiss Mr. Taylor's appeal because it considered the notice to be unfair.

The requirements of Rule 3 are designed to serve as a shield for parties against untimely or vague notices of appeal, to ensure finality of judgments and fair notice of the issues being appealed. The State here tries to turn those requirements on their head and instead seeks to use a purported defect in Mr. Taylor's notice of appeal as a sword with which to attack Mr. Taylor's valid and well-

founded appeal. This Court should reject such ill-advised efforts--particularly in a case where a death sentence is at stake.

Moreover, by dismissing Mr. Taylor's appeal on the grounds of this purported defect, the Court of Criminal Appeals has created precisely the kind of trap for the unwary that this Court warned against in both Edmonson and Barrows. Consider that the attorney who signed the Notice of Appeal: (i) signed an application to practice pro hac vice in this matter, (ii) was told by his colleague that he had been admitted pro hac vice, and (iii) thus believed in good faith that he was admitted pro hac vice when he signed the notice of appeal.[3] In addition, as will be discussed in

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[3] See Memorandum in Support of a Finding that Theodore V. Wells, Jr., Esq. Was Properly Admitted to Practice Pro Hac Vice in This Court On September 9, 2002, dated March 15, 2006 (``Circuit Court Mem.''), attached hereto as Exhibit 2, at internal Exhibit D (Affidavit of Theodore V. Wells, Jr.) (``Wells Aff.''). The Court of Criminal Appeals remanded this matter to the Circuit Court to address the question of Mr. Wells's admission pro hac vice. Upon return from remand, the Circuit Court Clerk failed to include in the Record on Appeal following remand the pleadings and evidence submitted by Mr. Taylor in the Circuit Court. Mr. Taylor immediately moved in the Court of Criminal Appeals to supplement the record with these materials, which motion the Court of Criminal Appeals never addressed before dismissing the appeal. For this Court's convenience, Mr. Taylor attaches as exhibits to his

further detail below, infra sections II.A and II.B., consider that both a Circuit Court docket sheet entry and statement by the Circuit Court judge on the record clearly indicated that the attorney who later signed the Notice of Appeal was properly admitted pro hac vice.

In a case the Court of Criminal Appeals cited at length and with approval in McLin, the United States Supreme Court held similarly and unanimously that under the Federal Rules of Appellate Procedure, even when an appellant fails altogether to sign the notice of appeal, it is error to dismiss the appeal. Becker v. Montgomery, 532 U.S. 757 (2001). In Becker, the Supreme Court also held that under Rule 3 of the Federal Rules of Appellate Procedure (which Alabama courts have often noted is analogous to the Alabama Rule 3), a signature on a notice of appeal is not a "jurisdictional specification." Id. at 766.

If it was error to dismiss a notice of appeal that is not signed at all, then in a capital case such as this one, where Mr. Taylor faces the possibility of losing

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brief selected file-stamped copies of materials that were before the Circuit Court on remand proceedings.

meaningful collateral review of his death sentence in the Alabama state courts, it was surely error to dismiss a timely notice of appeal submitted by two attorneys, one of whom was unquestionably admitted to practice in Alabama, and the other of whom believed in good faith that he was.

The Notice of Appeal at issue in this case, which was concededly timely and which clearly stated the grounds for appeal, at a minimum demonstrated the "substantial compliance" with Rule 3 that this Court has required in Ex parte Soule, 892 So. 2d at 882, and elsewhere, and that the Court of Criminal Appeals required in McLin. Accordingly, the Court of Criminal Appeals violated its own jurisprudence, the settled law of this Court and, indeed, a clear pronouncement by the Supreme Court of the United States, when it dismissed Mr. Taylor's appeal. The dismissal should be reversed and this case remanded for consideration of the merits of Mr. Taylor's appeal of the plainly erroneous dismissal by the Circuit Court of his Rule 32 petition.

II.

THE COURT OF CRIMINAL APPEALS ERRED BECAUSE MR. WELLS WAS PROPERLY ADMITTED TO PRACTICE PRO HAC VICE AND BECAUSE THE CIRCUIT COURT'S ORDER TO THE CONTRARY WAS CLEARLY ERRONEOUS

While it remains true that the issue of Mr. Wells' admission to practice pro hac vice does not decide, as a matter of law, the question of whether Mr. Taylor's Notice of Appeal was properly filed, the simple truth is that the State has sought to curtail review of this capital case on a demonstrably false reading of what is, in the end, a simple factual record: Mr. Wells was admitted to practice pro hac vice in this case.

Moreover, no court has yet exercised independent judgment to assess that issue. The Circuit Court signed a wholly illogical and demonstrably wrong proposed order that the State submitted on its own initiative, and the Court of Criminal Appeals incorporated that order wholesale into its summary order dismissing the appeal below, without making any critical assessment of the correctness of the trial court's order.

A. The Circuit Court's Case Action Summary Shows That Mr. Wells Was Admitted to Practice Pro Hac Vice on September 9, 2002

Although the State has continually tried to muddy the record, the facts surrounding Mr. Wells' admission to practice pro hac vice in this case are neither complicated nor confusing. In fact, it is as simple as this excerpt from the Circuit Court's docket sheet:

	Verified application for admission to practice under Rule VII of the rules governing admission to the Alabama State Bar filed by Andrew Tauber, Monica J. Stamm, John D. Tortorella, Jennifer R. Sandman and Theodore V. Wells, Jr. filed August 30th, 2002 (Each attorney listed above filed an individual application for admission)	
9/09/02	Admission to practice under Rule VII of the rules of governing admission to the Alabama State Bar - Granted	

Mobile Cty Circuit Court Case Action Summary, No. CC-98-1328.60 ("CAS") at page 11.[4] Although the State's

[4] The most recent Circuit Court docket sheet included in the Record on Appeal, which is included in the record prepared following the remand from the Court of Criminal appeals, is incomplete. (C. Rem. 1-17.) As set forth in ¶¶ 38-40 of Mr. Taylor's Response to the Circuit Court's Order of March 23, 2006, filed in the Court of Criminal Appeals on April 19, 2006, that docket sheet is missing certain entries from November 2005. Counsel for Mr. Taylor obtained from the Circuit Court Clerk a more complete version of the Case Action Summary, which he submitted to the Court of Criminal Appeals and which he attaches hereto as Exhibit 4 for the Court's convenience, and to which he cites in this brief. The

submissions below were an exercise in obfuscation of and distraction from this record on the Circuit Court's docket sheet, that record shows a pro hac vice application for Mr. Wells filed just weeks after the initiation of these Rule 32 proceedings, followed immediately thereafter by a ruling granting that application.

Not surprisingly, then, soon thereafter Mr. Wells learned of the Circuit Court's September 9, 2002 Order granting him admission pro hac vice from his associate Mr. Andrew Tauber, Esq. who had reviewed the docket sheet in the regular course. See Wells Aff. ¶ 3.

The State attempted below to manufacture ambiguity in a number of respects. First, it made much of the fact that the Circuit Court did not issue a formal order granting the pro hac vice motions, and speculated, without foundation, that the docket entry granting the motions may somehow be suspect. But it was the Circuit Court's regular practice to rule on motions pending before it without issuing formal, signed orders but rather by entering notations in the Case Action Summary. The docket is

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discrepancies in the various copies of the trial court docket, however, have no bearing on the portion excerpted above.

replete with such entries, many in the State's favor, which the State surely does not now contest.[5]

Second, in the proceedings below, the State also purported to rely on a statement by the Alabama State Bar that Mr. Wells was not admitted to practice pro hac vice in this case. But Rule VII of the Rules Governing Admission to the Alabama State Bar is abundantly clear that it is the order of the Court before which the application is pending, and not the filing of such order with the State Bar, that permits pro hac vice practice. See, e.g., Rule VII(E) ("The granting or denial of an application for admission as counsel pursuant to this rule is discretionary with the court or administrative agency before which the application is made."); see also Mixon v. Seaboard Sys. R.R., 548 So. 1034 (Ala. 1989) (holding that a notation by a Circuit

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[5] For example, on December 12, 2005 the Circuit Court denied a motion for admission pro hac vice by making a notation on the Case Action Summary. (CAS at 15.) As discussed in section II.C., infra, the State's core argument before the Court of Criminal Appeals was that this December 12, 2005 entry somehow operated to deny the application Mr. Wells submitted more than three years earlier. The State cannot have it both ways; either an entry on the court's docket is sufficient to rule on a pending motion, or it is not. And, plainly, it is practice of the trial courts in Alabama to make rulings by entering such rulings on their dockets.

Court judge on a letter from a member of the Board of Commissioners of the Alabama State Bar was evidence of proper pro hac vice admission). Filing the Circuit Court's Order - the operative document granting admission to practice pro hac vice - with the State Bar serves a recordkeeping function. Although that recordkeeping function is certainly important to the orderly administration of justice, the denial of collateral review of a death sentence on this basis alone, in the face of a Circuit Court Order granting pro hac vice admission, would truly create a trap for the unwary, in contravention of this Court's precedents. Edmondson, 341 So. 2d at 484.

B. The Circuit Court Judge Confirmed On the Record that Mr. Wells Had Been Admitted to Practice Pro Hac Vice

Not only is the Circuit Court's Case Action Summary plain evidence of Mr. Wells's admission to practice, but significant other evidence in the record demonstrates that fact as well. The State has presented no effective rejoinder to this evidence.

On February 28, 2003, the Circuit Court held oral argument on the State of Alabama's motions to dismiss Mr. Taylor's Rule 32 Petition in part. During that hearing the

Circuit Court twice referred to the fact that Mr. Taylor's Paul, Weiss attorneys had been admitted pro hac vice.

First, in response to a question from counsel for Mr. Taylor as to whether Paul, Weiss needed to be formally appointed to represent Mr. Taylor given Mr. Taylor's in forma pauperis status, the Circuit Court stated: "[I]t's my understanding that when the pro hac vice was previously approved by this Court, you are co-counsel with Mr. Pennington." (R-69:13-16) (emphasis added). Second, the Court responded clearly and affirmatively to efforts by counsel for Mr. Taylor, Mr. Tauber, to make absolutely certain that the Paul, Weiss attorneys' pro hac vice status was proper. Out of respect for the procedures for admission, and out of an abundance of caution given the stakes in this capital proceeding, Mr. Tauber asked: "I just wanted to make sure that we are in good standing with this Court." (R-70:1-2) (emphasis added). The Court's reply was unambiguous: "Yes, sir. Yes, sir. All the paperwork has been filed with the Alabama State Bar and - so we are procedurally in correct order as it relates to your representation of the defendant in these proceedings." (R-70:3-7) (emphasis added).

The State, in proceedings below, again tried to create ambiguity in this clear transcript by asserting that the Circuit Court's references to "you" and "your" refer only to Mr. Tauber, and not his colleagues from Paul, Weiss who applied together with him for application to practice pro hac vice. Not only is this reading of the record strained and illogical, but it is flatly contradicted by subsequent colloquy between the Court and counsel.

The State then noted that it was currently addressing its papers to "some six odd" attorneys for Mr. Taylor – no doubt the five attorneys listed on the pro hac vice application, plus then-local counsel, Mr. Pennington. (R-70:12-13.) When the Court noted that it appeared that four attorneys were listed on the service list for the motions under consideration at that hearing, Mr. Tauber noted that Mr. Taylor was, in addition to those four attorneys listed on the service list, also represented by two other attorneys, including "one attorney for whom we filed pro hac vice papers who is a senior attorney, who is supervising us back at home, if you will . . . ." (R-71:4-6.) Mr. Tauber's reference to the "senior attorney" was a reference to Mr. Wells, who has served as the senior

attorney at Paul, Weiss on this matter from its inception. Neither the State nor the Court took any exception to Mr. Tauber's assertion that Mr. Wells was among those attorneys admitted pro hac vice.

Mr. Taylor offered the Circuit Court and the Court of Criminal Appeals all of this dispositive record evidence, both from the Circuit Court's docket and from the transcript of the Circuit Court hearing cited above, showing that Mr. Wells was admitted pro hac vice on September 9, 2002. The determination to the contrary in the Circuit Court's March 23, 2006 Order, and its subsequent uncritical adoption by the Court of Criminal Appeals, was clearly erroneous.

C. The State's Version of Events Below Was Based on a Misunderstanding of the Record

Finally, mention must be made of the mistaken version of events that the State presented below and that Mr. Taylor anticipates the State may present again to this Court. The confusion appears to stem from the State's misreading of the Circuit Court's docket, and must be clarified to prevent further muddling of the record.

In its briefs before the Court of Criminal Appeals, the State advanced as its primary argument the assertion that the September 9, 2002 docket entry granting Mr. Wells and his Paul, Weiss associates admission to practice pro hac vice was not what it appeared to be. The State speculated that the entry was either somehow entered by someone other than the Circuit Court clerk, or was entered without the Circuit Court's knowledge. See State of Alabama's Response to Jarrod Taylor's Motion in Opposition to the State's Motion to Dismiss His Appeal at 5. The State further argued that, because it did not mention any single attorney by name, the September 9, 2002 entry might not apply to Mr. Wells. See id.; State of Alabama's Brief on Return to Remand Addressing the Mobile County Circuit Court's Finding that Foreign Attorney Theodore V. Wells, Jr. Was Not Admitted to Represent Jarrod Taylor Pro Hac Vice Under Rule VII of the Rules Governing Admission to the Alabama State Bar at 14.

It appears that the State grounded these speculative and dubious suppositions in the belief that a docket entry dated December 12, **2005** denied the pro hac vice application that Mr. Wells had filed more than three

years earlier on August 30, 2002. This, of course, is not what happened.

Paul, Weiss attorneys have filed three sets of pro hac vice applications in this case:

- The "8/30/02 Application" of Mr. Wells and four colleagues.
- The "11/2/05 Application" of Messrs. Ehrlich, Lerer, and Berman, attorneys who began working with Mr. Wells on the matter when Mr. Tauber left the Paul, Weiss firm.
- The "12/28/05 Application" of Messrs. Ehrlich, Lerer, and Berman.

File-stamped copies of each of these applications are found in the record, along with their disposition.

To summarize:

Application	Filing	Disposition
8/30/02 Application (Wells, et al.)	August 30, 2002 (CAS at 11)	Granted on Sept. 9, 2002. (CAS at 11)
11/2/05 Application (Ehrlich, Lerer & Berman))	November 2, 2005 (C. 1661-93.)	Set for Argument on December 12, 2005. (CAS at 14.) Denied on Dec. 12, 2005. (CAS at 15)
12/28/05 Application (Ehrlich, Lerer & Berman)	December 28, 2005 (C. 1696-1728)	Denied on Jan. 24, 2006. (CAS at 16)

The record evidence, as summarized above, clearly contradicts the State's strained and mistaken contention that the December 12, 2005 docket entry operated as a denial of Mr. Wells's application filed three and a half years earlier. The only reasonable interpretation is that the September 9, 2002 ruling related to the 8/30/02 applications filed the preceding month, and that the December 12, 2005 ruling related to the 11/2/05 motions filed the month before that ruling—and not the motions filed some three-plus years earlier.[6]

The State's attempt to foster confusion as to the state of the record may have led to the Circuit Court's clearly erroneous finding that Mr. Wells was not admitted pro hac vice, and may have further led the Court of Criminal Appeals to adopt to that erroneous finding. The record, however, is clear, and Mr. Taylor respectfully submits that when subject to objective and careful review,

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[6] It is worth noting that the State's confusion may have been the result of the fact that the 11/2/05 motions fail to appear on the Circuit Court's Case Action Summary. Those motions, however were stamped filed by the Circuit Clerk and those file-stamped copies appear in the Record on Appeal that the Circuit Clerk prepared, at pages 1661-93. There thus can be no question that the December 12, 2005 ruling pertains to those motions, and nothing else.

compels the conclusion that Mr. Wells was admitted to practice below, and thus that the State's spurious attempt to short-circuit collateral review in this case lacks a basis in fact as well as in law.

III.

THE COURT OF CRIMINAL APPEALS ERRED IN ADOPTING ALMOST WHOLESALE AN ORDER ON REMAND THAT WAS ENTITLED TO NO DEFERENCE

As discussed above, part I, the validity of Mr. Taylor's Notice of Appeal must not, as a matter of law, turn on the question of whether one of two attorneys who submitted the document was admitted to practice pro hac vice in Alabama. And, as a matter of fact, as we showed in Part II, above, Mr. Wells was admitted on September 9, 2002, notwithstanding the Circuit Court's adoption of the State's proposed order to the contrary. As we demonstrate below, the court below further erred by adopting that lower court order wholesale, because the Circuit Court followed entirely inadequate procedures in reaching its determination.

The approach taken by the Circuit Court, and the one taken by the Court of Criminal Appeals when it adopted the Circuit Court's flawed and groundless finding,

certainly did not meet the "heightened standard of reliability" required of fact-finding procedures in capital cases. Ford v. Wainwright, 477 U.S. 399, 411 (1986). It therefore deserves no deference from this Court.

A. The Circuit Court Failed to Hold a Hearing

On remand from the Court of Criminal Appeals, Mr. Taylor repeatedly requested that the Circuit Court hold a hearing to resolve the facts at issue, i.e. the question of Mr. Wells' admission. In his opening brief to the Circuit Court on remand, Mr. Taylor offered as evidence the fact affidavits of Mr. Tauber and Mr. Wells, see Circuit Court Mem. at internal exhibits B, D. Furthermore, in his final brief to the Circuit Court on remand, Mr. Taylor made clear his intention to present Mr. Tauber and Mr. Wells as fact witnesses at any hearing in order to enrich the Circuit Court's understanding of a cold record concerning events that had occurred years earlier.[7]

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[7] See Petitioner Jarrod Taylor's Reply in Further Support of His Memorandum In Support of A Finding That Theodore V. Wells, Jr., Was Properly Admitted to Practice Pro Hac Vice in This Court on September 9, 2002 (``Circuit Court Reply'') (attached hereto as Exhibit 3)

On March 20, 2006, the Circuit Court scheduled a hearing for March 31, 2006. (CAS at 16.) However, for reasons it never articulated, the Circuit Court never held a hearing and instead issued the March 23 Order.

The Court of Criminal Appeals remanded to the Circuit Court for a factual determination, and the Circuit Court chose to make its determination on the pleadings without hearing oral testimony. This Court has held that:

> where a trial court does not receive evidence ore tenus, but instead makes its judgment based on the pleadings, exhibits, and briefs, the ore tenus standard's presumption of correctness does not apply to the trial court's factual findings and it is the duty of the appellate court to judge the evidence de novo.

Ex parte Horn, 718 So. 2d 694, 705 (Ala. 1998) (disagreeing with the trial court's factual findings and reversing the Court of Civil Appeals). Thus, well-settled Alabama law required that the Court of Criminal Appeals not defer to the Circuit Court's determination, but instead that it review the evidence de novo. Mr. Taylor respectfully submits that this Court should now conduct such a review, which would be the first meaningful review of the evidence in this case, and which compels the conclusion that the

trial court's adoption of the State's proposed order was error.

B. The Circuit Court Signed the State's Order Which Contained No Real Findings of Fact

The Circuit Court signed, without modification, the proposed order submitted by the State and issued it as the March 23 Order. This order contains one sentence of rote, conclusory "factfinding": "Upon thorough consideration and review of the record and the pleadings that have been filed by Petitioner Taylor and the State of Alabama, this Court finds that it did not admit Foreign Attorney Theodore V. Wells, Jr. to represent Jarrod Taylor pro hac vice in this matter." (C. Rem. 20-21.)

The Circuit Court's Order is nothing more than a cipher. The March 23 Order does not address any of the "discrepancies in the record" (id. at 19) that caused the Court of Criminal Appeals to remand this case to the Circuit Court. It did not provide any factual analysis for an appellate court to review. It did not address any of Mr. Taylor's substantial arguments, set forth above, showing that Mr. Wells was admitted to practice.

The Court of Criminal Appeals has warned against this type of verbatim adoption of a party's proposed findings. In Weeks v. State, 568 So. 2d 864 (Ala. Crim. App. 1989), an appeal from the denial of a Rule 32 petition, the Court stated: "We issue a caution that courts should be reluctant to adopt verbatim the findings of fact . . . prepared by the prevailing party." Id. at 865; see also Williams v. State, 627 So. 2d 985, 993 (Ala. Crim. App. 1991) (verbatim adoption of order which state prepares in capital case "gives rise to a legal issue of whether the findings . . . are in fact those of the court.").

By signing the State's proposed order, the Circuit Court provided an inadequate record, created the appearance of bias, and adjudicated Mr. Taylor's claims in an unreasonable manner. The Court of Criminal Appeals erred by deferring to such an order.

C. The Circuit Court's Case Action Summary Was Missing Relevant Entries

Since the Circuit Court did not hold a hearing, made only a conclusory finding, and based that finding on "consideration and review of the record and the pleadings" - but not on its own recollection of the facts - it appears

that the Circuit Court necessarily would have made its determination in reliance on its case action summary to some significant degree.

But as discussed at footnote 2, supra, the case action summary that the Circuit Clerk included in the Record on Appeal after remand was missing entries that are directly relevant to the issue of Mr. Wells's pro hac vice admission. In fact, it appears that the Circuit Court possessed two different versions of the case action summary. The fact that it included the less complete version in the Record on Appeal after remand suggests that it used that version in making its determination.

More specifically, the case action summary certified by the Circuit Clerk was missing a key entry that is present in a copy of the case action summary later obtained from the Circuit Court by the under-signed counsel. Specifically, the case action summary is missing an entry dated "11/7/05" that states "At the request of attorney Al Pennington, Case reset: 12/12/05 for Pro Hac Vice." (CAS at 14.) Mr. Taylor relied on this entry in his briefs before the Circuit Court (and relies on it above in section II of this brief). It appears that the Circuit

Court never examined a correct case action summary that included this entry. Mr. Taylor does not know how there came to exist two versions of the case action summary, one including this November 7, 2005 entry and one missing it, but the Circuit Court's reliance on an incorrect case action summary was clear error.

Second, as also noted above, both versions of the case action summary are missing another entry, the underlying facts of which Mr. Taylor can verify with documentary evidence. On November 2, 2005, Andrew J. Ehrlich, Justin D. Lerer, and David A. Berman filed applications for pro hac vice admission in the Circuit Court (the "11/2/05 Application"). (C. 1661-93) (applications of Messrs. Ehrlich, Lerer, and Berman stamped filed November 2, 2005 by the Circuit Clerk). Neither version of the case action summary contains an entry recording the filing of these applications.

As discussed above, in its briefing before this the Court of Criminal Appeals and the Circuit Court, the State used the absence of these entries on the case action summary to muddy the record. With all due respect to the Circuit Court, its failure to keep an accurate case action

summary – and the disturbing presence of two conflicting versions of the case action summary – compel the conclusion that the Court of Criminal Appeals should not have granted any deference to the March 23 Order.

D. The Circuit Court Issued the March 23 Order Before Receiving the Full Briefing on Remand

As discussed above, the Circuit Court scheduled a hearing for March 31, 2006, but then signed the March 23 Order without explanation. Furthermore, again without explanation, the Circuit Court waited until March 31 to release its order to the parties. Meanwhile, unaware that the Circuit Court had already signed an order, the State filed two more briefs with the Circuit Court on March 24, and Mr. Taylor filed his final brief with the Circuit Court on March 29. (CAS at 17.) Because the Circuit Court signed its order on March 23, it is clear that it did not consider these briefs filed after the order was signed but before it was released to the parties. Mr. Taylor's brief of March 29, in particular, presented Mr. Taylor's fullest rebuttal of the State's factual contentions and an explanation of the testimony Mr. Taylor planned to present at a hearing.

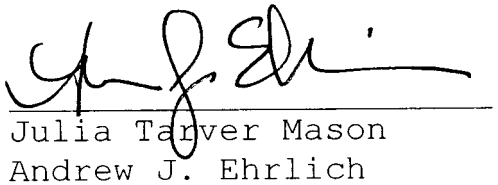
In addition to the Circuit Court's failure to hold a hearing - which by itself requires this Court to exercise de novo review - the Circuit Court's unorthodox action in signing the March 23 Order before either party had completed its briefing further undercuts the reliability of the order.

Conclusion

For all of these reasons, individually and collectively, Mr. Taylor respectfully requests that this Court reverse the dismissal of his appeal of the erroneous dismissal of his Rule 32 Petition, and remand this cause to the Court of Criminal Appeals for consideration of the merits of his appeal.

Dated: New York, New York
October 5, 2006

Respectfully submitted,



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Certificate of Service

I, Andrew J. Ehrlich, an attorney, hereby certify that on the 5th day of October, 2006, a copy of the forgoing Brief of Petitioner was served by U.S. Express Mail addressed to the attorney for the Appellee at the following address:

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