NO. 06-10920-CC

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHRISTOPHER BARBOUR, *et. al.*,

Appellants,

v.

MICHAEL HALEY, *et. al.*,

Appellees.

BRIEF OF APPELLANTS

On Appeal from the Final Judgment Issued by Chief Magistrate Judge Charles S. Coody of the United States District Court, Middle District of Alabama
Civil Action No. 01-01530 CV-S-N

BRYAN A. STEVENSON (STE077)
ANGELA L. SETZER (SET001)
Equal Justice Initiative of Alabama
122 Commerce Street
Montgomery, AL 36104
Ph: (334) 269-1803
Fax: (334) 269-1806

STEPHEN F. HANLON
Holland & Knight LLP
2099 Pennsylvania Ave., N.W.,
Suite 100
Washington, DC 20006
Ph: (202) 828-1871
Fax: (202) 955-5564

LAURIE WEBB DANIEL
Holland & Knight LLP
1201 West Peachtree St., N.E.
One Atlantic Center, Suite 2000
Atlanta, GA 30309
Ph: (404) 817-8533
Fax: (404) 881-0470

April 24, 2006

NO. 06-10920-CC

CHRISTOPHER BARBOUR, *et. al.*, v. MICHAEL HALEY, *et. al.*

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel certifies that the following persons may have an interest in the outcome of this case:

Richard Allen – Commissioner, Alabama Department of Corrections;

Christopher Barbour – Alabama death row prisoner and named Plaintiff;

Tony Barksdale – Alabama death row prisoner and named Plaintiff;

James Borden – former Alabama death row prisoner and named Plaintiff;

Stephen Bullard – former Warden of Donaldson Prison and named Defendant;

Albert Sims Butler – counsel for Department of Corrections;

James Callahan – Alabama death row prisoner and named Plaintiff;

Charles Campbell – Alabama Assistant Attorney General and counsel for Appellees;

Donal Campbell – former Commissioner, Alabama Department of Corrections;

Heather Esme Caramello – counsel for Plaintiffs;

Eugene Clemons – Alabama death row prisoner and named Plaintiff;

The Honorable Charles S. Coody – Chief United States Magistrate Judge for the Middle District of Alabama;

NO. 06-10920-CC

CHRISTOPHER BARBOUR, *et. al.*, v. MICHAEL HALEY, *et. al.*

J. Clayton Crenshaw – Alabama Assistant Attorney General and counsel for Appellees;

Grantt Culliver – current Warden of Holman Prison;

Laurie Webb Daniel – counsel for Appellants;

Ira DeMent – Senior District Judge for the Middle District of Alabama;

Margaret Fleming – Alabama Assistant Attorney General and counsel for Appellees;

Michael Haley – former Commissioner, Alabama Department of Corrections and named Defendant;

Stephen F. Hanlon – counsel for Appellants;

Gary Hart – former Alabama death row prisoner and named Plaintiff;

James Houts – Alabama Assistant Attorney General and counsel for Appellees;

Charles Jones – former Warden of Holman Prison and named Defendant;

Kenneth Jones – current Warden of Donaldson Prison;

Troy King – Alabama Attorney General;

Billy Mitchem – former Warden of Donaldson Prison and named Defendant;

John J. Park – Alabama Assistant Attorney General and counsel for Appellees;

Bob Riley – current Alabama Governor;

NO. 06-10920-CC

CHRISTOPHER BARBOUR, *et. al.*, v. MICHAEL HALEY, *et. al.*

Andrew W. Redd – counsel for Department of Corrections;

Angela Setzer – counsel for Appellants;

Don Siegelman – former Alabama Governor and named Defendant;

Bryan Stevenson – counsel for Appellants;

Kim T. Thomas – counsel for Department of Corrections;

Anthony Tyson – Alabama death row prisoner and named Plaintiff.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request that this Court grant oral argument in this case which presents important constitutional questions about the rights of indigent death-row prisoners facing complex postconviction procedures in Alabama without counsel. The class of death-sentenced prisoners in this case present previously unreviewed questions about whether Alabama's current postconviction process requires the state to provide attorneys or some other form of legal assistance on this set of facts. As such, oral argument will greatly aid the Court in its resolution of these issues

TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL STATUTES

STATE STATUTES

STATEMENT OF JURISDICTION

This is a civil-rights action under 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), (4). Its final judgment disposing of all claims was entered January 23, 2006; notice of appeal was filed February 1, 2006. This Court has jurisdiction under 28 U.S.C.§ 1291.

STATEMENT OF ISSUES

In a class action by impecunious death-sentenced inmates who assert that Alabama's postconviction process is so fraught with procedural pitfalls that they cannot navigate it without legal assistance and that the State of Alabama denies them the necessary legal assistance in any form, did the district court err in rejecting their contentions:

(1) that under the Sixth, Eight and Fourteenth Amendments, they have a right to counsel which requires the State to provide attorneys to represent them in preparing and presenting state postconviction challenges to their convictions and sentences;

(2) *alternatively*, that under Alabama's current death-row conditions and postconviction practices, the Fourteenth Amendment right of access to the courts requires the State to provide attorneys to represent them in preparing and presenting state postconviction challenges to their convictions and sentences;

(3) *alternatively*, that under Alabama's current death-row conditions and postconviction practices, the Fourteenth Amendment right of access to the courts requires the State to provide them at least with some lesser form of legal assistance or relief from state-created obstacles that disable them

from obtaining meaningful consideration of potentially meritorious postconviction challenges to their convictions and sentences; and

(4) that, for any of the foregoing three reasons, Alabama's postconviction process interposes an "impediment to [condemned inmates'] filing an application [for federal habeas relief] created by State action in violation of the Constitution" within the meaning of 28 U.S.C. § 2244(d)(1)(B).

STATEMENT OF THE CASE

Proceedings Below

On December 28, 2001, Alabama death-sentenced inmates filed this class action under 42 U.S.C. § 1983 in the District Court for the Middle District of Alabama. The complaint alleged that the conditions under which the State of Alabama[1] compels death-row prisoners to litigate postconviction claims violate their federal constitutional rights of access to the courts and to counsel. Specifically, plaintiffs alleged that Alabama violates the constitutional rights of death-row prisoners by (1) failing to provide counsel to represent indigent condemned inmates in state postconviction proceedings; (2) failing to fulfill the State's affirmative obligation to provide indigent, unrepresented condemned inmates with meaningful access to the courts through the

[1] The defendants, sued in their official capacity, were the Commissioner of the Department of Corrections, the wardens of the Donaldson Correctional Facility and Holman Prison, and the Governor.

assistance of attorneys in preparing and filing a state postconviction petition that is adequate to obtain judicial consideration of potentially meritorious claims; (3) failing to fulfill the State's affirmative obligation to provide indigent, unrepresented condemned inmates with meaningful access to the courts through any other form of legal assistance; and (4) subjecting both represented and unrepresented condemned inmates to restrictive visitation policies that (a) hampered private efforts to enlist *pro bono* attorneys for the unrepresented inmates and (b) obstructed communication between the few inmates who did have lawyers and those lawyers. (*See* Vol. 1, Doc. 1.)

The parties consented to have a magistrate judge conduct all proceedings and enter judgment under 28 U.S.C. § 636(c), and this civil jurisdiction was duly assigned to Chief Magistrate Judge Charles Coody. (*See* Vol. 1, Doc. 28.)

Plaintiffs moved for class certification and initially focused on the plight of approximately 40 unrepresented death-row inmates who were at risk of missing the one-year federal statute of limitations that the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter, "AEDPA") imposed upon federal habeas corpus petitions. (*See* Vol. 1, Doc. 1 at 51.) On April 3, 2002, plaintiffs moved for a preliminary injunction restraining the defendants from invoking or relying on this statute of limitations in the case of any habeas petitions filed by class members who

had been without counsel during the period prior to final judgment. (*See* Vol. 1, Doc. 29.) The ground of the motion was that Alabama's postconviction procedure so impaired the ability of unrepresented condemned inmates to prepare and file meaningful state postconviction petitions that it also effectively disabled them from filing timely, cognizable petitions for federal habeas corpus review, and that it therefore created an unconstitutional "impediment" to filing federal petitions within the meaning of 28 U.S.C. §2244(d)(1)(B).

Defendants opposed plaintiffs' motion for preliminary injunctive relief, and on May 1, 2002, an evidentiary hearing was held. In addition to considering the affidavits previously submitted by plaintiffs in support of their motion, the court heard live testimony from several witnesses on both sides. (*See* Transcript, Vol. 6.)

After that hearing, plaintiffs learned that the Alabama Supreme Court had amended the Alabama Rules of Criminal Procedure to reduce the filing deadline for state postconviction petitions from two years to one. This development led plaintiffs to amend their preliminary injunction motion to focus on the distinct problem that the death-row visitation rules which had been challenged in their complaint – and which the defendants were continuing to enforce – were impeding the ability of *all* condemned inmates, those who had volunteer lawyers as well as those who did not, to meet *both* the new state postconviction statute of limitations and the AEDPA federal

habeas statute of limitations. (*See* Vol. 2, Doc. 50.) The amended motion sought to enjoin defendants from enforcing policies and practices that forced condemned inmates to wait for long periods before seeing a volunteer lawyer, prevented members of legal defense teams from obtaining access to condemned inmates without a court order, and otherwise obstructed communications between condemned inmates and volunteer attorneys who had agreed to represent them or were considering doing so. (*See id.*)

On March 24, 2003, the district court granted in part and denied in part defendants' motion to dismiss for lack of jurisdiction. The court found that it lacked jurisdiction over plaintiffs' contention that the Sixth Amendment required Alabama to provide counsel to indigent condemned inmates because "the law is well settled that there is no constitutional right to state-appointed counsel in postconviction proceedings," and "plaintiffs lack standing to assert a claim based on . . . a positive right to counsel where one does not exist." (*See* Vol. 2, Doc. 76 at 10.)

On March 25, 2003, the district court held a hearing on plaintiffs' Motion for Immediate Action. (*See* Transcript, Vol. 7.) At this time, the parties began discussions about defendants' restrictive visitation policies, eventually reaching an agreement on that aspect of the case which included an expansion of the hours for legal visits and other modifications of the *status quo ante*. The district court thereupon issued an order staying further proceedings concerning the visitation policies for six months and

denying without prejudice the plaintiffs' motions for preliminary injunctive relief and to enjoin defendants from retaliatory action. (*See* Vol. 3, Doc. 102.)

While this anticipated settlement of the visitation-policies issues improved the situation of condemned inmates who had volunteer lawyers, it did little to relieve the situation of condemned inmates who did not. To speed a final disposition of the claims of unrepresented condemned inmates, counsel for the plaintiff class moved for final judgment, attaching affidavits and supporting evidentiary documentation and relying on the testimony taken in connection with earlier motions for preliminary relief. (*See* Vol. 2, Doc. 82.) The defendants responded by a motion for summary judgment captioned in the alternative as a brief in opposition to plaintiffs' motion for final judgment. (*See* Vol. 3, Doc. 86.) Plaintiffs submitted a responsive pleading with additional evidentiary support. (*See* Vol. 3, Doc. 91.)

On April 26, 2005, Magistrate Judge Coody granted plaintiffs' motion for class certification. (*See* Vol. 4, Doc. 112.) The class definition was subsequently modified by an Order dated January 23, 2006.

On January 23, 2006, the district court issued four rulings disposing of the entire case: (1) an order modifying the class definition; (2) an Order terminating all pending motions in recognition that final judgment was being entered; (3) a Memorandum Opinion [hereafter, "Mem. Opin."]; and (4) a Final Judgment rejecting all of the

plaintiff class's claims.

Facts Relevant to the Issues on Appeal[2]

There are currently 190 people under death sentences in Alabama.[3] Since 1990, Alabama's death row has doubled; Alabama now has the third largest death row per capita in the United States and the seventh largest in raw numbers. (*See* Vol. 1, Doc. 30, Tab 1 at 3.)

Despite the high number of death sentences, the State of Alabama has implemented no policies or initiatives to manage the growing number of death penalty cases. (*Id.*) Unlike other jurisdictions in this Circuit, Alabama has no state-supported agency to furnish postconviction representation, and no statewide public defender office to aid indigent death-sentenced prisoners to investigate, research, prepare and file postconviction papers. (*Id.* at 8.) Alabama has no resource center or other centralized agency to track the progress of condemned prisoners' cases and advise them of their filing deadlines and of the filing requirements. (*Id.*)

For a time there was an Alabama Capital Representation Resource Center. It opened in 1989. Although federal grants were available to pay for the Center if the

---

[2] This section summarizes the general situation of condemned inmates in Alabama. Further factual details are set forth at locations in the Argument, *infra*, where they are specifically relevant.

[3] Information available at Death Penalty Information Center, at www.deathpenaltyinfo.org/article.php?scid=9&did=188#state.

State provided matching money, Alabama never did. (*Id.* at 9.) From 1989 to 1995, the Center raised enough money to leverage a federal grant, but this funding was eliminated by Congress in 1995, and the Center closed. (*Id.*)

The primary organization in the State of Alabama that provides services to death-sentenced inmates is the Equal Justice Initiative of Alabama ("EJI"). EJI was established in 1995. It is a small, non-profit organization that receives no funding from the State and relies entirely upon private support. (*Id.*)

While resources to provide legal assistance to condemned inmates in Alabama have decreased since 1995, the difficulty of preparing these inmates' cases for state and federal postconviction review has increased substantially as a result of AEDPA's enactment (in 1996) of a filing deadline for federal habeas corpus petitions and then (effective in August 2003) a shortening of the statute of limitations for state postconviction proceedings (called "Rule 32" proceedings). (*See* Ala. R. Crim. P. 32.2(c).) The one-year statute of limitations prescribed by AEDPA runs concurrently with the one-year statute of limitations now prescribed by Rule 32 (although they run from different starting dates) and is tolled only if and when a state postconviction petition is filed. (*See* 28 U.S.C. § 2244(d)(2).)

Without timely legal assistance, Alabama's condemned inmates have lost and continue to lose potentially life-saving claims through forfeiture, procedural default,

and other preclusion doctrines. Their plight is substantially exacerbated because the Alabama courts characteristically enforce complex procedural requirements in unpredictable ways to prevent death-row prisoners from obtaining review of their convictions and sentences. (*See, e.g. Smith v. State*, No. CR-04-1491, slip. op. (Ala. Crim. App., June 1, 2005) (raising *sua sponte* and relying on a rule of civil procedure to declare that Mr. Smith's notice of appeal was untimely and to dismiss the appeal).) This is the straitened situation in which the members of the plaintiff class now find themselves.

Standard of Review

The district court dismissed, for lack of subject matter jurisdiction, plaintiffs' claim that the Sixth, Eighth and Fourteenth Amendments require Alabama to provide indigent condemned inmates with counsel prior to the filing of state postconviction proceedings. This Court's review of that ruling is *de novo*. *Doe v. F.A.A.*, 432 F.3d 1259, 1261 (11th Cir. 2005).

The remainder of plaintiffs' claims – (1) that the Fourteenth Amendment right of access to thApril 24, 2006e courts requires Alabama to provide counsel to assist indigent condemned inmates to prepare and present state postconviction proceedings; (2) that, in the alternative, the Fourteenth Amendment right of access requires Alabama to provide some lesser form of legal assistance to these inmates; and (3) that

Alabama's failure to provide the inmates any sort of legal assistance in its postconviction process constitutes an unconstitutional impediment to filing federal habeas proceedings within 28 U.S.C. § 2244(d)(1)(B) – were rejected by the district court as a matter of constitutional interpretation. This Court reviews a district court's interpretation and application of legal rules *de novo* and reviews its findings of fact under Fed. R. Civ. P. 52(a) to determine whether they are clearly erroneous. *See American Dredging Co. v. Lambert*, 153 F.3d 1292, 1295 (11th Cir. 1998).

SUMMARY OF ARGUMENT

Due Process obliges a State to afford its prisoners meaningful access to the courts. Access means an adequate opportunity to obtain consideration of potentially valid postconviction claims on the merits, not an empty ritual in which prisoners are permitted to file papers that are then dismissed on procedural grounds for failure to comply with technical requirements that a prisoner cannot practicably meet. Alabama has created a postconviction process so labyrinthine and beset with pitfalls that death-sentenced inmates cannot safely traverse it without legal assistance. Yet Alabama, alone among States that use the death penalty, makes no provision for any sort of legal assistance to indigent condemned inmates.

The result is not merely to deny them any genuine state-court process for correction of convictions and death sentences marred by federal constitutional errors

but to tangle them in a web of procedural defaults that causes them to forfeit federal habeas corpus review which would have been available to them if Alabama had no state postconviction procedure at all. This amounts to a radical, systemic violation of their Fourteenth Amendment right of access to the courts.

Murray v. Giarratano and its progeny do not dictate a contrary conclusion. Justice Kennedy's vote was necessary to produce a majority in *Giarratano*, and he explicitly acknowledged that a violation of the right of access might be found under the factual conditions now existing in Alabama. Neither *Giarratano* nor any of the subsequent cases reiterating its holding extends its rule so as to justify the denial of counsel to death-sentenced inmates who are compelled to run the gauntlet of a postconviction process like Alabama's. Still less do they address the question whether condemned inmates compelled to run such a gauntlet are constitutionally entitled to some measure of legal assistance short of the appointment of counsel.

Any realistic examination of the procedures for administering capital punishment today compels the finding that not only Due Process but the Sixth and Eighth Amendments require Alabama to provide its indigent condemned inmates with the aid of counsel in state postconviction proceedings. The States – apart from Alabama – overwhelmingly concur in the consensus that such proceedings are an integral part of the safeguards that must be built into any system of capital prosecution,

and that the safeguards cannot be made adequate if indigent death-sentenced inmates are left to prepare and present postconviction cases on which their lives depend without an attorney's assistance.

ARGUMENT

I. ALABAMA IS VIOLATING ITS DEATH-ROW PRISONERS' RIGHT OF ACCESS TO THE COURTS BY FAILING TO PROVIDE THEM WITH NECESSARY LEGAL ASSISTANCE.

In *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977), the Supreme Court held that prisoners have a constitutional right of "meaningful access to the courts." *Id.* at 824, 97 S. Ct. at 1496. The Court defined the right as guaranteeing that prisoners are to be given "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." *Id.* at 825, 97 S. Ct. at 1496. To protect that right, the Court required "prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828, 97 S. Ct. at 1498.

In *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996), the Court made clear that *Bounds* was not concerned with creating any freestanding right to a "particular methodology" of ensuring access (*id.* at 356, 116 S. Ct. at 2182) but rather with conferring "a capability — the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts" (*id.*). *Lewis* emphasized that

"prison law libraries and legal assistance programs are not ends in themselves, but only . . . means." *Id.* at 351, 116 S. Ct. at 2180. The crucial obligation that the constitutional right of access imposes on the States is "ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Id.*

The record in this case establishes that Alabama's indigent death-row prisoners are being denied any reasonably adequate opportunity to present fundamental constitutional claims to the courts. Postconviction litigation procedures in Alabama are so complex and convoluted that condemned inmates cannot navigate the process without assistance from persons trained in the law. Alabama does not provide that assistance. Its refusal either to provide condemned inmates with legal assistance or to provide a postconviction process they can navigate without such assistance makes the existing process quite literally a death trap.

Alabama's postconviction practice systematically thwarts the efforts of condemned prisoners to present potentially meritorious claims of unconstitutionality of their convictions and death sentences to the state and federal courts. It causes them irremediable forfeitures of viable grounds for relief from their convictions and death sentences. Thus, it constitutes both an unconstitutional denial of a state forum and an unconstitutional impediment to filing federal habeas corpus applications within the

meaning of 28 U.S.C. § 2244(d)(1)(B).

In denying relief to the plaintiff class, the district court did not dispute the facts making up the core of plaintiffs' case. Rather, it held that *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765 (1989), and *Lewis v. Casey*, *supra*, required it to conclude (1) that the Sixth Amendment does not oblige Alabama to provide counsel to indigent death-row prisoners in postconviction proceedings; (2) that "as a matter of law" the right of meaningful access to the courts does not require Alabama to appoint lawyers to assist indigent death-row prisoners in investigating, drafting and filing postconviction petitions; and (3) that the right to meaningful access does not even require Alabama to provide some alternative form of legal assistance to indigent death-row prisoners so that they can obtain judicial consideration of claims that could save their lives but are beyond the capacity of unassisted prisoners to present. In so holding, the district court erred as a matter of law because the undisputed facts of record in the present case distinguish it from both the Virginia postconviction system upheld in *Giarratano* and the sort of access claim rejected in *Lewis*. The present facts require a reversal of the district court's decision and a holding that Alabama is violating the constitutional rights of its indigent, condemned prisoners by refusing to provide them any sort of legal assistance in a postconviction process so fraught with procedural obstacles that it is inaccessible to them *without* legal assistance.

A. *Alabama Does Not Provide its Death-Row Inmates with Assistance in the Preparation and Filing of Meaningful Papers.*

Alabama employs none of the common practices by which its sister States fulfill their obligations to aid inmates to prepare and file meaningful legal papers. The State of Alabama is the only jurisdiction with the death penalty that fails to give condemned inmates any sort of legal assistance in preparing and presenting postconviction claims. (*See* Vol. 3, Doc. 91 at 2 and the declarations cited there.) Since 1997, ninety-five Alabama death-row inmates have filed state postconviction proceedings. The State provided counsel to just *one* of these inmates prior to filing — and that was to an inmate who was actively seeking the death penalty. (*See* Vol. 3, Doc. 91 at 3 and the attachments cited there.)

The State does not provide paralegal aid or other assistance to condemned inmates, to investigate or collect extra-record factual information relating to their cases. It does not provide legal aid or other assistance to condemned inmates to help them draft postconviction pleadings. The State does not have a postconviction public defender system, a Capital Resource Center, or any other centralized agency that tracks the progress of condemned inmates' cases and advises them of filing requirements and deadlines. It does not recruit volunteer counsel for condemned inmates or provide any funding to private organizations that attempt to recruit counsel for condemned inmates.

(*See* page 6 *supra*.)

Alabama's failure to provide necessary assistance continues even if and after a condemned inmate manages to file a *pro se* petition for postconviction relief under Alabama's Rule 32. The State persistently refuses to make timely provision of adequate legal resources to enable these inmates to present their claims to courts when evidentiary and substantive hearings are ordered. Although Alabama statutes give state courts discretion to appoint counsel after the filing of a *pro se* Rule 32 petition, in practice the state-court judges often do not appoint counsel until after an Assistant Attorney General writes the judge a letter requesting counsel for the inmate. Without such a letter, judges commonly ignore a death-row inmate's motion for appointment of counsel. (*See* Vol. 3, Doc. 91 at 11 and the attachment cited there.)

For example, one of the named plaintiffs, Anthony Tyson, filed a *pro se* Rule 32 petition on May 17, 2002, with a motion for appointment of counsel. The state postconviction judge failed to appoint counsel for more than eleven months, even after Mr. Tyson asked a federal district court to permit him to proceed in federal habeas without further exhaustion of state remedies. The federal district court denied permission. On April 8, 2003, a judge of this Court granted Mr. Tyson leave to appeal. On April 16, 2003, an Assistant Attorney General urged the state judge to appoint counsel for Mr. Tyson. On April 18, 2003, the state judge did so. On April 24, 2003

— before Mr. Tyson had heard anything from either the state court or the lawyer appointed by the state court — the Attorney General's Office filed a motion in this Court asking that Mr. Tyson's appeal be dismissed and attaching, in support of that motion, the Assistant Attorney General's April 16 written communication to the state judge and the state judge's April 18 appointment order. In less than 48 hours, the Assistant Attorney General's tactically-motivated request for the appointment of counsel to represent Mr. Tyson had accomplished what Mr. Tyson's own motion for counsel failed to accomplish in 48 weeks. (*See* Vol. 3, Doc. 91 at 34-35 and the attachments cited there.)

Also, Alabama caps the compensation for appointed postconviction counsel. Until 1999, the cap was $600; in 1999, it was raised to $1000. To provide adequate legal assistance, postconviction counsel must read the trial transcript, confer with his or her client, conduct a factual investigation — a task which includes interviewing witnesses and gathering, reading, organizing, and evaluating records — and do legal research and drafting. Because appointed counsel are typically inexperienced in death-penalty and habeas corpus proceedings, they must educate themselves in these unfamiliar, complex areas of the law. And even if they have had some prior experience in the area, they must acquaint themselves with its recent developments, in light of its constantly changing character. All told, the preparation of a postconviction capital

case will typically require hundreds of hours of work.[4] As several postconviction attorneys have candidly acknowledged, the compensation cap seriously undermines the effectiveness of the representation that these appointed counsel provide their clients. Under the $600 or $1000 cap, appointed counsel has the choice either to work at wages

[4] The work that must be performed by postconviction counsel is daunting even for experienced practitioners. Postconviction counsel must investigate the facts and research the law relating to numerous legal claims that might result in overturning the conviction or death sentence. S/he must ascertain the facts surrounding the offense, the details of the State's investigation that led to the client's arrest, the history and life circumstances of the client, the facts surrounding the trial itself, including the defense attorney's pretrial investigation, planning and conduct at trial, the facts relating to media coverage, community bias against the client, the behavior of the victim's family and other persons present in the courtroom, and biases or conflicts of interest on the part of the judge, prosecutor or jurors. There are typically dozens of family members, teachers, employers, neighbors, friends and other witnesses who must be interviewed, as well as numerous records (school, medical, employment, mental- health, military, and court records) which must be obtained in order to do an adequate investigation of the client's life history alone. (*See* Vol. 3, Doc. 91, Tab 23 at 3-7.)

Not only must postconviction counsel thoroughly investigate all of these facts; s/he must also develop an understanding of the complex substantive and procedural law applied in capital prosecutions and of the specific rules governing each of the stages through which death-penalty cases typically proceed. To avoid dismissal of a Rule 32 petition, counsel must be well versed in the frequently-changed procedural requirements of Rule 32 and must have extensively investigated the client's claims in order to prepare a sufficiently specific petition. Counsel must master the complex doctrines of procedural default and retroactivity, statutes of limitations and other time-limiting rules, to navigate the case from the pleading stage through final disposition. Because AEDPA attaches important consequences to what is done and not done in state postconviction proceedings, counsel must also acquire familiarity with the complicated law of federal habeas corpus. (*See* Vol. 3, Doc. 91, Tab 23 at 5, ¶16; *see also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.1(B), (C), (E) & Commentary (Rev. Wed. February 2003).)

that are effectively less than the federal minimum wage or not to work the number of hours necessary to prepare an adequate postconviction case.[5] Many appointed counsel do not have practices that generate sufficient resources to make any choice other than the latter.

B. *The Complexity of the Alabama Postconviction Process Makes Legal Assistance Necessary for Alabama Death-Row Inmates to Obtain Meaningful Access to Courts.*

The problems created by Alabama's failure to provide any sort of legal assistance to its inmates are compounded by its insistence on maintaining a postconviction process barricaded by mazes of complex procedural and substantive rules that the typical death-row inmate cannot navigate unaided.[6] Alabama's

[5] Even the $ 1000 cap denies postconviction counsel any compensation for more than an insignificant fraction of the hundreds and sometimes thousands of hours of work needed to handle a capital postconviction proceeding. (*See* Vol. 3, Doc. 91, Tab 15 at 1-2; Tab 16 at 1-2; Tab 17 at 1-2.) The cap requires counsel who accept appointment to bear a heavy financial loss or to restrict work on the case to a level precluding adequate representation. (*See* Vol. 3, Doc. 91, Tab 15, at 2, ¶ 8.) As a consequence, death-row prisoners who have been forced to file *pro se* petitions and rely upon appointed counsel subject to the compensation cap have been severely prejudiced by stunted legal assistance. (*See* Vol. 3, Doc. 91, Tab 7, at 1-2; Tab 8, at 1-3.)

[6] Even procedural rules that Alabama has in common with other States produce a different effect in Alabama, because elsewhere condemned inmates have some legal assistance in comprehending and complying with the rules. For example, in Louisiana – a State in which indigent death-row prisoners have a statutory right to state postconviction counsel – the Louisiana Supreme Court has held that a postconviction petition filed by an indigent death-row prisoner cannot be summarily denied or dismissed for failure to meet pleading requirements until the petitioner has had counsel appointed and until counsel has had a reasonable opportunity to prepare the

postconviction procedure is governed by Rule 32 of the Alabama Rules of Criminal Procedure. That Rule is fraught with strict pleading requirements, inflexible filing deadlines, elaborate preclusion doctrines, and other procedural pitfalls.

Its pleading requirements are enforced by dismissals without leave to amend or by dismissal orders that give unrepresented inmates a short time to amend and no guidance about the sort of amendment that will suffice to escape dismissal with prejudice.[7] The technical details that must be properly pleaded to avoid immediate or eventual dismissal with prejudice are of at least two kinds. First, a Rule 32 petition must set forth factual allegations showing that the claims it contains are not barred by six overlapping issue-preclusion rules; then it must set forth factual allegations sufficient to state a substantive claim for relief with the requisite particularity.

The first of these requirements derives from Rule 32.2, which provides that postconviction petitions cannot raise any claim that: (1) can "still be raised on direct

---

petition. *See State ex rel. Hampton v. State*, 795 So. 2d 1198 (La. 2001); *State v. Hoffman*, 768 So. 2d 592 (La. 2000).

[7] For example, after Donald Dallas filed a *pro se* postconviction petition, the State of Alabama filed a motion to dismiss several claims, including his claim of juror misconduct, for failure to comply with the specificity requirements of Rule 32.6 of the Alabama Rules of Criminal Procedure. The judge subsequently gave Mr. Dallas fourteen days to amend the juror misconduct claim with additional facts. Lacking the ability to interview witnesses or gather records from his cell on death row, Mr. Dallas was unable to amend his petition, and the claim was subsequently dismissed. *See* Order, *Dallas v. State*, Montgomery County Cir. Ct. Feb. 16, 2000) (No. CC-92-2142), Plaintiffs' Exhibit 7 at the May 1, 2002 hearing. (*See* Transcript, Vol. 6.)

appeal . . . or by posttrial motion" (under another Rule); (2) "was raised or addressed at trial", (3) "could have been but was not raised at trial" (with one exception); (4) "was raised or addressed on appeal or in any previous collateral proceeding . . . "; (5) "could have been but was not raised on appeal" (with one exception); and (6) is not "raised as soon as practical" in the case of a claim of ineffective assistance of counsel. These provisions mean that the only claims unrepresented petitioners can raise under Rule 32 are claims that have never been identified or shaped by an attorney. Compare *Ross v. Moffitt*, 417 U.S. 600, 614-16, 94 S. Ct. 2437, 2445-47 (1974), with *Bounds*, 430 U.S. at 827- 28, 97 S. Ct. 1497-98. And the petitioner not only has to identify and shape such claims unassisted but understand and explain how each claim escapes the bars of the six issue-preclusion rules. This typically involves demonstrating how trial or appellate counsel's failure to raise the claim constituted ineffective assistance of counsel under the intricate doctrines of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) – a task that is likely to be far beyond the capacity of incarcerated, unassisted, legally uneducated inmates.

In the rare instances when inmates can identify a claim and justify why it is not precluded by Rule 32.2, they must then cope with Rule 32.6(b)'s requirement that they plead "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Unrepresented death-

row inmates routinely have their petitions dismissed under Rule 32.6(b) because without an attorney, locked down on death row, with no ability to interview witnesses, gather records, or investigate factual questions, these inmates cannot ascertain the facts necessary to craft pleadings with the specificity demanded to avoid a Rule 32.6(b) dismissal.[8]

The most common claims cognizable in Alabama postconviction proceedings

---

[8] *See Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999):

> "Our practice has been, in recent appeals, to deny appellate counsel leave to withdraw from capital cases which have reached the post-conviction stage unless the appellant agrees to proceed pro se or substitute counsel may be found. Obtaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible. This practice ignores the reality that the state post-conviction stage is particularly important in capital cases, and that having the same counsel represent the condemned in appellate proceedings and post-conviction actions prevents counsel from raising the claim of ineffective assistance of trial or appellate counsel at the post-conviction stage. This practice also ignores the reality that indigent death-row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the UPCCRA. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy."

The Alabama Supreme Court itself has recognized this reality of death-row life in a decision that palliates it only insignificantly. *See Ex parte Jenkins*, No. 1031313, 2005 WL796809 at *5 (Ala. Apr. 8, 2005).

– ineffective assistance of counsel, violations of *Brady v. Maryland*,[9] and juror misconduct – all require the discovery, analysis, pleading, and proof of facts not contained in the trial or appellate record. In the context of a juror misconduct claim, for example, Alabama courts have held that a petitioner cannot meet Rule 32.6(b)'s factual specificity requirement with a pleading that simply identifies the kind of misconduct complained of. S/he must go further and "identify the specific jurors who failed to [behave properly]." *Trawick v. State*, CR-00-1494, slip.op. at 8-9 (Ala. Crim. App. Jan. 25, 2002) (mem.) This and similar constructions of the factual specificity requirement for other claims make it virtually impossible for unrepresented inmates to obtain relief in Rule 32 proceedings.

These pleading requirements are all the more difficult for unrepresented death-row inmates to meet because of the short and inflexible statute of limitations that governs Alabama postconviction proceedings. In 2002, the Alabama Supreme Court amended Rule 32 to impose a one-year limitations period on state postconviction filings. This statute of limitations runs from the date of conclusion of the direct appeal – specifically, the date of issuance of a certificate of judgment by the Alabama Court of Criminal Appeals. It is not tolled to permit death-row inmates to seek *certiorari* review of their convictions or sentences in the Supreme Court of the United States. And because the State of Alabama terminates the appointment of counsel for indigent

[9] 373 U.S. 83, 83 S. Ct. 1194 (1963).

inmates after the issuance of the certificate of judgment at conclusion of their direct appeals, inmates have but 365 days to obtain volunteer postconviction counsel while simultaneously seeking *certiorari*. Counsel are obviously unlikely to be willing to volunteer and undertake the laborious, uncompensated effort of preparing postconviction pleadings for an inmate who still has pending a *certiorari* petition that the Supreme Court of the United States may grant.

C. *Alabama Death-Row Inmates Have Lost Viable State and Federal Claims Against Their Convictions and Sentences Because of the State's Failure to Provide Them with Legal Assistance.*

The effect of Alabama's failure to assist inmates in coping with the substantive and procedural hurdles of Alabama's postconviction process is the systematic denial of meaningful access to the courts for unrepresented death-row inmates. The State's denial of legal assistance to inmates in the preparation of their state postconviction papers has caused unrepresented Rule 32 petitioners to suffer: (1) the preclusion and dismissal of potentially meritorious claims in state and federal courts and (2) the prejudice resulting from rushed drafting and filing of federal postconviction petitions to meet rapidly approaching statute-of-limitations deadlines that were truncated because of the failures of the state postconviction process.

(1) The primary injury suffered by unrepresented Alabama death-row prisoners is the dismissal and preclusion of potentially meritorious Rule 32 claims that were not

adequately raised because of the State's failure to provide the assistance needed to raise them properly. This is particularly true for those prisoners who could not secure volunteer counsel and had to navigate the postconviction process either *pro se* or with compensation-capped appointed counsel. In the last few years, at least seven condemned inmates have been compelled to initiate the postconviction process *pro se*. All seven of these inmates either had their cases dismissed or their claims precluded under the procedural and substantive rules described above. For instance, condemned inmate Donald Dallas had the claims in his *pro se* petition dismissed because he could not present new facts from his death-row cell to meet Rule 32's factual specificity and other technical pleading requirements. *See* Order, *Dallas v. State*, Montgomery County Cir. Ct. February 16, 2000) (No. CC-92-2142), Plaintiffs' Ex. 7 at the May 1, 2002, evidentiary hearing (noting that petitioner had failed to amend and therefore dismissing his juror misconduct claim) (*See* Transcript, Vol. 6).

Even those inmates who were later given appointed counsel at some stage of the Rule 32 process – with appointments made under the current compensation-cap regime – have lost claims because the claims were not adequately raised or were not preserved during the process. Named plaintiff Christopher Barbour was almost executed without effective review of his constitutional claims because of the failures of Rule 32 practice

that make it a trap for indigent condemned inmates.[10] Mr. Barbour filed his initial Rule 32 petition *pro se*. The judge appointed counsel, who represented Mr. Barbour perfunctorily at a postconviction evidentiary hearing and then failed to file either a post-hearing brief or a proposed order. After the petition was denied, appointed counsel also failed to file a notice of appeal, thereby abandoning all of Mr. Barbour's claims. Mr. Barbour's execution was scheduled, and he would have been executed but for a stay obtained in federal district court by volunteer counsel two days before the scheduled execution date. *Barbour v. Haley*, 145 F.Supp. 2d 1280, 1284, 1290 (M.D Ala. 2001). *See also Henderson v. State*, 733 So. 2d 484, 485 (Ala. Crim. App. 1998) (court affirms the dismissal of a Rule 32 petition that court-appointed counsel asked the trial judge to dismiss); *Arthur v. State*, 820 So. 2d 886, 887-90 (Ala. Crim. App.2001) (court holds claims time-barred although counsel was not provided prior to expiration of the statute of limitations); Order Dismissing the Rule 32 Petition as Untimely Filed, *Smith v. State* (Mobile Co. Cir. Ct. Oct 9, 2002) (No. CC-98-2064.60) (court dismisses petition filed *pro se*).

Although the most immediate effect of Alabama's *de facto* denial of the right of

[10] Several Alabama death-row inmates have been executed without their claims being heard on the merits in federal habeas as a result of forfeitures suffered in the state postconviction process. See, *e.g., Baldwin v. Johnson* 152 F.3d 1304, 1318-19 (11th Cir. 1998); *Waldrop v. Jones*, 77 F.3d 1308, 1313-16 (11th Cir. 1996); *Weeks v. Jones*, 26 F.3d 1030, 1042-46 (11th Cir. 1994).

access is to deprive condemned inmates of a state postconviction forum when their *pro se* petitions are denied without merits adjudication because of their inability to survive the system's procedural pitfalls, there is a still more drastic secondary effect. This is to deprive them of a federal habeas corpus forum because the exhaustion of state remedies is a precondition of recourse to federal habeas,[11] and Alabama's Rule 32 "remedy" operates as a trap to ensnare these prisoners in procedural defaults that bar their claims in federal court.[12]

In rejecting plaintiffs' contentions, the district court acknowledged that it was true that "in some instances collateral review of some of their claims has been denied on procedural or limitations grounds," but it concluded that:

> "these grounds are not denials of access. If the right of access is properly understood as a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights which may not be hindered, *see Lewis v. Casey*, 518 U.S. 343, 352 [116 S. Ct. 2174] (1996), the plaintiffs' right of access has not been denied because their claims have been presented."

Vol. 4, Doc. 119 at 21-22. This reasoning mistakenly conflates "a reasonably adequate opportunity to present claim[s]" with the opportunity to engage in the sterile ritual of

---

[11] *See, e.g.*, 28 U.S.C. § 2254(b)(1), (c); *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198 (1982).

[12] *See, e.g.*, cases cited in note 10 *supra*. Concerning the procedural default doctrine, *see Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497 (1977); *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546 (1991).

filing a lawsuit which will then be dismissed or precluded on procedural grounds, without any consideration of its merits. For instance, in rejecting plaintiffs' assertion that Christopher Barbour had been injured by the failure of his appointed counsel to file a notice of appeal after his Rule 32 petition was denied – thereby abandoning all of Mr. Barbour's claims – the district court relied on the fact that a federal judge had subsequently stayed Mr. Barbour's execution to consider his claim of actual innocence and in doing so had *noted* that some claims *might* demand consideration on the merits. Vol. 4, Doc. 119 at 21. While Mr. Barbour may get review of his claim of innocence, his other constitutional claims will likely receive no consideration as a result of appointed counsel's irresponsible default, and to the extent that they receive any review at all it will be under a doubly difficult standard.[13]

Similarly, the district court disregarded the injury suffered by Donald Dallas when his juror misconduct claim was dismissed by the trial court for lack of specificity before counsel was appointed to represent him in Rule 32 proceedings. While it is true that Mr. Dallas was eventually appointed counsel (*see* Vol. 4, Doc. 119 at 20-21) – though it was this appointed counsel who then "missed the appeal deadline, and the Court of Criminal Appeals dismissed Dallas' appeal," *Ex parte Dallas*, 845 So. 2d 780, 781 (Ala. 2002) (Johnstone, J., dissenting from order setting execution date) – Mr.

[13] *See* cases cited in notes 10 and 12 *supra*.

Dallas will never be able to litigate his juror misconduct claim, and he may also never get substantive review of his other constitutional claims. The injuries to Mr. Barbour, Mr. Dallas and the rest of the plaintiff class are a direct result of the State's failure to provide adequate legal assistance to indigent death-row prisoners in the state postconviction process.

The right of access under *Bounds* requires greater protections than those received by Alabama's death-row inmates who are helplessly, hopelessly consigned to this labyrinth of procedural dead-end roads. This Circuit held in *Bonner v. City of Prichard*, 661 F.2d 1206, 1212 (1981), that the right of access is not

> "limited to the preparation and presentation to the court of complaints and petitions. . . . Inmate access to the courts must be 'adequate, effective and meaningful.' . . . It is none of these if it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to court and litigants."

"In discussing the right of access, *Bounds* refers to the rights of an indigent to a transcript in order that he have adequate and effective appellate review, and right to counsel in order that he have a meaningful appeal . . . [– r]ights that reach beyond filing suit." *Bonner*, 661 F.2d at 1212-13. The kinds of litigation assistance that the Supreme Court has approved as necessary to afford that right under various

circumstances[14] — access to jailhouse lawyers, paralegals, transcripts, a functional law library, and so forth, *e.g.*, *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747 (1969); *Younger v. Gilmore*, 404 U.S. 15, 92 S. Ct. 250 (1971); *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800 (1974), *overruled on other grounds*, *Thornburg v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989); *see Bounds*, 430 U.S. at 823-32, 97 S. Ct. at 1495-1500 – would hardly be necessary if the right of access were nothing more than a right to physically file papers in court. Plainly, as *Lewis v. Casey* explicitly recognizes, an inmate has suffered an actionable denial of the right of access to the courts if he or she can demonstrate, for example, "that a complaint he [or she] prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he [or she] could not have known." *Lewis*, 518 U.S. at 351, 116 S. Ct. at 2180. This being understood, it is equally plain that Alabama's postconviction process violates death-row inmates' right of access to the courts, because the inflexible technical requirements of Rule 32 practice cannot be met by

[14] By its very nature, the right of access imposes differing obligations upon the states in connection with different classes of prisoners under different circumstances. See, *e.g.*, *Cruz v. Hauck*, 627 F.2d 710, 720-721 (5th Cir. 1980); *Kelsey v. Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980); *Ramos v. Lamm*, 639 F.2d 559, 583 (10th Cir. 1980). In many situations it will not require that prisoners be given the assistance of a state-paid attorney to prepare and file petitions for postconviction relief, *see, e.g.*, *Hooks v. Wainwright*, 775 F.2d 1433, 1434 (11th Cir. 1985), while in other situations it will, *see, e.g.*, *John L. v. Adams*, 969 F.2d 228, 233-234 & n. 6 (6th Cir. 1992); *Morrow v. Harrell*, 768 F.2d 619, 623 (5th Cir. 1985).

those inmates without some sort of legal assistance, and Alabama fails to provide them with any sort of legal assistance at all.

(2) In addition, Alabama's systemic deficiencies cause members of the plaintiff class to suffer the loss or deterioration of potentially meritorious claims through the attrition of their state and federal statutes-of-limitations periods. Alabama's failure to provide legal assistance to these inmates combines with the complexities of the Alabama postconviction process to make it virtually indispensable for them to find volunteer counsel to present their claims. Finding volunteer counsel who are willing to represent condemned inmates under the conditions governing postconviction litigation in Alabama, however, is a very difficult and time-consuming task[15] — a task

[15] In the past, the Equal Justice Initiative of Alabama (EJI) has been able to obtain volunteer counsel for death-row inmates only by extensive recruiting and support efforts. (*See* Vol. 3, Doc. 91, Tab 23, at 9-10; Vol. 1, Doc. 30, Tab 3 at 1; Vol. 2, Doc. 82, Tab 1 at 2.) Finding volunteers who are willing to represent condemned inmates under the conditions governing postconviction litigation in Alabama is very difficult (*see* Vol. 3, Doc. 91, Tab 14 at 7-8; Vol. 3, Doc. 91, Tab 13 at 2-3; Vol. 1, Doc. 30, Tab 3 at 1-2) and has become increasingly difficult recently (*see* Vol. 3, Doc. 91, Tab 13 at 2-3; Vol. 2, Doc. 82, Tab 1 at 2), as the number of inmates on Alabama's death row has mushroomed. As Robin M. Maher, Director of the American Bar Association Death Penalty Representation Project has commented:

> "While it is clearly the state of greatest need, Alabama is also the most difficult jurisdiction to place cases with volunteer lawyers. We [the American Bar Association Death Penalty Representation Project] have not successfully recruited any lawyers from the state of Alabama and therefore must rely on out of state lawyers for this work. The time and cost involved in traveling to Alabama is often burdensome. We have had difficulty finding local counsel in Alabama to work with out of state

that must be done without any aid from the State. Volunteer counsel is often found only after a substantial part of the state and federal limitations periods have already elapsed.

The loss of the time spent searching for counsel prejudices these death-row inmates in both state postconviction proceedings and federal habeas. The inmates are prejudiced in state postconviction because volunteer counsel found after a significant portion of the state limitations period has run must then rush to investigate, frame, draft, and file an often insufficiently developed Rule 32 petition in whatever time is left. The inmates are prejudiced in federal habeas because the federal statute of limitation runs concurrently with the state limitations period throughout the entire time when the inmates are searching for volunteer counsel. The federal statute of limitations is not tolled unless and until a state postconviction petition is filed. Thus, even if the inmates file their Rule 32 petitions with volunteer counsel before the state statute of limitations has expired, they typically will have very little time remaining to draft and file their federal habeas petitions.

Among the latest death-row inmates to file Rule 32 petitions in Alabama,

---

lawyers and assist them with *pro hac vice* admission and local filing."

(Vol. 3, Doc. 91, Tab 13 at 3-4.)

twenty-one of them had less than one week remaining of their federal limitations period at the time they filed their state Rule 32 petitions. (*See* Vol. 3, Doc. 91, Tab 21 at 2.) Ten of those twenty-one had less than two days. *Id.* That short period of time is wholly inadequate for these prisoners to obtain meaningful access to federal habeas review. There are two distinct reasons why such short periods are inadequate. First, the drafting work necessary for a well-pleaded federal habeas petition cannot be done in so short a time. And although counsel can begin drafting the federal habeas petition while the state petition is pending, he or she cannot tailor it to the demands of procedural-default and other issue-preclusion doctrines until the state-court opinion or order denying relief has been received and analyzed. Second, where the time remaining in the federal statute of limitations is only a few days, unavoidable flukes and happenstance circumstances – such as counsel being out of town for a couple of days, sick, or in an intensive trial in another case – will result in the running of the federal statute of limitations and the loss of all federal review for all of the inmate's federal claims. The inmate loses even claims that were fully exhausted on direct appeal and did not depend on state Rule 32 proceedings for their preservation. In these and other cases, the deficiencies of the Rule 32 process not only makes state postconviction proceedings an illusory forum for the vindication of unrepresented death-row inmates' federal claims; those deficiencies also result in the destruction of

federal habeas review of the inmates' claims which would have been available *without* prior presentation in a Rule 32 proceeding but which could not be filed without venturing into the Rule 32 mantrap because of the federal exhaustion rule of *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198 (1982).

D. *Providing Indigent Alabama Death-Row Inmates with Counsel to Aid in the Preparation and Filing of Their Rule 32 Petitions Is the Proper Remedy to Ensure Them Meaningful Access to the Postconviction Process.*

In fashioning a remedy for Alabama's violation of condemned inmates' access rights, the touchstone must be "ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis v. Casey*, 518 U.S. at 351, 116 S. Ct. at 2180. In other words, the remedy for the violation must be such as to provide indigent Alabama death-row prisoners with the capability to file any viable challenges they may have to their convictions and sentences in a way that meaningfully and effectively frames the issues and produces a reasonably adequate opportunity for the inmate to obtain relief. *See John L. v. Adams*, 969 F.2d 228, 233-34 (6th Cir. 1992). Taking into account the specific and unique conditions and impediments to access that confront indigent condemned inmates in Alabama, the proper remedy for the systemic denial their right of meaningful access to the courts is the provision of lawyers to aid them in preparing and presenting Rule 32 petitions.

This is so because *factually* – as this record documents with no real dispute – in

Alabama, access to a lawyer is the *sine qua non* of "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." *Bounds*, 430 U.S. at 825, 97 S. Ct. at 1496. The hypertechnical Alabama postconviction process requires a lawyer's legal skills to navigate. It requires a sophisticated understanding of complex doctrines of issue preclusion, procedural default, retroactivity, successor petitions and statutes of limitations, under both state and federal law.[16] It requires factual specificity in pleading claims that cannot be achieved by an inmate who lacks the ability either to investigate factual details outside the trial record or to explain conceptually why there exists a specific factual basis for a claim even though the details have not yet been precisely ascertained. It requires the development of facts that no indigent, incarcerated, unaided condemned inmate working under exiguous deadlines can gather and an understanding of elaborate legal rules that determine what facts are relevant and how they have to be put together to state a cognizable claim of remediable violation of a constitutional right.

An appreciation of the *de facto* inaccessibility of Alabama's state postconviction process to unrepresented death-row inmates is precisely the type of analysis that has led courts to conclude, in various other specific contexts, that the assistance of an attorney is required in order to ensure meaningful access to the courts. Indeed, the

[16] Numerous rules of federal habeas practice have implications for the way state postconviction proceedings must be conducted.

Bounds litigation itself demonstrates the propriety of requiring assistance of counsel to make access to courts meaningful. Almost a decade after the prison library plan was approved by the United States Supreme Court in *Bounds v. Smith*, 430 U.S. 817, 97S. Ct. 1491 (1977), the district court concluded that the State had failed to properly implement this plan and found that the only way to ensure access would be to require the assistance of counsel. *Smith v. Bounds*, 610 F. Supp. 597, 603-06 (E.D.N.C. 1985). In affirming, the Fourth Circuit observed that:

> "The district court did not conclude, as the defendants contend, that prisoners have a constitutional right to access an attorney. The district court ordered a remedy of attorney assistance because the state's program of law libraries failed to meet the defendants' constitutional obligation of providing meaningful access to the courts."

Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987), *aff'd en banc*, 841 F.2d 77 (4th Cir. 1988).

The need for lawyers to assure that indigent Alabama death-row inmates will have meaningful access to the courts is demonstrated by the fact that all of the death-row prisoners who have succeeded in challenging their convictions and death sentences in Alabama have been assisted by counsel. Timothy Cothren was able to establish that he was denied the effective assistance of counsel during his capital trial only after volunteer counsel spent the time necessary to pursue his claim and conduct a thorough investigation. (*See* Vol. 3, Doc. 91, Tab 11 at 2-4 ¶ 6-17.) Similarly, James Martin's

capital conviction was reversed only after an investigation conducted by Mr. Martin's volunteer counsel identified exculpatory evidence that had been unconstitutionally suppressed by the Montgomery County District Attorney's Office and law enforcement officials. (*See Martin v. State*, 839 So. 2d 665, 681 (Ala. Crim. App. 2001); Vol. 3, Doc. 91, Tab 12 at 3-4.) Tommy Hamilton's conviction and sentence were overturned in state postconviction proceedings only after hundreds of hours and thousands of dollars were expended by his volunteer attorneys. (*See* Vol. 3, Doc. 91, Tab 10 at 1-4.)

The District Court nonetheless concluded that the "complexity of the postconviction process and the difficulties of surmounting it without counsel cannot as a matter of law be equated to a denial of meaningful access even for condemned prisoners." Vol. 4, Doc. 119 at 24. This reasoning either misconceives the nature of plaintiffs' claim or rejects it upon a palpably erroneous view of the law. Plaintiffs' Due Process access-to-the-courts claim does not assert that "as a matter of law" a death-sentenced prisoner is always entitled to appointment of counsel whenever postconviction procedures are complex and difficult to surmount. Plaintiffs' Due Process access-to-the-courts claim depends on no legal rule other than that they are entitled to "the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis v. Casey*, 518 U.S. at 356, 116 S. Ct. at 2182. Beyond that, plaintiffs rely upon the

particular facts of the current Alabama postconviction process and death-row situation shown by this record to bring their claim for an attorney's assistance within the settled legal rule set forth in *Lewis v. Casey*. And if the district court was saying that, in the teeth of those facts, there is some legal rule that disentitles the plaintiff class to the assistance of counsel "as a matter of law," the district court was legally incorrect, as the following sections demonstrate.

E. Murray v. Giarratano *Does Not Bar Giving Appellants Access to Counsel as the Remedy for Alabama's Violation of Their Right of Access to the Courts.*

Contrary to the district court's conclusion that giving the plaintiff class the assistance of attorneys as a remedy for Alabama's denial of meaningful access to the courts would "swallow whole the Sixth Amendment jurisprudence [rooted in *Murray v. Giarratano,* 492 U.S. 1, 109 S. Ct. 2765 (1989)] related to postconviction proceedings" (Vol. 4, Doc. 119 at 24), in fact *Giarratano* does not preclude granting plaintiffs relief in the form of entitlement to the assistance of counsel as a remedy for the violation of their right of meaningful access.[17] Justice Kennedy's concurrence was

[17] Nor do this Court's cases following *Giarratano*. The Court has several times cited *Giarratano* for the general proposition that death-row inmates have no federal constitutional right to counsel in state postconviction proceedings. *Presnell v. Zant*, 959 F.2d 1524, 1532 n.6 (11th Cir. 1994); *Kennedy v. Herring*, 54 F.3d 678, 684 (11th Cir. 1995); *Hill v. Jones*, 81 F.3d 1015, 1024 (11th Cir. 1996); *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996); *Jones v. Crosby*, 137 F.3d 1279, 1280 (11th Cir. 1998). However, each of these cases applies the rule of *Giarratano* without purporting to extend it; none of the cases applies that rule to factual circumstances like

necessary to create a majority in support of the result in *Giarratano*; Justice Kennedy (unlike Justice O'Connor) concurred only in the judgment and not in the plurality opinion in *Giarratano*; and Justice Kennedy's own concurring opinion rejecting the right-of-access claim in *Giarratano* expressly limited the holding to the factual record before him. His conclusion that Virginia was not required to provide its death-row prisoners with individual postconviction counsel was premised on two features of

---

those in the present case or addresses contentions that *Giarratano* is distinguishable on grounds remotely akin to those which distinguish *Giarratano* from the present case. Therefore, if those grounds are valid, they suffice to distinguish this Court's post-*Giarratano* precedents together with *Giarratano* itself.

In the district court, plaintiffs noted that post-*Giarratano* Supreme Court opinions had expressly left open the possibility that counsel may be required in state postconviction proceedings if the state postconviction process presents the first opportunity for the petitioner to advance a particular claim. *See Coleman v. Thompson*, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567 (1991); *Daniels v. United States*, 532 U.S. 374, 387, 121 S. Ct. 1578, 1586 (2001) (Scalia, J., concurring). The district court responded by quoting this Court's statement in *Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) that "the possible exception to *Finley* and *Giarratano* the Supreme Court noted in *Coleman* simply does not exist in this circuit. . . ." (Vol. 4, Doc. 119 at 15.) But the *Hill* opinion simply relied on prior opinions in *Toles v. Jones*, 888 F.2d 95 (11th Cir. 1989) (a decision handed down before the Supreme Court's opinion in *Coleman*) and *Weeks v. Jones*, 26 F.3d 1030 (11th Cir. 1994), holding that because there is no right to effective assistance of counsel in state postconviction, attorney error cannot provide cause to excuse a procedural default – which is precisely the holding of the *Coleman* Court, no less and no more. Neither of these cases (and none of this Court's subsequent cases) have ever addressed the potential exception explicitly identified in *Coleman* in the context of a case such as this – where the state postconviction process provides inmates their first opportunity to advance constitutional claims.

Virginia's postconviction proceedings in the late 1980's that are notably different from the current-day Alabama scene.

First, at the time of *Giarratano*, "no prisoner on death row in Virginia . . . [had] been unable to obtain counsel to represent him in postconviction proceedings." 492 U.S. at 14, 109 S. Ct. at 2773. Second, Virginia's prison system . . . [was] staffed with institutional lawyers to assist [prisoners] in preparing petitions for postconviction relief." *Id.* at 14 – 15, 109 S. Ct. at 2773.[18] In Alabama, seven death-row prisoners have recently gone through postconviction proceedings without a lawyer. These inmates and others did not have access to "institutional lawyers" or any other legal assistance from Alabama. All seven inmates had their postconviction petitions dismissed or claims precluded by reason of the various pitfalls of the Alabama process.

The facts that Alabama death-row inmates have no state-provided legal assistance of any sort in investigating, researching, or drafting postconviction claims and that they have been – and are increasingly[19] – unable to obtain counsel to represent

---

[18] The fact that no Virginia death-row prisoner had been unable to obtain postconviction counsel and the fact that Virginia provided these prisoners with institutional attorneys were the only features of Virginia's scheme that Justice Kennedy highlighted in explaining why he concluded that Virginia was meeting its constitutional obligations.

[19] As EJI staff attorney Randall Susskind averred:

> "In the last year, the recruitment of counsel has become even more difficult. The growing unease regarding the economic stability of many

them at any stage of postconviction proceedings alone suffice to distinguish this case

---

> law firms has made lawyers increasingly reluctant to even consider volunteering to represent a death row inmate. EJI also has fewer resources to allocate to recruitment efforts. These developments have made it less likely that we will be able to find law firms willing to represent inmates who are currently without counsel."

(Vol. 2, Doc. 82, Tab 1 at 2.) Robin Maher, Director of the ABA Death Penalty Representation Project expressed similar concerns:

> "Our ability to recruit firms, which has always been limited, has become increasingly difficult in recent months. Law firms have always been hesitant to take death penalty cases because doing so means a commitment of an unknown number of years, "lost" billable hours, and an investment of out-of-pocket costs that cannot be easily estimated. There is also the unfamiliarity of death penalty work and the emotional cost of handling a case with life and death consequences. These factors are often intimidating to civil lawyers who have no experience with criminal law."
>
> " . . . In recent months, our declining success recruiting law firms has also been affected by other factors. Generally, billing and marketing pressures within law firms make it difficult for many lawyers to take on time-consuming *pro bono* projects like death penalty work. As a consequence, when the firm is very busy, lawyers are unlikely to have the time to take on significant *pro bono* matters. Conversely, when the economy declines or reflects uncertainty, as it did after September 11, 2001, law firms react conservatively and are much more reluctant to invest resources in a death penalty case. It takes a perfect confluence of availability, interest, and a willingness to invest resources to successfully recruit a law firm to take a death penalty case."

(Vol. 3, Doc. 91, Tab 13 at 2-3.)

from *Giarratano*.[20] But there are additional important distinctions between the death-row situation in Virginia in the 1980's and the situation on Alabama's death row today that make the right-of-access finding in *Giarratano* inapplicable to the present case.

These are the results of several interconnected legal developments since *Giarratano* that have created a greater need for a lawyer's assistance in postconviction proceedings, particularly in the context of present-day Alabama Rule 32 practice. The Anti-Terrorism and Effective Death Penalty Act of 1996 fundamentally altered the relationship between state postconviction process and federal habeas corpus by restricting the scope of review in federal habeas to whether state-court decisions on the merits of federal constitutional claims: (1) are "contrary to" or (2) involve an "unreasonable application of" U.S. Supreme Court precedent or are based upon "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2). These restrictions mean that federal habeas is no longer – as it was when *Giarratano* was decided – a cure-all for mistakes of law and fact committed in state postconviction proceedings. When a state postconviction court gets the law or the facts wrong today because an unrepresented

[20] Justice Kennedy expressly found, in his *Giarratano* concurrence, that the "the complexity of our jurisprudence in this area [of constitutional rules relating to the death penalty and of procedural rules governing postconviction review] makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." 492 U.S. at 14, 109 S. Ct. at 2773.

state prisoner is unable to present his or her case effectively to the state judiciary, that error will remain uncorrected and will kill a death-sentenced inmate in the end, whatever the quality of the legal assistance that the federal courts may later give him or her, unless the state-court decision was "unreasonable" on the evidence presented to it.

And the need for counsel to protect condemned inmates against ill-considered, adverse state-court rulings and factfindings that will be insulated from federal habeas review by AEDPA is greater in Alabama because of a prevalent practice by Alabama state judges in Rule 32 proceedings to adopt factual findings and proposed orders prepared by the Alabama Attorney General's office without independent consideration. The Attorney General's office uses these orders to dispose of Rule 32 petitioners' claims in a way that creates substantive and procedural bars to consideration of the claims in subsequent federal habeas proceedings, including apparent state-court "findings of fact" that resolve all factual disputes against the petitioners. Of the last twenty capital postconviction cases in which the Alabama Court of Criminal Appeals issued a final judgment, the Rule 32 judge adopted the State's dispositive order without modification in seventeen. (*See* Vol. 3, Doc. 91, Tab 25, at 1-2.) Faced with this practice, an inmate needs the assistance of an advocate with legal skill to challenge the State's proposed order and avert the destructive results that such orders often produce

in later proceedings.

Furthermore, AEDPA has enacted a one-year federal habeas statute of limitations that did not exist at the time of *Giarratano*, and Alabama has adopted a separate Rule 32 statute of limitations where Virginia had none.[21] The problems faced by an unrepresented condemned inmate who is forced to develop, document, and plead a cognizable postconviction case within the strictures of these two distinct but intersecting statutes of limitations have been previously summarized. *See* pages 21 - 30 *supra*. Those problems have produced a situation in which twenty-one Alabama inmates are already at risk of execution without any federal habeas review of any sort if they are unable to draft and file federal habeas petitions within one week — and for ten of the inmates, less than two days. (*See* Vol. 3, Doc. 91, Tab 21, at 2.)

---

[21] At the time of *Giarratano*, the only time constraint upon a death-sentenced Virginia prisoner's filing of a petition for postconviction relief was the Virginia Attorney General's ability to move the trial court to set an execution date pursuant to Va. Code 53.1-232. Such a motion would compel the prisoner to go to court, where the trial judge could, at his or her discretion, either set an execution date or announce an intention to set an execution date if the petitioner did not file by a certain time. The trial court could appoint postconviction counsel at this time, and volunteer counsel were available if the trial court did not. Any execution date set would be vacated if the petition was filed or if a reasonable application for an extension of time for filing it was submitted before that date.

F. *In the Alternative, Providing Indigent Condemned Inmates with Other Forms of Legal Assistance (Short of Attorneys) as a Remedy for Violation of Their Right of Access to the Courts Would Be Preferable to Leaving the Current Situation in Alabama Uncorrected.*

Bounds recognizes that States are required to shoulder affirmative obligations to assure all prisoners meaningful access to the courts. *Bounds*, 430 U.S. at 824, 97 S. Ct. at 1496. Plaintiffs contend that the assistance of counsel is required to provide indigent, condemned inmates with such access. However, even if the provision of counsel to each death-row inmate is not required, some relief from the unrunnable gauntlet of Alabama's current postconviction process is required.

In rejecting this alternative claim of the plaintiffs, the district court did not dispute the facts (1) that Alabama does absolutely nothing to assist its condemned inmates to prepare and present postconviction petitions and (2) that, without legal assistance, indigent condemned inmates are incapable of presenting petitions that will suffice to surmount the multiple procedural hurdles in Alabama's Rule 32 process and preserve the inmate's substantive constitutional contentions for merits review by state and federal judges. Instead the district court found that "plaintiffs do not identify any existing claims which they lost or the presentation of which was hindered within the meaning of *Lewis*," and from this concluded that plaintiffs' contention failed under the district court's reading of the standard for § 1983 relief in denial-of-access cases set

by the United States Supreme Court in *Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179 (2002).

However, plaintiffs' denial-of-access claim is – according to *Harbury*'s own explicit classification of claims – in a wholly different category than the one presented in *Harbury*. The claim in *Harbury* was a solitary, backward-looking denial-of-access claim – a claim for money damages for past harm wrought by the defendants' actions. In *Harbury*'s taxonomy, by contrast, the class plaintiffs here have presented a "forward-looking" denial-of-access claim. Plaintiffs have pleaded and proved exactly what *Harbury* specified as the elements of a forward-looking denial-of-access case: – that "systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time," and that the plaintiffs are seeking relief which will "place the plaintiff in a position to pursue a separate claim . . . [*i.e.*, the claims to be raised in state and federal postconviction petitions] once the frustrating condition has been removed." 536 U.S. at 413, 122 S. Ct. at 2185-86.

Under *Harbury*, to establish such a forward-looking case, plaintiffs need only "identify a 'nonfrivolous,' 'arguable' underlying claim" that they would pursue but for the defendants' unconstitutional obstruction. *Id.* at 415, 122 S. Ct. at 2187. In the proceedings below, plaintiffs demonstrated that, in Alabama, "death penalty cases present significant Sixth Amendment claims of ineffective assistance of counsel."

(Vol.1, Doc. 30 at 12 and the declaration cited, at ¶¶ 21-37). And Alabama death-row inmates have prevailed on claims of other constitutional defects that undermined the fairness and reliability of their convictions or sentences. *See, e.g., Bui v. Haley,* 321 F. 3d 1304 (11th Cir. 2003); *Morrison v. Jones*, 952 F.Supp. 729 (M.D. Ala. 1996); *Raines v. Smith,* No. CV 83-P-1080-S, 1983 WL 3310 (N.D. Ala. 1983); *Martin v. State,* 839 So. 2d 665 (Ala. Crim. App. 2001); *McMillian v. State,* 616 So. 2d 933 (Ala. Crim. App. 1993); *Freeman v. State*, 605 So. 2d 1258 (Ala. Crim. App. 1992). To suggest that the entire *class* of indigent death-sentenced Alabama inmates is without any "'nonfrivolous,' 'arguable' underlying claim[s]" to present against their convictions and sentences defies history (see the cases just cited and those discussed at pp. 37-38 *supra*), reality, and common knowledge.

Considering the nature and effect of defendants' conduct, the plaintiff class has adequately identified and established the elements of its denial-of-access claim under *Harbury*. Plaintiffs as a class manifestly have grounds for postconviction challenges to their convictions and death sentences that state and federal courts would be required to address on the merits if plaintiffs had the means to present them justiciably. For want of legal assistance of any sort, the plaintiff class lacks those means and therefore it is out of court. The district court was altogether wrong to reject the obvious conclusion that the plaintiff class is being denied access to the courts when Alabama

simultaneously erects a postconviction process that cannot practicably be navigated without legal assistance and denies death-sentenced inmates any sort of legal assistance in navigating it. *See Bounds*, 430 US. at 830.

II. THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS GUARANTEE DEATH-ROW INMATES THE ASSISTANCE OF COUNSEL IN STATE POSTCONVICTION PROCEEDINGS.

In this Twenty-First Century, the Sixth, Eighth, and Fourteenth Amendments require the provision of counsel for death-row prisoners in state postconviction proceedings. The district court rejected this contention because it found the plurality opinion in *Giarratano* controlling. That opinion concluded that the Court's previous rulings requiring counsel in criminal trials and direct appeals do not extend to state postconviction proceedings because such proceedings are not part of "criminal prosecutions" for Sixth Amendment purposes. 492 U.S. at 7-8, 109 S. Ct. at 2769. And it declared that Eighth Amendment concerns for assuring the reliability and fairness of capital sentences did not require a different result in capital cases because "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of the capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Id.*, at 10, 109 S. Ct. at 2770.

The district court erred in declining to consider plaintiffs' argument that developments since *Giarratano* have undercut the plurality's rationale and require the

rejection of its conclusions.[22] Empirical evidence that has emerged since *Giarratano* was decided erodes the plurality's premise that trial and direct appeal proceedings are sufficient to ensure the reliability of capital sentences. From 1973 to 1995, 68% of death sentences obtained in state trial courts were reversed in appellate and postconviction proceedings.[23] During the same period in Alabama, 77% of the death sentences were overturned.[24] The plurality's rationale is further weakened by the emergence of 123 cases in which death-row prisoners have been released since 1973 on the basis of official findings that they were actually innocent of the crimes for which

---

[22] Ordinarily, of course, it is not for lower courts to say that a decision of the Supreme Court no longer constitutes a binding precedent. *E.g.*, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989). However, a plurality opinion does not establish a binding precedent in the first place. And when the issue under consideration involves constitutional guarantees that evolve over time – as does the Sixth Amendment, *e.g.*, *Johnson v., Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938), and the Eighth, *e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978 (1976) – a lower court can properly find that changed conditions have eroded even an otherwise binding Supreme Court precedent. *See Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), *affirming State ex rel. Simmons v. Roper,* 112 S.W.3d 397 (Mo. 2003).

[23] State postconviction courts invalidated death sentences in 10% of the cases they considered. Federal habeas courts invalidated death sentences in 40% of the cases they considered. *See* James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (2000), at 40-41, available at http://www2.law.columbia.edu/instructionalservices/liebman.

[24] *Id.*, at 77. Of these, 9% were reversed in state postconviction proceedings and 45% were reversed on federal habeas corpus. *See id.*, at 57, 66.

they had been sentenced to die.[25]

The unreliability of trial proceedings as a mechanism to assure that capital convictions and sentences are factually well founded and constitutionally obtained also undermines the plurality's more theoretical argument against extending the Sixth Amendment right to counsel to the postconviction stage of state capital cases — the argument that collateral review proceedings are distinct from those "criminal prosecutions" in which the Sixth Amendment guarantees that defendants "shall enjoy the right . . . to have the assistance of counsel for . . . their defence." The current reality is that postconviction procedure has become an invariable part of the normal and accepted judicial process for finalizing a capital judgment.[26] Sixth Amendment rights are held to extend to proceedings that were not part of the criminal trial process at common law but serve the same essential functions and involve the same risks of irreparable loss in the absence of the safeguards that the Amendment secures.[27]

---

[25] Information obtained from the Death Penalty Information Center, available at www.deathpenaltyinfo.org/article.php?did=4128scid=6.

[26] This Court recognized the essence of the point in *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996), when it held that the motion-for-new-trial stage of Georgia's "Unified Appeal Procedure" in capital cases is an inseparable part of the criminal process, at which a defendant has the constitutional right to counsel. It would trivialize that decision to limit it to the peculiarities of Georgia procedure.

[27] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002); *cf. Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209 (1967); *Mempa v. Rhay*, 389 U.S. 128, 88 S. Ct. 254 (1967)

In any event, whether or not capital postconviction review procedures are now to be deemed part of a State's "criminal prosecutions" for Sixth Amendment purposes, "[t]he reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level."[28] State postconviction review serves side by side with direct appeal as the principal state procedural safeguards against unconstitutional, factually groundless, or arbitrary imposition of the death penalty. And of course the right to counsel on appeal from a criminal conviction and sentence is now recognized as a Fourteenth Amendment entitlement.[29]

Sixth and Eighth Amendment requirements evolve as times change.[30] In the

---

[28] *Jackson v. State*, 732 So.2d 187, 190 (Miss. 1999). The *Jackson* court adds that: "[t]he importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus." *Id.*

[29] *E.g., Douglas v. California,* 372 U.S. 353, 83 S. Ct. 814 (1963); *Evitts v. Lucey,* 469 U.S. 387, 105 S. Ct. 830 (1985).

[30] See note 22 *supra.* For example, in *Woodson* the Supreme Court relied upon evolving standards in invalidating mandatory death sentences and holding that the procedural safeguard of individualized sentencing is "a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304, 96 S. Ct. at 2992. "It is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.'. . . [O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." *Id.* at 301, 96 S. Ct. at 1989.

generation since *Giarratano* was decided, the States have established a consensus that the mandatory provision of counsel for death-row inmates in state postconviction proceedings is necessary to ensure reliable and just administration of the death penalty. At the time of *Giarratano*, eighteen States[31] required the appointment of counsel for death-row prisoners in state postconviction proceedings. Currently, twenty-nine of the thirty-seven States that administer the death penalty require the appointment of counsel for death-row prisoners in state postconviction proceedings.[32] The evidence of a national consensus on this issue is substantially stronger than in other instances where

---

[31] Arizona; California; Colorado; Connecticut; Florida; Idaho; Indiana; Maryland; Missouri; New Jersey; North Carolina; Oklahoma; Oregon; Pennsylvania; Tennessee; Utah; Vermont; and Washington. (Since the time of *Giarratano*, Vermont has abolished the death penalty.)

[32] None of the States enumerated in note 31 *supra* has changed its position (except that, as indicated there, Vermont has been removed from the category altogether by its abolition of the death penalty). The lack of any regression on the part of these 17 States is significant in its own right. See *Atkins v. Virginia*, 536 U.S. 304, 315, 122 S. Ct. 2242, 2249 (2002); *Roper v. Simmons*, 543 U.S. 551, 565-66, 125 S. Ct. 1183, 1193 (2004). The 13 States that have since joined the 17 are Arkansas (Ark. Code 16-91-202 (a)(1)(A)(i)(1997); Illinois (725 Ill. Comp. Stat. Ann. 5/122-2.1); Kansas (Kan. Crim. Proc. Code Ann. 22-4506(d)(2); Kentucky (Kentucky 2005 Session Laws, 2005 Regular Session, Chapter 99); Louisiana (LA. Rev. Stat. 15:149.1); Mississippi (Miss. Code Ann. § 99-39-105); Montana (Mont. Code. Ann. 46-21-201(3)(a); New Mexico (N.M. R. Ann. Rule 5-802); Nevada (Nev. Rev. Stat. Ann. 34.820); Ohio (Ohio Rev. Code Ann. 2953.21(I)(1); South Carolina (S.C. Code Ann. 17-27-160); Texas (Tex. Crim. Proc. Code Ann. 11.071(2); and Virginia (Va. Code Ann. 19.2-163.7).

the Supreme Court has recently found a national consensus.[33]

Only a dwindling minority of jurisdictions now execute people without making statutory provision for their representation by state-provided counsel in postconviction proceedings that may save their lives. Only Alabama continues to make *no provision for any sort* of postconviction legal assistance to the people it executes. By far the larger number of States that employ the death penalty in the Twenty-First Century recognize the essential function of postconviction proceedings in capital cases and have established a growing consensus that counsel must be provided for these proceedings. This Court should hold that the Sixth, Eighth and Fourteenth Amendments require the provision of counsel to death-row inmates for purposes of state postconviction proceedings, and that Alabama's Rule 32 procedures violate this requirement.

---

[33] In *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), eighteen States with capital punishment required that mentally retarded persons be excluded from consideration for that penalty. In *Roper v. Simmons*, 543 U. S. 551, 125 S. Ct. 1183 (2005), eighteen States with capital punishment required that juveniles be excluded from consideration for that penalty. Today, *twenty-nine* States with capital punishment require that persons sentenced to death be provided with postconviction counsel. The number of States that have changed their statutes to provide for the mandatory appointment of postconviction counsel since *Giarratano* is twelve, as compared with seven that changed their positions between *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969 (1989), and *Simmons*, sixteen that changed their positions between *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2394 (1989), and *Atkins*.

CONCLUSION

The Court should reverse the judgment below and hold that Alabama is constitutionally obliged to provide counsel – or at least, in the alternative, to provide some other form of legal assistance – to its indigent, condemned prisoners in Rule 32 proceedings.

Respectfully submitted,

BRYAN A. STEVENSON (STE 077)
ANGELA L. SETZER (SET001)
Equal Justice Initiative of Alabama
122 Commerce Street
Montgomery, AL 36104
Ph: (334) 269-1803
Fax: (334) 269-1806

STEPHEN F. HANLON
Holland & Knight LLP
2099 Pennsylvania Ave., N.W.
Suite 100
Washington, DC 20006
Ph: (202) 828-1871
Fax: (202) 955-5564

LAURIE WEBB DANIEL
Holland & Knight LLP
1201 West Peachtree St., N.E.
One Atlantic Center, Suite 2000
Atlanta, GA 30309
Ph: (404) 817-8533
Fax: (404) 881-0470

Counsel for Appellants

April 24, 2006

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13, 894 words.

Bryan A. Stevenson

CERTIFICATE OF SERVICE

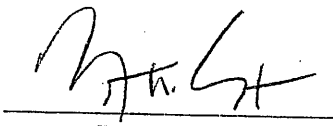
I HEREBY CERTIFY that on April 24, 2006, I filed an original and six copies of the attached brief by first-class mail, postage pre-paid, with the United States Court of Appeals for the Eleventh Circuit at the following address:

Thomas K. Kahn, Clerk
United States Court of Appeals for the 11th Circuit
56 Forsyth St. N.W.
Atlanta, GA 30303

I HEREBY CERTIFY that on April 24, 2006, I served a true and correct copy of the attached brief by first-class mail, postage pre-paid, to:

Kim T. Thomas
Andrew W. Redd
Alabama Department of Corrections
101 South Union Street, P.O. Box 301501
Montgomery, AL 36130

J. Clayton Crenshaw
James Houts
John J. Park
Charles Campbell
Margaret Fleming
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, AL 36130



Bryan A. Stevenson